Sovereignty and the Falkland Islands Crisis

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During the period of Argentine occupation of the Falkland Islands in the earlier part of 1982, the question of sovereignty over the Islands was much ventilated on radio and television and in the newspapers. Also, learned societies held meetings at which distinguished speakers expressed their opinions. On the whole, however, very little of what was said seemed to go far beyond assertions that the Islands belonged to Britain or to Argentina. In part, one suspects that the media were to blame in seeking partisan dogmatism in preference to a rational (and less newsworthy) assessment of the contending claims.

There was an additional reason for the treatment of the issue and that stemmed from the apparent misapprehension of the nature and role of international law in the regulation of the affairs of nations. As international law is largely based upon the practice of nation States, the conduct of the relations between which gives rise to rules of "customary international law", it is seldom possible to determine a particular issue with a definitive answer. To provide an answer in such categorical terms to the issue of Falklands sovereignty assumes that the rules of international law are clear enough to justify such confidence. Seldom will this in fact be the case. More often the issue will be sufficiently in doubt for the very activity in dispute (the Argentine resumption of a possession which had been lost nearly 150 years earlier) to be part of the corpus of State practice which establishes a rule, or alters an existing rule, of customary international law.

This paper will concentrate on the sovereignty issue, and will not deal, except in a peripheral way where relevant, with the legality or otherwise of the Argentine use of force in taking possession of the Islands in April 1982 nor of the ensuing British operations to recapture them. There will be no detailed discussion of the limits on the use of force and on the right of self-defence under the United Nations Charter, nor of the requirement in Article 2.3 of that instrument that all disputes should be resolved by peaceful means. However, it should be borne in mind that the British position in relation to the sovereignty issue appeared to have greater support because of the hostile reaction of most States to Argentina's resort to force to resolve the dispute in its favour. Thus, it is necessary, in evaluating the attitude of States towards the former, to separate those expressions of opinion from activities which were concerned particularly with the latter issue.

The purpose of this paper is to examine the question of sovereignty as part of an historical perspective of changing rules of international law, indeed of competing concepts of international law. In the same way as the definition of those rules formed part of the conflict between competing European powers

from the fifteenth century onwards, so the question of definition or competition is part of the conflict between the colonial powers and the States which emerged from European domination, some in the early nineteenth century (with the break up of the Spanish American Empire), but most in the second part of the present century.

The historical record and modes of acquisition of territory

It is not possible to divorce the contemporary situation entirely from the historical record of the discovery of the Islands and of their later colonisation nor from the development of the rules of international law which are said to govern the acquisition of title to territory. It is particularly instructive to consider how those rules developed in the light of the different policy interests of the States or groups of States which have exhibited a concern about the Falkland Islands.

The first European State to seek overseas colonies was Portugal. The legal justification for its operations was to be found in a series of Papal Bulls, which authorised that State to subjugate lands inhabited by infidels and confirmed Portuguese claims to Africa and lands beyond towards India.[1] The first voyage of Columbus, which signalled the entry of Spain into the search for possessions outside Europe, led to the Bull "Inter caetera Divinae" issued by Pope Alexander VI, on 4 May, 1493,[2] which divided the unexplored world between the two Iberian countries. The actual demarcation line (a line which incidentally ran from pole to pole) was moved further west by agreement between the two States in the Treaty of Tordesillas of 1494 (a Treaty which was later approved by a Bull of 1506).

Two main features of these Papal Grants need emphasising. First, they were examples of the all-embracing authority claimed by the Pope in the middle ages. It was part of Augustinian theory that, the world belonging to God, mankind held no more than a right of user to the land. It was for the Pope as God's representative on Earth to grant rights to lands not already part of Christendom. The seriousness with which rights stemming from Papal fiat were treated may be illustrated by the suggestion at one time made that the English conquest of Ireland could be justified by reference to the authority earlier bestowed upon Henry II by the Pope. In the fifteenth century, there were no recognised rules of international law for dealing with colonial expansion so that the decree of the Pope provided a plausible legitimation for the policies of Portugal and Spain towards the world outside Europe, at least as far as other European countries were concerned.

The second aspect which assumed increasing importance in the Falklands context was the extent to which the Papal grants, particularly the Bull of 1493, established a monopoly of access to the unexplored and undiscovered territories of the world. The 1493 Bull forbad "any persons of whatever dignity" from approaching "for the purpose of trade or for any other reason" any lands discovered in the areas concerned without the licence of Portugal or

1. The principal being the Bull "Romanus Pontifex" of Pope Nicholas V of 8 January 1455, translated text in Ehler and Morrall, *Church and State through the Centuries*, 146-53.
2. Translated text in Ehler and Morrall, 155-9.

Spain. Not surprisingly this admonition was taken by those two States to carry with it a right of exclusive access by sea to the areas in question. In the Treaty of Tordesillas this interpretation was spelt out in the form of an undertaking that neither would enter the region allocated to the other with the intention of discovering, trading with or conquering territories that might lie within that region.

There was no immediate political confrontation over the Papal grants. England was only just emerging from years of civil war. In a cautious way Henry VII steered a course between acknowledging Portuguese and Spanish rights on the one hand, and attempting to limit those rights to territories which had already been discovered and were in the possession of those States.[3] This was a line which Queen Elizabeth later pursued more vigourously. Various arguments were advanced to support the proposition that the Bull of 1493 was void or ineffective.

It was pointed out that this instrument enjoined the two Catholic Monarchs to ("you should and must") "cause the peoples dwelling in those islands and continents to accept the Christian religion", but that the Spanish explorers and colonists had not pursued such a policy.

In addition, the Bull had been akin to an "arbitral award" in that it followed an appeal to the Pope by Spain when Portugal had attempted to claim the benefit of Columbus' discoveries on the authority of earlier Papal pronouncements. In that sense it would hardly affect third parties. However, in so far as it was clearly intended to do so it was ultra vires as all Princes had the right of navigation upon the seas and could not be deprived of this right by the Pope. As the Queen pointed out in her famous response[4] to Mendoza's complaint of 1580 about Drake's voyage round the world, she did not recognise the "prerogative" of the Pope "in matters of this kind"; moreover "this donation of *res alienae* which by law is . . . void, and this imaginary proprietorship, ought not to hinder other princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the law of nations, since without possession prescription is of no avail . . ., nor yet from freely navigating that vast ocean since the use of the sea and air is common to all men; further that no right to the ocean can inure to any people or individual since neither nature nor any reason of public use permits occupation of the ocean."

The view so strongly asserted by Elizabeth did have the support of the civil law. In the middle of the fourteenth century, Bartolus had linked the Roman rules of private law for the acquisition of *dominium* over a newly created island by occupation (the taking possession of a *res nullius* with the intention of acquiring ownership) to the acquisition of *imperium* or sovereignty over it by a prince or ruler through a similar process.[5] In Spain itself there was

3. See Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic Acts*, 49-50.
4. The version quoted is that used by Goebel, *The Struggle for the Falkland Islands*, 63: for a more authentic version, see Darcie, *The True and Royall History of the Famous Empresse Elizabeth*, reproduced in Wagner, *Sir Francis Drake's Voyage round the World*, 323.
5. *Tractatus de Insula:* see the discussion in Goebel, *The Struggle for the Falkland Islands*, 74-9.

recognition that the Papal Grant might not in itself be sufficient, even when coupled with the act of discovery. Much use was made of symbolic acts (particularly the erection of crosses in prominent positions on coasts where a fleet visited) to demonstrate the taking of possession on behalf of the Spanish crown.[6] Though this did not go so far as to recognise the need for actually establishing a settlement in a claimed territory, Goebel[7] (99) has argued that Spain soon relinquished its reliance upon the Papal grant and did in fact accept the requirement of actual occupation as a basis for title. He cited the dispute with Portugal over the Moluccas, which came to a head in the early 1520s, as evidence of this attitude. It is true that Spain appealed to "the fact of our occupation and possession" (instructions from Charles V to one of his Ambassadors, cited Goebel 97). This is hardly surprising in view of the additional fact that both States were relying upon Papal grant in support of their claim. Even the 1493 Bull had excluded from its operation territories already "possessed by some other Christian King or Prince". So, as the Moluccas were approximately the same distance east and west of the dividing line, there was some sense in settling the matter on the basis of "prior possession". What is in doubt, of course, is what was meant by the "peaceful and uninterrupted possession" referred to in the Spanish King's instructions. The only explanations in the document itself were that he was "received and obeyed as King and lord" and that "those, who until the present held possession of these regions, have rendered me obedience as King and rightful seignior, and have been in my name appointed as my governors and lieutenants over the said regions."

Whatever significance can be attached to the dispute and its resolution, it hardly constitutes a ground for arguing that there had been a change of attitude on the part of Spain towards the acquisition of territory in the Americas. Later events referred to by Goebel contradict his theory. The Treaty of Munster 1648 involved an acknowledgement of Dutch rights to areas wrested from Spain by the Dutch, but also contained a reservation of navigation with all other places "possessed by the one or the other party". Goebel's own comment (127) on this provision was that "particularly [in view of] the Spanish claims of possession to the large stretches of uninhabited lands lying between their scattered settlements, it was undoubtedly intended to limit the Dutch to what they actually held and to exclude them not only from trade in the Spanish ports but from access to the wild shores where they might found settlements".

Half a century later France was involved in an attempt to gain a foothold in the Americas and access to the lucrative trade with the Spanish colonies. Louis XIV sought to obtain Spanish acceptance of French settlements on the Mississipi and in Cayenne. In response to the Spanish argument that these locations were in a part of the world allocated to Spain and subject to its

6. See Article XIII of the Royal Ordinance of 13 July 1563 cited by Keller, Lissitzyn and Mann, 34-5.
7. Op cit. Because of the frequency with which it is cited, this book is hereinafter referred to, together with the page number, in the text.

sovereignty by virtue of the Papal Bull, it was the French who referred to the need for actual possession as the basis of title (Goebel 143).

Further evidence that Spain was continuing to cling to rights stemming from obsolescent doctrines is provided by the comments of Vattel. Writing in the mid-eighteenth century, this Swiss jurist, a confirmed naturalist by philosophical persuasion, had a ready answer to the controversy:[8]

> "All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation. In this way navigators setting out upon voyages of discovery and bearing with them a commission from their sovereign, when coming across islands or other uninhabited lands, have taken possession of them in the name of their Nation; and this title has usually been respected, provided actual possession has followed shortly after."

For Vattel the "mere act of taking possession [of] lands which [a Nation] does not really occupy, and which are more extensive than it can inhabit or cultivate" was not sufficient. Such a claim would be "contrary to the natural law, and would conflict with the designs of nature, which destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it, and not merely to hold it against others who may wish to profit by it. Hence the Law of Nations will only recognise the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them." This view was confirmed, in Vattel's opinion, by the fact that "where explorers have discovered uninhabited lands through which the explorers of other Nations have passed, leaving some sign of their having taken possession, they have no more troubled themselves over such empty forms than over the regulations of Popes, who divided a large part of the world between the crowns of Castile and Portugal".[9] To Vattel's mind, there was no need to pay attention to claims based upon Papal decree unless they had been followed up by occupation of the territory concerned.

The other aspect of Spanish claims, the *mare clausum,* or right to prohibit access to waters around its American territories, was a subject of continuing dispute. Various States had advanced pretensions to exercise control over the seas around their coasts far more extensive than those later encompassed by the concept of territorial waters: Venice in the Adriatic; Norway to the waters between its coasts and Iceland; Denmark to the entrance to the Baltic; and England to the "King's Chambers". While such rights might be established by usage or recognised by treaty, jurists of the period between the fourteenth and sixteenth centuries accepted the proposition that a State was entitled to

8. *The Law of Nations,* translation by Fenwick in *The Classics of International Law* series, Chapter XVIII, para 207.
9. Ibid, para 208.

exercise control in sea areas around its coasts. The limit suggested varied between 60 and 100 miles, based upon the distance that could be sailed by a ship of the time in one or two days.[10] The principal object of such a right was security, either the protection of the litoral state, or the safety of all ships passing through the area. Pirates posed a threat to all.

It is hardly surprising therefore that Spain sought to place a similar cordon around its American colonies. Not only did the 1493 Bull grant such a right, but it was in keeping with an existing tradition within Europe. In essence the motive behind the policy was to protect Spanish trading interests in their monopoly. The English adventurers who attempted to establish illicit trading relations with the Spanish colonies were denigrated as pirates and subjected to the severest penalties. The centre of the conflict was in the Caribbean, where French freebooters were as much of a threat as the English. The French port of St Malo was notorious as a base for operations against Spanish America.

While the territories acquired by France and England in the West Indies and Central America legitimised the traffic by those states into the Caribbean and therefore made diversions to Spanish ports more difficult to detect, the Spanish authorities found it easier to enforce the prohibition in the waters further south. Spanish rights were to a subsequently disputed extent confirmed by Article VIII of the Treaty of Utrecht 1713[11] which granted a licence (*assiento*) to Britain to exclusive benefits of the slave trade with the Spanish Indies, including a right to use land on the river del Plata as a staging post. However, it was clear that this latter privilege was under the control of the Governor of Buenos Aires.[12]

If Britain (or indeed France) was to undermine the Spanish monopoly in South America, a base would be required from which to conduct trading operations or even to organise some form of settlement on the coast. It was at this stage that the Falkland Islands became part of the colonial struggle.

Discovery and settlement

Dispute still rages over who first sighted the Falkland Islands. In 1501-2, a Portuguese expedition with Amerigo Vespucci on board one of the ships encountered storms during which Vespucci's ship was driven along the coast of what some acknowledge may have been the Falklands (Boyson 15;[13] Goebel 8), though others would argue that it could have been the Patagonian coast (Goebel 8), the Jason Islands (Boyson 15) or even South Georgia (Varnhagen,[14] cited Goebel 5–7). More recently the suggestion has been made that the Vespucci letters containing the references were fabrications, and that Spanish reticence about any such islands suggests that no new territory was discovered during the voyage in question (Cawkell 2-3).[15]

10. Fulton, *The Sovereignty of the Sea*, 538-41.
11. Text in Israel (ed), *Major Peace Treaties of Modern History 1648-1967*, 217-239.
12. The relevant provision was Article XII, see Israel, op cit, 225-6.
13. *The Falkland Islands*, hereinafter referred to in the text, with page numbers, by the author's name.
14. In his book *Amerigo Vespucci* (1865), 111.
15. Cawkell, Maling and Cawkell, *The Falkland Islands*, hereinafter referred to in the text, with page numbers, by the first author's name.

Magellan's first voyage to the region occurred in 1520 and, soon afterwards, islands off the Patagonian coast began to appear on maps although they were situated in different places by the various cartographers. One of the maps, by Ribero (1529), showed eight or nine islands about 130 miles from the coast in 49°S (Islas de Sanson) and it was those islands which were claimed to have been seen by a ship from the Camargo expedition in January/February 1540. Goebel (17-29) rejects the alternative view that the ship was south of Tierra del Fuego.

British writers have tended to attribute the finding of the Falklands to Davis in 1592 or to Hawkins in 1594. The account of the former[16] referred to being driven by a storm "fiftie leagues or better from the shoare east and northerly" from the Magellan Straits (quoted in Goebel 35, Boyson 22, Cawkell 6-7). Goebel (38) disparages the Davis account suggesting that it deserves no greater credence than the Vespucci letters.

The Hawkins account[17] was more detailed and has been subjected to greater examination. Writing around the turn of the present century, Captain Chambers, a British naval officer, questioned whether "Hawkins Maiden Land" could be identified as the Falkland Islands.[18] Three statements by Hawkins (the reference to 48°S latitude, an observation about the discoloration of the waters by mud brought to the sea by rivers and the inference from fires on shore that the land was inhabited) led Chambers to conclude that Hawkins had been sailing along part of the Patagonian coast. While Goebel (39-41) accepts Chambers' criticisms, Cawkell (8-9) cites subsequent investigations supporting the Hawkins' claim. In particular, it is pointed out that the reference to 48° was clearly an error as the record showed that Hawkins had already reached 49° 30′. In addition, at certain times of the year, after heavy rain, the water round the Islands does become peat coloured. Finally, it was not unknown for lightening to cause fires in the grasses of some of the outlying islands.

In 1600 a Dutch expedition led by Sebald de Weert sailed for Holland from the Magellan Strait and encountered the three islands which are today called the Jasons, though they were referred to as the Sebaldines after a later Dutch expedition confirmed their existence in 1616. A further reference to these islands is to be found in the journal of one William Cowley who accompanied Dampier on a voyage to the region in 1683-4.

The first recorded landing on the Falklands was by an English captain, Strong, who commanded an armed ship bearing letters of marque to conduct reprisals against the French King. Extracts of documents recounting his visit to the Islands are given in Boyson (30-31). It was Strong who gave the name Falkland Sound to the passage between the main Islands. The name Falkland's Land was extended to the Islands as a group by Captain Woodes Rogers who visited there at Christmas 1708, but it was Captain McBride, the commander of the squadron which reached there in 1766, who transposed the

16. Jane, *Voyages and Works of John Davis*, 108.
17. Bethune (ed), *The Observations of Sir Richard Hawkins, Knight, in his Voyage into the South Sea* (Hakluyt Society 1847).
18. 17 Geographical Journal (series 1893-1902) 414.

name to Falkland Islands and renamed the Sebaldes the Jason Islands after his own ship.

Increasing interest was being shown in the area by the French. The first French landing in 1701 was by a sailor called Beauchene who also discovered and named after himself an island to the south of the main group. Further visits occurred in 1703 and 1708 and a French map of 1722 first used the name Iles Malouines after St Malo from which so many of the French expeditions to these waters had sailed.

Following his return from his 1740-44 expedition against the Spanish, Anson, who later became Admiral of the Fleet, advocated the surveying of the Falklands with a view to taking them in the name of the Crown. In an ingenuous attempt to allay Spanish fears, the British government explained to the Spanish, through the British Ambassador in Madrid, that they wished to send an expedition to make "full discovery" of the Islands but that there was "no intention of making any settlement". Spanish hostility to the plan led to its being shelved (Boyson 39; Goebel 197-202).

Thus it was that the first settlement was established by the French. The expedition was led by Bougainville who, it has been suggested, was mourning the loss of Quebec where he had been an aide-de-camp to General Montcalm. He and the Malouins who sailed from St Malo in September 1763 were equipped to establish a colony in the Islands that already bore their name. They set up camp on the main (east) island and solemnly took formal possession of the Islands on behalf of Louis XIV on 5 April 1764.

At about this time a British expedition of two ships was being prepared, its actual destination being kept a secret (Boyson 43). On 15 January 1765, the vessels entered a harbour on West Falkland to which the name Port Egmont was given. It was at this stage, on 23 January, that formal possession was taken of the Islands on behalf of the Crown of Great Britain (Cawkell 23).

It was not until December 1766 that the British came across the French colony. The commander of the British force addressed a letter in the following terms to the French governor: "The Falkland's Islands were first discovered by the subjects of the Crown of England, sent out by the Government for that purpose and of right belonging to His Majesty and His Majesty having given orders for the settlement thereof, the subject of no other power can have any title to establish themselves without the King's permission. I therefore desire to be informed upon what authority you have erected a settlement upon the said islands." Subsequently the French produced the authorisation they had received in August 1764 from Louis XIV. These facts were duly reported to the Admiralty in London (Cawkell 26-8).

In the meantime news of the French intentions had reached Madrid where the Spanish government framed a protest to be directed to the French government. In the Spanish view, the French action was in breach of the Family Compact between the two (Bourbon) Kings and was in breach of the long established principle that territories in the South Atlantic in proximity to the American coast belonged to Spain. The offer was also made that Spain should purchase the settlement, a move which even Goebel admits (228) "indicated that the Spanish were none too sure of the validity of their

protest". It was subsequently agreed in the course of 1766 that Bougainville should be compensated as consideration for the transfer of the territory to Spain (text in Goebel 228-9, fn 19). A formal transfer was effected at a ceremony attended by Bougainville at the French settlement on the Islands on 1 April 1767.

The situation in the Falklands nearly led to the outbreak of war between Britain and the two Bourbon countries. There was pressure from within government circles in Madrid that the British settlement should be destroyed. Although the French felt some obligation to support the Spanish case, they were unwilling to go to war over the matter: hence their contradictory attitude towards the rival claims. Choiseul, the Chief Minister, informed the British Ambassador that the Malouines had been handed over to Spain in deference to Spanish claims under the Treaty of Utrecht that "all but Spaniards are excluded from settling in that part of the world", a principle which the British themselves had acknowledged by their deference to Spanish protests over the earlier projected expedition (Goebel 243-4). In contrast, at about the same time Choiseul queried with the Spanish this very interpretation of the Treaty on the ground that, if the settlement was on the Falklands and not in the South Sea, it was not prohibited by Article 8, unless it could be shown that there had been a Spanish presence on the Islands at the time of Charles II of Spain (Goebel 248).

Despite the increasing French reluctance to risk a war over the Falklands dispute, the Spanish government in Madrid gave instructions to Buenos Aires to seek out and expel any British settlement that might be found on the Islands. Before this order could be carried out, Spanish and British ships from the Islands had encountered each other. There followed an interchange of letters in which the Spanish gave formal warning to the British to depart and the British replied informing the Spanish that the Islands belonged to His Britannic Majesty "by right of discovery as well as settlement" (Goebel 274). News of this contretemps hastened the Spanish authorities in Buenos Aires into action. A substantial squadron of five ships, with troops numbering as many as 1400, was despatched. Faced with such an overwhelming force, the small British contingent, which had at its disposal only one ship, capitulated in early June 1770.

Rumours of a Spanish attack on the Falklands were already circulating in London before the news was confirmed. The North government plainly did not want war in any case, added to which it had troubles enough in the American colonies. Nevertheless, Chatham was leading a strong attack on the government in Parliament over their weak handling of the Falklands crisis. George III himself was against going to war, but nor did he wish to accept the humiliation that the tearing down of the British flag and destruction of the Falklands settlement involved. In fact, any backing down would probably lead to defeat for the government and the return of Chatham to office, something the King did not wish to happen any more than did North. The King's speech from the throne[19] was sufficiently assertive of British rights to take the sting out of opposition motions of censure, which

19. Cobbett, *Parliamentary History*, Vol 16, 1030.

failed to obtain a majority vote against the government. In addition one of the principal "hard-liners" in the Ministry, Viscount Weymouth, subsequently resigned.

Soon afterwards Britain and Spain were able to reach an agreement, formalised by an exchange of documents in London on 22 January 1771. The British settlement was to be restored to the situation it had been in on 10 June 1770. However, the Spanish declaration contained a disclaimer that restoration of the settlement "cannot nor ought in any wise to affect the question of the prior right of sovereignty" over the Islands. By the British acceptance of the Spanish undertaking, his Britannic Majesty agreed to "look upon the said declaration . . ., together with the full performance of the said engagement . . . as a satisfaction for the injury done to the Crown of Great Britain" (Goebel 358-60).[20]

On the face of it, the Spanish may have obtained a slight advantage in the sense that they were able to reserve their position on the question of the "prior right of sovereignty". However the Spanish (Argentine) view has always been that North gave a secret undertaking to abandon the settlement as soon as possible after any Parliamentary criticism of the express terms had been overcome.

The evidence for this agreement comes almost entirely from Spanish sources which are dealt with extensively in Goebel (316-363). There is no record of it in official British sources, but there was a good deal of suspicion of the government in London. On 14 February 1771, Harris, the British Charge d'Affairs in Madrid, wrote to the Earl of Rochford that the Spanish negotiators had reported that Britain had given a verbal assurance to evacuate the Falklands.[21] Rochford's reply was to inform Harris "that the Spanish Ambassador pressed me to have some hopes given him of our agreeing to a mutual abandoning of Falkland's Islands, to which I replied, that it was impossible for me to enter on that subject with him as the restitution must precede every discourse relating to those Islands."[22]

The principal evidence appeared in private publications.[23] In the *Letters of Junius* (an opposition journal), the 1771 arrangement was denounced because, it was alleged, the restoration was only temporary and was a prelude to the future cession of British rights in the Falklands. In Brooke's *General Gazetteer,* there was a statement that in 1774 "the settlement was abandoned, and the Islands ceded to Spain." Another book, *Anecdotes of the Life of the Right Honourable William Pitt,* mentioned an "important addition, upon which [the 1771] Declaration was obtained . . ., that the British Forces should evacuate Falkland Islands as soon as convenient". It was later stated that the Islands "were totally evacuated and abandoned . . . and have ever since been in the possession of the Spaniards." The *British Encyclopedia* made a similar

20. Full texts in 22 BFSP 1387-8; also Smith, *Great Britain and the Law of Nations,* Vol 2, 46-8.
21. Smith, op cit, 50.
22. Ibid.
23. The following quotations are taken from the Report of the Political and Military Commandant of the Malvinas of 10 August 1832: translated text in 20 BFSP 369, at 411-2. The Report was written in response to the U.S. letter of 10 July 1832, see below p 33.

comment: Port Egmont "was abandoned in consequence of a private agreement between the Ministry and the Court of Spain". Even the *British Naval Chronicle,* having referred to the war preparations of 1770-1 and the subsequent British withdrawal, observed that "these Islands so pertinaciously claimed by the English, were ceded to Spain".[24]

Even if some such statement had been made privately by North in the course of negotiations, it was clear to the Spanish at the time that it could not have been made public because of the fact that it would have been rejected by Parliament and would probably have led to the fall of the Ministry. An undertaking could hardly be regarded as binding upon a State when it could not be submitted for Parliamentary approval because of the likelihood that it would be rejected. Moreover, it is far from certain what significance should be given to an undertaking by the British to withdraw from the Falklands. There is nothing to suggest that such a step automatically would give rise to an inference that claims to sovereignty were being abandoned or might not at some future time be revived. In Parliament, North himself stated that he was in agreement with those who believed in a British base in the South Seas and who maintained the right to navigate those waters (Goebel 377). Alternatively the British might have seen their evacuation of the Falklands (and a general reduction of the war preparations which had been necessary to assuage domestic fears of a "sell-out") as contingent upon a further quid pro quo from Spain. Indeed the idea of a withdrawal by both countries from the Islands had been proposed in the course of negotiations by the French who had been closely involved with the events.

The disarmament issue had a more specific connection with the Falklands. If the British were not prepared to renounce their pretensions to the Islands, at least a limited presence there would pose no threat to Spanish interests in the South Atlantic or beyond. To this extent the British seemed prepared to go and the assurance that only a small force would be stationed at Port Egmont paved the way to the restoration of that settlement on 15 September 1771 (Goebel 407).

In 1773 the British presence was reduced on grounds of economy, and the same reason was given for the withdrawal of the remaining British contingent on 20 May 1774. A plaque was however left at the settlement declaring that "the Falkland Islands . . . are the sole right and property of His Most Sacred Majesty George the Third" (Goebel 410; Boyson 77).

The plaque was soon removed — to Buenos Aires, from which it was recaptured by a British force some 30 years later. The Spanish settlement itself lasted only about that length of time. Although the vestiges of the British presence were destroyed, the waters of Port Egmont were regularly used by whalers and other vessels, principally from North America. No serious attempt seems to have been made to exclude them. With the growing mood of revolution on the mainland, the Spanish presence on the Falklands came to an end. In 1807 the last resident governor abandoned his post, and the settlement itself was withdrawn in 1811.

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24. Ibid 411-2.

The second coming

The southern regions of the continent were part of the Viceroyalty of Peru until 1776. In that year a new Viceroyalty of La Plata was established, with Buenos Aires as its capital, in an area which today comprises Argentina, Paraguay, Southern Bolivia and Uruguay. Following the removal by Napoleon of Ferdinand VII from the Spanish throne in 1808, a number of governments in South America proclaimed their autonomy in the name of Ferdinand. The Government in Buenos Aires called itself the Provisional Government of the United Provinces of Rio de la Plata in 1810. However, although Ferdinand was restored to the throne in Spain in 1814, the independence movements in South America had grown too strong. The Buenos Aires government declared its independence in 1816. By this time the Provinces were already showing secessionist tendencies, Uruguay being the last to separate in 1828.

Despite the uncertain political situation in this period, the Argentine version is that 1810 saw the creation of modern Argentina. Furthermore, like the other new States that were forming out of the Spanish Empire in America, it claimed to be the successor to Spain to the whole of the administrative units whereby its territory had formerly been governed by Spain. Thus, the part of the United Provinces which became Argentina was entitled to all lands between the Andes and the Atlantic from the Rio de la Plata to Cape Horn together with the islands of Tierra del Fuego, Staten Island and the Malvinas.

The Argentine claim to the Falklands was given practical effect with the arrival there on 1 November 1820 of a ship under the command of Colonel Jewitt. A circular was sent to the captains of all vessels in port and a personal letter was written to Captain Weddell of the British ship, *Jane*, advising them of Jewitt's arrival to take possession of the islands "in the name of the country to which they naturally appertain" (Cawkell 39). How seriously this assertion should be taken is doubtful in the light of a decree of the Buenos Aires government dated 10 June 1829 which admitted that "circumstances have hitherto prevented this Republic from paying the attention to that part of the Territory which, from its importance, it demands."[25] The most successful of those who came to the Islands was Louis Vernet who, on his second expedition there in 1826, asked the Buenos Aires authorities for permission to establish a colony. His request was acceded to and, with the exception of certain prior gifts, he was granted by a decree of 5 January 1828 the whole of the Islands of East Falkland and Staten Land[26] and was later appointed the Governor of the Malvinas and Tierra del Fuego in pursuance of Article I of the Decree of 10 June 1829.[27]

It was at this stage that the British Government made its first protest. On receiving the information from the British Charge d'Affaires in Buenos Aires,

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25. Translated text in 20 BFSP 314-5.
26. Translated text in 20 BFSP 420-1.
27. According to Article I:
    "The Islands of the Malvinas and those adjacent to Cape Horn in the Atlantic Ocean shall be under the Command of a Political and Military Governor, to be named immediately by the Government of the Republic."

the British government gave instructions that notice should be given to the Buenos Aires authorities that the islands were a British possession.[28] The Foreign Minister replied with an assurance that the matter would be given "attentive consideration".[29] What might have followed is impossible to guess, but events on the Islands gave the British an opportunity to assert their claim more directly.

The whalers and sealers who used the Islands as a base for their operations had been subject to no constraints in recent years (see Boyson 83-90). With the re-establishment of a local community who felt that they had rights in the animals on the land and the sea creatures in coastal waters, the depredations of visiting seamen were resented. Vernet therefore notified foreign vessels of a prohibition on sealing or fishing in territorial waters. According to Goebel (438-9), despite a warning to an American ship, the *Harriet,* two years before, this vessel together with two others, the *Superior* and the *Breakwater*, flouted the law and were arrested on 30 July 1831. The *Superior* was released; the *Breakwater* escaped; but Vernet went with the *Harriet* to Buenos Aires.

Goebel (439-42) attributed the acerbation of the dispute which then occurred to the insolence of the U.S. consul who, in the Argentine view, exceeded his consular functions in formally protesting at the enforcement of fishing regulations against U.S. nationals and at Vernet's actions.[30] What Goebel played down were the U.S. allegations that Vernet had in some way bribed or forced the crew of one of the ships, the *Superior,* to enter into the contract by which they agreed to continue sealing on Vernet's behalf, some of the ship's company (presumably those who least approved of the arrangement) being left marooned on Staten Island, and that the cargoes of the ships were seized and disposed of without proper legal formalities.[31]

In the meantime, a U.S. warship, the *Lexington,* had arrived at Buenos Aires. Upon hearing from his consul and from the captain of the *Harriet* what had transpired in the Falklands, the commander of the ship, Silas Duncan, demanded that Vernet, "having been guilty of piracy and robbery" should "be delivered up to the United States to be tried, or that he be arrested and punished by the Laws of Buenos Aires".[32] This demand not being satisfied, the *Lexington* sailed for the Falklands where its crew virtually destroyed the

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28. The text of the British note of 19 November 1829 appears in 20 BFSP 346-7.
29. Reply by the Minister of Foreign Relations of 25 November 1829, translated text in 20 BFSP 347.
30. See the Argentine request that he should "henceforth circumscribe himself to those functions" in the letter from the Minister of Foreign Relations on 9 December 1831, translated text in 20 BFSP 320-2; and the later suspension of "all official intercourse" with him by a letter of 14 February 1832, translated text in 20 BFSP 326-7. The U.S. complaint at the suspension by the Buenos Aires government of his functions, at which the Consul had himself complained (see also letter to the Minister of 16 February 1832 in 20 BFSP 329-30), is contained in the U.S. Charge d'Affaires' letter of 20 June 1832, 20 BFSP, 335-6.
31. See the letter from the Secretary of State in Washington to the newly arrived U.S. Charge d'Affaires in Buenos Aires of 26 January 1832, text in Moore, *Digest of International Law,* Vol 1, 876-83; and the Charge d'Affaires' letter to the acting Minister of Foreign Relations of 20 June 1832 in 20 BFSP 330-6. Compare Vernet's account, loc cit, 378 et seq.
32. Text of letter of 7 December 1831 in 20 BFSP 319-20.

Argentine settlement (Boyson 95; Goebel 44).[33] A group of Argentines was seized and kept in irons until the ship put them ashore in Montevideo.[34]

Although the extent of the damage caused was Duncan's own decision, he had been despatched to the South on the initiative of President Jackson, following receipt of the news of Vernet's activities on the return of the *Breakwater*.[35] In Secretary of State Livingstone's instructions to the U.S. Charge d'Affaires of 26 January 1832, the latter was only to order the commander of the U.S. Squadron to break up the settlement if Vernet's acts were disavowed by the Buenos Aires government.[36] In a subsequent communication of 14 February 1832, once it was clear that Duncan had already left for the Falklands, the Secretary of State instructed the Charge d'Affaires that if Duncan had in fact disarmed Vernet's bands, "you are to justify it not only on the general grounds in your instructions, but on the further facts disclosed in the protest of the captain of the *Harriet*, which show the lawless, and indeed piratical proceedings of Vernet and his band — imprisoning the crews; leaving part of them on desert islands; sending others to distant foreign ports; refusing them the liberty to come with their vessel to the port where he sends her for condemnation; forcing others into his service".[37]

Thenceforth the U.S. government continued to deny Argentine sovereignty over the islands. For example, in a letter from the U.S. Charge d'Affaires to the acting Minister of Foreign Affairs of 10 July 1832,[38] the writer traced the history of the region in terms that must have had the approval of his government. Commenting on the Spanish seizure of June 1770, the letter stated that at "the time of the forcible dispossession, the title of Great Britain was, certainly, placed on very strong foundations".[39] Following the disavowal of the act of dispossession by Spain, the writer explained the situation as follows: "With her rights again acknowledged, the emblems of sovereignty again reared, and possession resumed by a military and naval Force, Great Britain voluntarily abandoned these distant Dominions, taking every possible precaution, when she so did, to give evidence to the World, that, though she abandoned, she did not relinquish them. It is true that many years have elapsed since, under these circumstances, she ceased to occupy the Falkland Islands. But the lapse of time cannot prevent her from resuming possession".[40]

Later, in *Williams* v *Suffolk Ins Co*,[41] the United States again made its position clear. The plaintiff had commenced an action on an insurance policy covering the *Harriet* and her cargo, and a similar action had been brought in

33. The Argentine reaction, accusing the *Lexington* of having "invaded . . . our infant Colony"; "destroyed with rancorous fury . . . public property"; and "assaulted" the colonists, is contained in a Proclamation of 14 February 1832, translated text in 20 BFSP 327-8.
34. See Duncan's letter of 11 February 1832, 20 BFSP 328.
35. President Jackson's message to Congress of 6 December 1831, Moore, op cit, 885.
36. Ibid, 883.
37. Ibid, 884.
38. 20 BFSP 338-355.
39. Ibid, 345.
40. Ibid, 345-6.
41. 38 US 414 (1839).

respect of the cargo of the *Breakwater*. One of the questions reserved for the Supreme Court was whether the courts could examine evidence as to sovereignty over the Falklands in the light of the attitude of the U.S. government to the situation. The Court held that the judiciary were precluded from doing so. In the words of the headnote:

> "The government of the United States having insisted, and continuing to insist, through its regular executive authority, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish; it is not competent for a circuit court of the United States to inquire into, and ascertain by other evidence, the title of the government of Buenos Ayres to the sovereignty of the Falkland Islands."

The sporadic correspondence between the two countries continued until 1886 when the Secretary of State addressed a final communication on the events of 1831. As the United States was not a party to the controversy between Argentina and Britain, it had delayed replying to earlier protests, because "the question of the liability of the United States to the Argentine Republic . . . is so closely related to the question of sovereignty over the Falkland Islands, that the decision of the former would inevitably be interpreted as an expression of opinion on the merits of the latter." However, the reply contended that, "even if it could be shown that the Argentine Republic possesses the rightful title to sovereignty of the Falkland Islands, there would not be wanting ample grounds upon which the conduct of Captain Duncan could be defended . . . in putting an end in 1831 to Vernet's lawless aggressions upon the persons and property of our citizens."[42]

To return to the events of 1831-3, however, Goebel (442) attributed the U.S. Consul's "bold front and truculent behaviour" to the encouragement he presumably received from the British Charge d'Affaires who informed him of the British view that the United Provinces had no right to the Islands. Certainly the destruction of the settlement, and the hostility which this act had caused between Buenos Aires and Washington, presented Britain with the ideal opportunity to reassert its claims. HMS *Clio* re-entered Port Egmont on 20 December 1832 and encountered an Argentine naval vessel at Port Luis (Port Soledad) on 2 January 1833. The British flag was raised, that of the United Provinces returned to the Argentine vessel which was sent on its way. British sovereignty had been "restored".

It should not be supposed that the Islands were at once blessed with the Pax Britannica. The *Clio* did not stay in the Islands and a period of lawlessness and uncertainty prevailed (Cawkell 44-50). However, a small British presence was maintained from 1834 and the situation was improved following the passing on 11 April 1843 of "An Act to enable Her Majesty to provide for the Government of Her Settlements on the Coast of Africa and in the Falkland Islands".[43] By virtue of Letters Patent issued on 23 June 1843, a Governor was

42. Moore, op cit. 889-90.
43. 6 & 7 Vic, c 13.

appointed who later became Admiral of the Islands. Under his direction an Executive Council was established on 2 April 1845 and a Legislative Council on 13 November in the same year. With the gradual development of the colony thereafter we need not concern ourselves. Suffice to say that the population increased and by the end of the century was around the 2000 mark. It reached a maximum of 2392 in 1931 but declined thereafter, and at the time of the last census in 1980, the population was calculated as being 1813.[44] The British presence, which has continued to this day, has never been accepted by Argentina.

On 17 June 1833 the first major protest by Argentina[45] referred to the succession to Spanish rights as the basis of its claim. Spain's rights to the Falklands were, in turn, based upon the prior occupation by and purchase from France and by the abandonment of possession by Britain. Palmerston's response on 8 January 1834[46] was to refer to the communications that had taken place in 1770-1 as demonstrating no intention on the part of Britiain of relinquishing its claim, and included the often quoted statement that "the Government of the United Provinces could not reasonably have anticipated that the British Government would permit any other State to exercise a right as derived from Spain, which Great Britain had denied to Spain itself".[47] On a subsequent occasion, in December 1841, the attempt was made by Argentina to follow up this correspondence by pointing out that Soledad (East Falkland) had never been in British occupation.[48] This protest seems to have been largely ignored.[49] Since then Argentina has continued to use opportune moments for protesting at Britain's assumption of sovereignty.

The legal issues

The dispute as analysed in the media (in Britain as well as in Australia) has been confined within too limited a compass. While historical events have been invoked in support of the claims of the one side or the other, there has been little attempt to consider the dispute in a total perspective. However before embarking upon such an exercise, some comment is necessary upon the rival contentions.

(i) Argentina

The Argentine claim, largely based upon its rights as successor to Spain, may be stated as follows:

1. Spain had long established rights to the Atlantic coasts of South

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44. Figures given in COI (London), Doc No. 152/82/Revised.
45. Letter to Viscount Palmerston, French translation of text with its appendices in 22 BFSP 1366-84.
46. Ibid, 1384-94.
47. Ibid, 1385-6.
48. Letter of the Buenos Aires Minister in London to the Earl of Aberdeen of 18 December 1841, translation in 31 BFSP 1003-4.
49. The reply from the Foreign Office of 29 December 1841 simply stated that the Minister's note had been referred "to the consideration of the proper Department of Her Majesty's Government"! Ibid, 1005.

America arising from the Papal Bull of 1493 and the Treaty of Tordesillas of 1494; and these rights had been acknowledged and confirmed in treaties between various European powers, including Britain, during the seventeenth century and, in particular, by the Treaty of Utrecht 1713.

The crucial provision of the last-mentioned instrument was Article VIII whereby it was "by common Consent established as a chief and fundamental Rule, that the Exercise of Navigation and Commerce to the *Spanish West-Indies* should remain in the same State it was in the Time of the aforesaid King *Charles* II. That therefore this Rule may hereafter be observ'd with inviolable Faith, and in a manner never to be broken, and thereby all Causes of Distrust and Suspicion concerning that Matter may be prevented and remov'd, it is especially agreed and concluded, that no Licence, nor any Permission at all, shall at any time be given either to the *French,* or to any Nation whatever, in any Name or under any pretence, directly or indirectly, to fail to, traffick in, or introduce Negroes, Goods, Merchandizes, or any things whatsoever, into the Dominions subject to the Crown of Spain in America".[50] The Spanish (and Argentine) view of this provision was that it constituted a binding obligation upon other countries, but especially aimed at Britain and France, to recognise Spanish rights to trade with and over the territories of its Empire in South America.

2. Britain had subsequently recognised those rights in (a) desisting from pursuing the Anson inspired expedition in the face of Spanish opposition in the late 1740s; and (b) withdrawing from Port Egmont in 1774 on the basis of the secret understanding given by Lord North at the time of the 1771 demarche.

3. If Britain should claim sovereignty based upon prior occupation, Spain could point to the fact that it had succeeded to the rights of France, stemming from an even earlier occupation, by virtue of the cession effected through the purchase from Bougainville. Bougainville himself regarded Spain's pre-existing claim as being thereby reinforced when he wrote that Spain's "primitive right was thus rendered stronger by that which we undoubtedly acquired by the first occupation."[51]

4. Whatever rights Britain might have acquired had subsequently been abandoned.

(a) If there had been a secret understanding, then the 1774 withdrawal, whatever the ostensible reasons given for it, amounted to a dereliction of sovereignty. This was certainly the view of various British commentators.[52]

(b) If there was no such understanding, or, if for some reason it was not binding, Britain could not retain sovereignty after such a lengthy absence (nearly 60 years).

The Roman Law notion that ownership of a *res nullius* could be acquired by the physical act of taking possession coupled with the intention to act as owner had been readily assimilated into the International Law. However, the

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50. Israel, op cit, 222.
51. Cited Vernet's *Report,* 20 BFSP, 408.
52. See above, pp 29–30.

further analogy that ownership could only be lost by abandoning possession with the intention of also relinquishing ownership should not be taken too far in relation to sovereignty.

Such a rule might be appropriate in the case of temporary and enforced withdrawal of an established settlement. In the *Delagoa Bay* arbitration[53] between Britain and Portugal, a British officer had purported to enter into various arrangements with native chiefs for the creation of British rights in the region. It was held that these agreements were ineffective as Portugal retained its rights over the chiefs in question during the temporary absence of the Portuguese authorities who had been forced to withdraw in the face of local unrest.

However, there was no reason to extend the same principle to a lengthy absence which could well give rise to a presumption of abandonment. British Honduras (Belize) was once part of a Spanish province in central America. A series of agreements between Britain and Spain in the period 1763 to 1786 granted rights of log cutting to British settlers and also acknowledged Spanish title to the territory. When war broke out in 1796 between Britain and Spain, the land was thus under the control of British settlers. An unsuccessful attempt was made by Spanish forces to recapture the area in 1798. Following the Spanish withdrawal, no further attempt seems to have been made to recover control over the British inhabitants. In *A-G for British Honduras* v *Bristowe,*[54] the Judicial Committee of the Privy Council had no doubt that British sovereignty was established prior to the formal annexation of the territory by the Crown on 12 May 1862. Grants of land had been made by the Crown as early as 1817 and this fact "affords ample evidence that in that year at least the Crown had assumed territorial dominion in Honduras."[55] However, the court found it unnecessary to reach any firm conclusion as to when Spanish dominion was abandoned, being content to observe that there "certainly seems to have been an interval between the abandonment of Spanish and the assumption of British sovereignty".[56]

Nor should the principle that sovereignty could be retained by intention alone be relevant to a situation in which there was a failure to reassert a relatively fragile claim within a comparatively short period of time. The example usually given in support of such a proposition is that of St Lucia. English settlers on the island were murdered by native inhabitants in 1640. The island was subsequently occupied by the French in 1650. Its allocation to France by the Treaty of Utrecht, sixty-three years later, was belated recognition of a title which had long been established.

On this point the Argentine case is supported by Lindley. Having referred to the above examples, he had this to say of the British position:[57] it could not be said that "the notice left on the fort, which, moreover, appears to have been destroyed in 1781, was sufficient evidence, over the whole intervening

53. (1875) Moore, 1 Int Arb 4984.
54. (1880) 6 App Cas 143.
55. At 148.
56. Ibid.
57. *The Acquisition and Government of Backward Territory in International Law,* 51.

period, of her intention to retake the islands, and it would appear that any rights she may have had in 1774 had been abandoned long before 1832".

5. Although the British had laid claim to the whole of the Islands on the basis of the settlement at Port Egmont, even in 1774 Britain did not have, nor had it ever had, possession of the part originally occupied by the French. Britain could not preserve by its plaque rights which it had never exercised.

6. Whatever controversy there might have been over the continued existence of rights affirmed by the Treaty of Utrecht and later acknowledged by Britain, the Spanish position was strengthened by the outcome of the dispute over the Nootka Sound. On grounds similar to those advanced in respect of the Atlantic coasts of South America, Spain had claimed all the Pacific coast of North America as far north as 61°. Britain resisted this claim on the basis that occupation and use of a particular territory was necessary to establish title. The dispute was resolved by the Treaty of Escurial 1790[59] which provided in Article I for the restoration of certain "buildings and tracts of land" which had been seized by the Spanish in 1789 and in Article II for the payment of "just reparation". By Article III, however, it was agreed "that their respective subjects shall not be disturbed or molested . . . in landing in the coasts of [the Pacific Ocean or the South Seas], in places not already occupied, for the purpose of . . . making settlements there", subject to the restrictions contained inter alia in Article VI:

> "It is further agreed, with respect to the eastern and western coasts of South America, and to the islands adjacent, that no settlement shall be formed hereafter, by the respective subjects, in such parts of those coasts as are situated to the south of those parts of the same coasts, and of the islands adjacent, which are already occupied by Spain".

As Spain had been left in undoubted and undisputed occupation of the Falklands, which equally undoubtedly were islands adjacent to coasts which were themselves in Spanish occupation or to the south of such coasts, the consequence of the Treaty was to confirm the Spanish position in relation to the territory.

7. The revolt against Spain in Latin America was in origins a revolt against Spain under a Bonaparte. One of the effects of the revolution was the decision in January 1811 by the Governor of Montevideo to evacuate the Falklands settlement. In March 1811, therefore, the Islands, in Goebel's own words (433), "were once again abandoned to the elements".

The creation of the new United Provinces occurred in July 1816, but it was not until 1820 that Jewitt was sent to the Islands to substantiate the claims of the Buenos Aires government. This action may be regarded as either re-assertion of an existing authority, or the basis of acquisition of *terra nullius*. The Buenos Aires government adopted the former approach, relying upon the principle of *uti possidetis*.[58]

8. Certainly, under Vernet, the duly authorised agent of the government, the colony was firmly established and with it the authority of the new State. The virtual destruction of the colony by the *Lexington* was a breach of

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58. See further below p 51.
59. Hertslett, *Commercial Treaties* Vol 2, 257.

international law and could hardly be relied upon as a basis for asserting that the Islands were ungoverned and therefore *terra nullius*. The U.S. view that Vernet was a pirate was totally at variance with the facts (a) that he was the authorised governor; and (b) that he was carrying out the policy of the Buenos Aires government in restricting fishing and sealing in national waters.

9. It followed that the British seizure of the Islands in 1833 was an illegal act on Argentine territory. It was an act the validity of which Argentina has never recognised. Indeed Argentina has continued to protest at the British presence ever since. Though, through prescription, a State may in time acquire sovereignty over the territory of another State, the basis of prescription is the acquiescence of the latter State to the loss of its territory. Far from acquiescing in the British reoccupation, Argentina has opposed the British presence throughout the 150 years it has continued.

The *Chamizal* arbitration[60] concerned a dispute between the United States and Mexico with regard to a piece of land into which American citizens moved when the boundary river altered its course southwards, thus cutting off the land in question from the rest of Mexican territory. The arbitrator held that the normal rule, that a boundary remained in its original position along the line of the former course of the river, was not displaced by the subsequent assumption of possession by the United States. The basis of the decision was that, throughout a period of half a century, Mexico had continued to protest the American presence: "the physical possession taken by the citizens of the United States, and the political control exercised by the local and federal governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents."[61] Of particular significance was the observation that Mexico could hardly have done more than protest vigorously as to have attempted to retake possession of the district "would have provoked scenes of violence": in the circumstances Mexico could "not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence."[62]

In more recent times, Argentina has been prepared to show that its protests were more than for "form's sake" by raising the matter in the United Nations. Moreover, when Britain attempted to submit the dispute over other Antarctic and sub-Antarctic territories (the Falkland Islands Dependencies) to the International Court in 1955, Argentina declined to allow the case to proceed inter alia on the ground that the British Application did "not say anything in relation to the fundamental sovereignty problem" concerning the Falkland Islands themselves. It was "not possible to produce a correct description of the question to which the Embassy of Her Britannic Majesty refers, without mentioning the occupation of the Malvinas Islands by the United Kingdom. As long as this aggression and the resulting usurped possession has not been remedied through the restitution of this archipelago to the Argentine Republic, the Argentine Government cannot conceive nor accept as either friendly or legal any proposition which has as its base the continuation of this

60. (1911) 5 AJIL 782.
61. At 806.
62. At 807.

usurpation. Even less could it admit that one could pretend to base said usurpation on titles of sovereignty over other Argentine territories, which would lead to the result that the latter would be affected by the consequences of the aggression to which the Malvinas Islands were subjected. No rights in favour of Great Britain could result from this situation."[63]

10. Following the creation of the UN, the position of the Falklands fell within Chapter XI of the Charter, a factor recognised by Britain itself which had regularly submitted reports in respect of the territory in accordance with Article 73e. From the outset Argentina had annually given notice in the General Assembly that the information thus transmitted by Britain in no way affected Argentine sovereignty over the Islands.

The adoption in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV)) had greatly accelerated the decolonisation process. The resolution was especially pertinent to the dispute because paragraph 6 had declared that any "attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." In the Argentine view, the Malvinas were, in 1810, an integral part of that portion of the Spanish American Empire to which the Buenos Aires government succeeded. Geographically and historically, therefore, the Islands were a part of Argentina which was under the illegal occupation of a colonial power and of its nationals which it had settled there as part of the colonising process.

(ii) Britain

Britain has been less concerned with the legalities of the pre-1832 situation, preferring to base its claims on the continuous occupation and settlement of the Islands since 1833. However, it would not allow the Argentine version of the events of the earlier years to go by default.

1. Britain had never recognised the Spanish monopoly of the Americas arising out of the Papal Bull of 1493. The later treaties, culminating in the Treaty of Utrecht, contained a recognition by Britain of Spanish rights but only in relation to areas actually settled in whole or in part by Spain.

2. From the time of Elizabeth, if not earlier, Britain had resisted Spanish claims that discovery alone could give rise to sovereignty. However, even if the Spanish approach had been the correct one under the legal rules which existed in the late sixteenth century, Britain could point out that its sailors had been the first to visit and identify the Islands and, later, to land thereon.

3. The better view was that discovery, especially when accompanied by a symbolic taking of possession, created inchoate title, i.e. the prior right to occupy. This approach seems to have been the one advocated by Vattel,[64] and was the rule later preferred by the arbitrator in the *Island of Palmas* case.[65]

63. Note from the Minister of Foreign Affairs of the Argentine Republic to the British Ambassador in Buenos Aires of 4 May 1955: ICJ Pleadings, *Antartica* cases, 91-3 (translation supplied). As early as 1844 Argentina had proposed arbitration of the dispute, see below p 66.
64. See above p 24.
65. (1928) 2 UNRIAA 831 at 845-6.

If it had come to a contest between the rival claims of France and Britain in the 1760s, as the settlements were made virtually contemporaneously, the British would have prevailed by virtue of its earlier connections with the Islands. Hence Spain obtained no priority by the transfer from France. Indeed the very act of handing over whatever rights France may have had could in itself have constituted a recognition by France that its claims to the Islands were defective. The payment to Bougainville was to compensate him for his expenses and was in no way a measure of the value of France's doubtful rights.

4. The important aspect of the events of 1770-4 was the restoration of Port Egmont at Britain's insistence. There was no secret undertaking given: no record of it has ever been discovered in any official British document.

That commentators of the time in London should have put such an interpretation on events was simply a demonstration of their political hostility to the government. That rumours were rife in the British capital was hardly surprising as there had been discussions about a joint abandonment of the rival settlements. However, it was known by Spain that a unilateral undertaking would have been totally unacceptable to Parliament. It may have been true that the Crown could cede territory without Parliamentary approval,[66] but this principle would hardly apply to a situation where there was no formal act of cession and where no Minister could publicly enter into such a commitment and remain in office.

It should be borne in mind that Vernet himself was later persuaded that no secret undertaking had been given. On this basis he seems to have changed his mind on the validity of the Argentine claim,[67] though his reason for doing so may have been in the hope of obtaining compensation from the British government.

5. The withdrawal of the British settlement in 1774 did not involve abandonment of the British claim. The restoration of Port Egmont in 1771, the announcements that the settlement was being reduced and then withdrawn as economy measures, and the subsequent leaving of a plaque as part of a public assertion of continued sovereignty, were sufficient to preserve that claim. The Treaty of Escurial was not intended to, and did not, have any effect on the situation.

6. In any case, whatever Spanish rights there might have been were relinquished when the last Spanish Governor of the Malvinas fled in 1807 (Goebel 432; Boyson 81), even before the withdrawal of the settlement itself in 1811. Moreover, Britain had never accepted the automatic succession of the American Republics to Spanish rights, especially where those were doubtful or contested.

The British view of *uti possidetis* was that, while it was a suitable principle for application by agreement amongst the South American Republics (and would protect them "from the designs of any enterprising adventurers, who

66. Even if there later developed a convention that such an issue needed Parliamentary approval, no such convention existed in 1770: see the discussion in Roberts-Wray, *Commonwealth and Colonial Law*, 117-26.

67. Metford, "Malvinas or Falklands", (1968) 44 International Affairs 463, 474-5.

may think fit to carve out for themselves new dominions"[68]), it was not binding upon outside States. As early as 1825, a Law Officer's Opinion was given, in respect of a coastal area, formerly part of the Spanish province of New Grenada which constituted part of the Republic of Colombia, that, as the region was inhabited only by Indians and there was no Colombian establishment of any kind there, the assumption of territory on the basis of *uti possidetis* would "scarcely be justified . . . in reason and principle".[69] Similarly, in 1849, Palmerston rejected a Nicaraguan argument along the same lines, pointing out that "since the People of Nicaragua have never occupied any part of the Territory of Mosquito, except Grey Town, which they forcibly took possession of only in 1836, the sole pretence upon which the State of Nicaragua can claim a right to Grey Town, or to any other part of the Mosquito Territory, is the allegation that the Mosquito Territory belonged to Spain, and that Nicaragua has inherited the rights of Spain over the Territory." The new Republics had not been regarded as bound by the obligations of the Spanish Empire vis-a-vis outside States nor were they successors to rights which in any case neither Spain nor themselves had exercised.[70]

7. The establishment of Argentine control over the Islands in the 1820s was never recognised by Britain nor by America. Vernet's authority was doubtful in that he was an adventurer whose interest in the Islands enabled the Buenos Aires government to create the appearance of control through his presence. Moreover, far from exercising authority for the protection of those visiting the Islands, Vernet embarked upon a reign of piracy against American ships and their crews to such a degree that a U.S. warship had to intervene to put an end to this lawlessness.

8. The British return in 1833 was necessary to restore order to the Islands which were in a state of anarchy. Even if this was not a reassertion of an existing sovereignty after 59 years absence, the Islands had reverted to being *terra nullius* so that Britain was entitled to reacquire them by occupation.

9. Alternatively Britain could argue that its reoccupation of the Islands entitled it to rely upon conquest as a basis for claiming sovereignty.

Although the outlawing of the use of force as an instrument of national policy in the Kellogg-Briand Pact 1928 and the reaffirmation of that principle in Article 2.4 of the UN Charter have rendered obsolete conquest as a mode of acquisition of territory, it was still a recognised basis of title in 1833. It is interesting to note that Vernet, in his Report of 10 August 1832,[71] acknowledged that "dominion, once acquired, is lost . . . by the prevalence of Foreign Force, or by conquest". In Vernet's view, the US Charge d'Affaires, who had made the accusations against him, would "not fail to agree in the correctness of these principles, which, founded in reason uniformly admitted and generally observed, constitute an essential part of the common Code of Nations."

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68. Canning to the British Ambassador to Brazil, 18 March 1826, text in Smith, op cit, Vol 1, 374-7.
69. Law Officer's Opinion of 28 March 1825 in Smith, loc cit, 372-3.
70. Note to the US Ambassador of 2 May 1854, Smith, loc cit, 379-80.
71. 20 BFSP, 402. The Report is referred to above, p 29, fn 23.

In so far as it might be argued that conquest in itself did not create title without some subsequent act or acts on the part of the acquiring State, Britain had perfected its right of sovereignty by establishing administrative control over the territory and providing it, for the first time, with a stable population. Although conquest could be, and perhaps was most frequently, ratified by a treaty of peace, a majority of writers[72] recognised that undisturbed possession and the exercise of governmental authority, even without formal annexation, were sufficient. To quote from Lawrence,[73] "conquest in the legal sense . . . is brought about when the victorious state exercises continuously all the powers of sovereignty over a territory conquered in a military sense, and signified by some formal act, such as a diplomatic circular, or a proclamation of annexation, or even by long and uninterrupted performance of the functions of a ruler, its intention of adding that territory to its dominions." This view is in keeping with the views expressed by Wheaton in 1836 (i.e. contemporaneously with the re-establishment of the British settlement on the Falklands):[74]

> "The exclusive right of every independent state to its territory and other property is founded upon the title originally acquired by occupancy, conquest or cession and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States."

Some writers seek to distinguish the military act of conquest and the legal act of subjugation (which requires annexation or the long exercise of governmental control) as a means of establishing title. Though this approach might reflect a degree of disapproval of this process of acquiring sovereignty,[75] it was nevertheless an accepted form of territorial acquisition prior to 1919.[76]

Whichever view one accepts, Britain fulfilled the requirements of a valid conquest or subjugation. There is no particular requirement as to the form which the subsequent annexation must take.[77] Thus the 1843 "Act to enable Her Majesty to provide for the Government of Her Settlements on the Coast of Africa and in the Falkland Islands" would be sufficient. Even if it were not, the series of executive acts which followed in establishing the basis for more than a century of uninterrupted British rule would convert the right of a military conqueror into a true sovereign.[78]

10. Whether or not Britain's acquisition of the Falklands could be justified in this way, the settlement of the Islands, and the continuous and peaceful exercise of sovereignty with respect thereto over a period of a century and a

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72. Vattel, op cit, Chap XIII; Wheaton, *Elements of International Law* (1866), Carnegie ed. 200; Maxey, *International Law* (1906), 144; Hall, *International Law* 3rd ed (1890), 565-6; Pitt Cobbett, *Leading Cases on International Law,* 5th ed (1937), Vol 2, 313.
73. *The Principles of International Law* 7th ed (1925), 159.
74. Wheaton, loc cit; the text had remained unchanged since the 1836 edition, see Westlake, *International Law* (1910), Vol 1, 112. O'Connell, *International Law,* 2nd ed (1970), Vol 1, 432, suggests that seizure in war alone was sufficient in the 17th and 18th centuries.
75. Hyde, *International Law* (1922), Vol 1, 176-7.
76. Oppenheim, *International Law,* 8th ed (1955), Vol 1, 570-1.
77. O'Connell, op cit, 433.
78. See *Re Southern Rhodesia* [1919] AC 211.

half, were sufficient to cure any original defect in title. It is true that, particularly since 1945, Argentina has protested at what it still regards as an illegal occupation of the Islands by Britain, but, during lengthy periods including one of more than thirty years in the nineteenth century, no protests were lodged with the British government.[79] Arguably, therefore, any claim Argentina may have had was extinguished during this time.

In any case, however, protests alone cannot prevail in the face of irrebuttable evidence of title.

Long and undisturbed possesion in itself creates a prescriptive title. This principle was certainly recognised in the first part of the nineteenth century. Wheaton[80] had no doubt that "the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory . . . for a certain length of time, by one State, excludes the claim of every other". Dana, the editor of the 1866 edition, referred in a footnote[81] to the extensive discussion of the technical requirements of such a rule and the widespread support for it amongst jurists, and then commented that it could not "be seriously doubted that long-continued firm possession, especially if practically undisputed by force, is sufficient to create sovereign title and to give all attempts to subvert it the character . . . of attempted conquest if by other nations." Thus, the analogy with municipal law, with its requirement that there must be an absence of effective protest, cannot be taken too far as the facts of international life have necessitated that those requirements be modified. As Hall observed,[82] instead, as in private law, of "being directed to guard the interests of persons believing themselves to be lawful owners, though unable to prove title . . . the object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of ultimate victory of right."

While the *Chamizal* arbitration[83] may have given support for the proposition that protest alone can preserve a title against the effects of prescription, the authority of that decision is limited. In the first place, there were no doubts as to the legitimacy of Mexico's true title prior to the alteration to the course of the river: in this case there had been a long standing controversy between Britain and Spain over sovereignty of the Islands. Secondly, there had been no established settlement, nor population, on the Islands before the British set up and developed a colony there from 1833 onwards. The very nature of the British possession, in contrast to the previously existing situation, rendered the circumstances totally different from those with which the arbitrators had to deal in the *Chamizal* case. Finally, even protests cannot be sufficient to prevent the acquisition of title by such a lengthy period of actual possession, settlement, and the undisturbed exercise of authority.

11. The fact that protests alone would be sufficient under Roman Law or the Common Law to prevent a prescriptive title being established makes the

79. Cohen Jonathan, "Les Iles Falkland (Malouines)", (1972) 18 Ann Fr Dr Int 235, 243-5.
80. Op cit, 200.
81. At 201.
82. Op cit, 121.
83. (1911) 5 AJIL 728.

analogy with municipal law unsatisfactory. As early as the mid-eighteenth century, Vattel referred to the fact that the ordinary rules of prescription, which he regarded as based upon natural law, "in so far as they are founded upon a presumption drawn from long silence, are frequently somewhat difficult of application as between Nations."[84] However, he continued, there were "other principles in virtue of which prescription may operate validly as between Nations. In view of the peace of Nations, the safety of States, and the welfare of the human race, it is not to be allowed that property, sovereignty, and other rights of Nations should remain uncertain, open to question, and always furnishing cause for bloody wars. Hence, as between Nations, prescription founded upon length of time must be admitted as a valid and incontestable title."[85] The need to recognise a less restrictive form of prescription justifies the adoption of different terminology, a clue to which may be found in Oppenheim's description[86] of what he terms prescription as

> "the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order".

This notion of historical consolidation is significant. It is partly a question of the time for which a situation has remained undisturbed, and partly a question of comparing the extent of the control which has been exercised with the strength of any rival claims. In contrast to the *Chamizal* arbitration, in the *Temple* case[87] the International Court emphasised the need to achieve certainty and finality in boundary settlements, so that the failure to perceive an error in the application of the boundary treaty between Siam and French Indo-China did not entitle a party to seek a correction of that line 50 years later. In the case of a claim disputed from the outset, at some stage international order requires that the earlier claim be supplanted in the interests of "stability and finality".

For that reason international tribunals have been more concerned with the answer to the question which State has actually exercised authority in the disputed territory than with whether a State has satisfied the alleged requirements of specific modes of acquiring title. Hence, in the *Island of Palmas* case,[88] the arbitrator equated the factors relevant to testing the existence of title with those applicable to the settlement of boundary disputes: in his view, "practice, as well as doctrine, recognises . . . that the continuous and peaceful display of territorial sovereignty . . . is as good as title" and so too, "under the reign of international law, the fact of peaceful and continuous display [of territorial sovereignty] is still one of the most important considerations in establishing boundaries between States."[89]

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84. Op cit. Chap XI. para 147.
85. Loc cit. para 149.
86. *International Law* Vol I. 8th ed (1955). 576.
87. ICJ Rep 1962. p 6 at 34.
88. (1928) 2 UNRIAA 829.
89. At 839.

In the *Eastern Greenland* case,[90] Denmark argued that the purported Norwegian occupation of the disputed territory in 1931 was ineffective because Denmark had exercised sovereign rights over Greenland as a whole for a long time and had thereby obtained a valid title. In other words the Danish claim was not based upon occupation as a defined mode of acquiring title, but upon the peaceful and continuous display of State authority considered conclusive by the tribunal in the *Palmas* case. In a well-known passage, the Permanent Court transposed the traditional test for acquiring title by occupation into a modern setting:[91]

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority."

It is clear from the judgment that what was significant was the degree of exercise of authority in relation to any competing claim. In this case a relatively low level of control was necessary as, prior to 1931, there had been no other claimant to the territory in question. In the *Temple* case, a relatively low level of activity by the French (and later the Cambodian) authorities had been called for because of the apparent absence of any rival claimant.[92] Moreover, in the *Minquiers and Ecrehos* case,[93] the International Court based its decision in favour of Britain on the finding "that the British authorities during the greater part of the nineteenth century have exercised State functions" in respect of the Islands, whereas the French government had "not produced evidence showing that it has any valid title".[94]

The overwhelming importance attributed to clear manifestations of sovereign authority as signifying title is consonant with the notion of consolidation whether one considers that notion as an aspect of prescription under international law, or as a distinct concept. As de Visscher has written:[95]

> "A State which has ceased to exercise any authority over a territory cannot, by purely verbal protestations, indefinitely maintain its title against another which for a sufficiently long time has effectively exercised the powers and fulfilled the duties of sovereignty in it. Considerations of stability, order and peace, analogous to those that justify acquisitive prescription, are here preponderant. The thesis that the consent of a dispossessed State is invariably required to validate a change of sovereignty is in harmony neither with the facts of international practice nor with the still primitive character of international law which in its present stage holds valid territorial changes imposed under constraint upon defeated countries in treaties of peace."

12. The British claim was reinforced by reference to the principle of self-determination. In granting independence to the large numbers of its

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90. (1933) PCIJ Ser A/B, No 53.
91. At 45-6.
92. See Judge Fitzmaurice's reference to this point in his discussion of the application of estoppel to Thailand's position: ICJ Rep 1962, p 64.
93. ICJ Rep 1953, p 47.
94. At 67: see also at 70, 71.
95. *Theory and Reality in International Law,* Eng trans (1957), 210.

former colonies in keeping with the wishes of their inhabitants (of which Southern Rhodesia was the most recent example), Britain had itself contributed significantly to the development of self-determination as a legal concept.

Britain had consulted the people of the Falklands and its policy towards the Islands had been framed in the light of their wishes. In 1964 the elected members of the Falklands Legislative Council had informed the UN Special Committee that the Islanders were proud to be citizens of a British Colony and had expressed their desire to retain and strengthen their links with Britain.[96] More recently, in 1980, as a culmination of a decade of talks with Argentina, Britain again consulted the wishes of the Islanders on the basis upon which future co-operation with Argentina could be negotiated. The Islanders rejected the idea of surrendering sovereignty to Argentina in exchange for a lease-back of the administration of the Islands. However, they were prepared to agree to consultations continuing with Argentina on the basis of an agreement to freeze the dispute over sovereignty for a specified time. This proposal was put to Argentina early in 1981, but it was rejected by that State.[97]

Whatever solution was at present acceptable to the Islanders, it was not one based upon recognition of Argentine sovereignty. At present they regarded themselves as British.

The Monroe doctrine and the Latin-American perspective

It has already been suggested that, in a number of respects, the present dispute over the Falklands between Britain and Argentina is part of a much longer conflict between the New World and the Old, between the Spanish inheritance and European colonialism.

It will be recalled that the events of 1763-74 formed part of the long history of British (and French) attempts to break the Spanish monopoly in America, from Vancouver in the North West, in Florida and Louisiana, to the Caribbean and ultimately to the South Atlantic. The success of Britain (and France) was less marked the further south the conflict took place. Brazil apart, which was Portuguese from the outset (though its boundaries in the interior were subject to much later adjustment), the coasts of South America remained largely intact from outside interference. Hence it was hardly surprising that the new South American Republics, which emerged from Spanish rule in the early part of the nineteenth century, inherited a sense of hemispheric integrity from their former rulers. Moreover, having succeeded in ridding themselves of one colonial master, they did not want their extensive territories to fall prey to another.

This attitude of mind with which the world was viewed had much in common with the United States. Although those colonies had achieved their independence from Britain some forty years earlier, the new country still felt

96. See the Report of Sub-Committee III on the Falkland Islands (Malvinas) attached as an Annex to Annex No. 8 (Part I) of GAOR (XIX) 1964 (Doc A/5800/Rev 1), 440.
97. *Falkland Islands: Britain's Search for a Negotiated Settlement* COI (London), No 152/82; Keesing's Contemp Arch June 11, 1982, 31525.

itself threatened by possible European colonisation, in the North, by Russia, or where the Canadian provinces remained loyal to Britain, and in the South where waning Spanish power could well have given way before attempts by Britain or France to extend their authority into areas coveted by the new Republic.

The United States succeeded in these southern areas because of the preoccupation of Britain and France with European events. While these same events gave the South American Republics the opportunity to overthrow the authority of the Spanish, with the restoration of peace in Europe in 1815, they were not as safely established as the United States itself. In addition, the Holy Alliance, a treaty signed originally between the Emperor of Austria, the King of Prussia and the Tzar of Russia in 1815,[98] was being employed as a vehicle for the eradication of revolutionary (and therefore republican) tendencies, not least in Spain itself. At the Congress of Verona, 1822, despite opposition from Britain, approval was given by members of the Alliance for the intervention of French troops in Spain to restore the authority of Ferdinand VII, an operation which was carried out with striking success in April/May 1823.[99]

It was alarm at the possibility that the Alliance might also attempt to restore the authority of the Spanish Crown in South America which made it seem likely that Britain and the United States would issue some joint declaration to pre-empt any such attempt to recover the Spanish colonies.[1] However, the American view was that, though their ultimate objectives might be similar vis-a-vis the Holy Alliance, their secondary aims were different. Britain was particularly anxious to keep France out of Latin-America. In his proposal to Ambassador Rush of 20 August, 1823,[2] Canning had suggested a joint statement that neither country aimed "at the possession of any portion" of the Spanish American colonies and that neither could "see any portion of them transferred to any other power with indifference". However, while the United States believed that Britain would prevent a French incursion into Latin-America in any case (and had the maritime strength to carry out such a policy), it had no wish to fetter itself with regard to the future acquisition of Puerto Rico and Cuba.[3] In the event, President Monroe enunciated his famous doctrine in the terms of a unilateral warning to all European powers in a message to Congress on 2 December 1823.[4] "We owe it", said the President, "to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or

98. Text in Hertslett, *Map of Europe By Treaty*, 317; Gantenbein (ed), *The Evolution of our Latin-American Policy*, 301.
99. See the letter from Secretary of State, Adams, to Secretary of the Navy, Thompson, of 10 May 1819, text in Moore, *Digest of International Law*, Vol. 6, 374-6.
1. See the correspondence concerning the negotiations between Foreign Secretary Canning and American Ambassador Rush in Moore, loc cit, 386-92.
2. Moore, loc cit, 389-90.
3. Logan, *No Transfer*, 164-5.
4. Text in Moore, loc cit, 401-3.

dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."

There are conflicting views as to the significance of the Monroe doctrine for Latin America. On one hand, there are those who regarded it as an example of United States self-interest from the start and as no more than a cynical warning to Europe to leave the former Spanish colonies to the mercy of American imperialism.[5] Admittedly the President's message was couched in idealistic terms,[6] and it did receive a euphoric response from the liberators of the new States, but they soon felt "let down" by the lack of commitment shown by the United States to advancing their common interests.[7] In particular, Argentina's sense of disaffection resulting from the destruction of the Malvinas Colony by the *Lexington* was kept alive by later refusals on the part of successive American administrations to apply the Monroe doctrine in favour of Argentina and against the British presence on the Islands.[8] However, even amongst those who were prepared to take its altruism at face value and to trace from it benefits to the new Republics in the precarious early years of their existence, there was no denying that the doctrine was later perverted into a justification for "Yankee Imperialism".[9]

Whatever emotive appeal it might have had as a plea for hemispheric solidarity,[10] in practical terms, it was Canning's diplomacy and British naval power which secured the safety of the Spanish Republics from the retribution of the Holy Alliance. As Fagg has written,[11] it was "truly England with her peerless fleet and economic power, who was the guardian of Latin American independence. Nearly everywhere British investors and traders had the advantage over their American competitors. Enough were rewarded to make the British businessman a prestigious figure in nearly every Latin American city and not far behind were bankers or diplomats and the Royal Navy or merchant fleet that advertised Britain's omnipotence."

But if the new Republics could not altogether rely upon the United States, and retained suspicions about Britain's objectives towards them, or were concerned at their vulnerability to any change of policy on Britain's part, what could they do to protect themselves from outside interference?

The Monroe doctrine was certainly seen, with its emphasis on non-

5. See the reference to Texas and Cuba as "the two great ambitions of expansionists in the United States" in Nerval, *Autopsy of the Monroe Doctrine,* quoted in part of the extract in Rappaport (ed) *The Monroe Doctrine,* 92 at 95.
6. Nerval, op cit, in Rappaport, loc cit; see also Logan, op cit, 175.
7. Fagg, *Latin America,* 3rd ed, 785.
8. See further below.
9. Quintanilla, *A Latin American Speaks,* in Rappaport, op cit, 99-106.
10. For a more favourable view of the Monroe doctrine, see Bemis, *The Latin American Policy of the United States,* 70-1.
11. Loc cit, fn 7.

intervention and no transfer, as in harmony with two principles dear to the hearts of the South American republics. The first was the doctrine of *uti possidetis* and the second the principle of no conquest.

The United States was anxious to secure to itself the North American continent to the Pacific, and in this context the Presidential pronouncement was an attempt to forestal any fresh European incursions into the unoccupied areas to the west.[12] Similarly, large parts of the former Spanish Empire in South America had remained unexplored; sovereignty over them had been based upon assertion and not upon occupation in any physical sense.

Yet, for most of its history, the Spanish Empire had been strong enough to exclude foreign settlement, although its claims had been gradually eroded, to a large extent in North America, to a lesser extent in Central America and the Caribbean. The new Republics were determined to claim the benefits of the comparative integrity of the Southern part of the Continent. If they succeeded de jure to the territories of the Empire to their fullest extent, there would be no room for a second wave of European colonisation based upon the assumption that the unexplored and unoccupied areas were *res nullius*. This preoccupation was to be found expressed in the constitutions of a number of the new States which proclaimed the principle of *uti possidetis* of 1810.[13] The same message was repeated in the instructions given by the Peruvian government to its representatives to the Congress of Panama 1824,[14] and in the instructions given by Secretary of State Clay to the United States delegates who were sent to that Congress.[15] According to Clay,[16] "from the northeastern limits of the United States, in North America, to Cape Horn; in South America, on the Atlantic Ocean, with one or two inconsiderable exceptions; and from the same cape to the fifty-first degree of north latitude, in North America, on the Pacific Ocean, without any exception, the whole coasts and countries belong to sovereign resident American powers. There is, therefore, no chasm within the described limits in which a new European colony could be now introduced without violating territorial rights of some American State." Even before the Treaty of Confederation, drawn up at the Congress of Lima in 1848, the principle was an underlying feature of the public law of the Southern part of the continent. Hence Article 7 of that instrument was a restatement of existing law in declaring that the "Confederated Republics . . . have a perfect right to the preservation of the boundaries of their territories as those of the respective Vice-royalties,

12. The west coast was of course subject to existing Spanish claims, although these had not been substantiated by actual settlement in other than a few scattered clusters on the coast of California: see Bemis, op cit, 75. The Nootka Sound settlement was therefore a useful precedent for the United States. There were also fears of Russian designs as, in addition to a Russian presence in the far north, there was also a small settlement on the Californian coast: see Perkins, *A History of the Monroe Doctrine*, 30-1.
13. See Alvarez, "Latin America and International Law", (1909), 3 AJIL 269 at 290.
14. Alvarez, *The Monroe Doctrine*, 152-3.
15. Though they never reached their destination: one died on the way and the other gave up the journey.
16. Alvarez, *The Monroe Doctrine*, 165.

captain-generalships or presidencies into which Spanish America was divided at the time of their independence from Spain".[17]

At a very early stage in their history, therefore, the Republics had established *uti possidetis* as a cardinal principle of their perception of Latin-American international law and hemispheric solidarity. As the tribunal in the *Beagle Channel* arbitration explained it:[18]

> "This doctrine — possibly, at least at first, a political tenet rather than a true rule of law — is peculiar to the field of the Spanish-American States whose territories were formerly under the rule of the Spanish Crown, — and even if both the scope and applicability of the doctrine were somewhat uncertain, particularly in such far-distant regions of the continent as are those in issue in the present case, it undoubtedly constituted an important element in the inter-relationships of the Continent.
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> As the Court understands the matter, the doctrine has two main aspects. First, all territory in Spanish-America, however remote or inhospitable, is deemed to have been part of one of the administrative divisions of Spanish colonial rule . . . Hence there is no territory in Spanish America that has the status of *res nullius* open to an acquisition of title by occupation. Secondly, the title to any given locality is deemed to have become automatically vested in whatever Spanish-American State inherited or took over the former Spanish administrative division in which the locality concerned was situated (*uti possidetis, ita possideatis* — the full formula). Looked at in another way, *uti possidetis* was a convenient method of establishing the boundaries of the young Spanish-American States on the same basis as those of the old Spanish administrative divisions, except that the latter were themselves often uncertain or ill-defined or, in the less accessible regions, not factually established at all, — or again underwent various changes."

While this concept might provide a degree of protection against one form of legal take-over of South American territory, it still left open the possibility, in traditional legal theory at any rate, of such territory being forcibly acquired by conquest. Here again there was a similarity of purpose between Monroe's objectives and the aspirations of the Southern republics. The main difference was that the United States did not want to place any self-limitation upon its own territorial ambitions vis-a-vis still existing Spanish colonies to its immediate south and on the western seaboard, nor in relation to those which had passed into Mexican hands. The United States was, however, at one with the South American republics in wishing to prevent future conquests by European powers, though the Southern republics sought to place a prohibition on territorial aggrandisement from whatever source.[19]

The first manifestations of this desire were the unsuccessful attempts by a

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17. Ibid, 174. For the original and subsequent divisions into which the Spanish Empire splintered, see Alvarez, "Latin America and International Law", (1909) 3 AJIL 269 at 289.
18. *Beagle Channel Arbitration* Award, paras 9-10: text in (1978) 17 ILM 634.
19. See the correspondence with Colombia, Alvarez, *The Monroe Doctrine*, 123-4; with Brazil, ibid, 125-8.

number of South American States to induce the United States to guarantee their security by treaty. However, in his instructions to the United States delegates to be sent to Panama in 1826, Secretary of State Clay followed his comments about the sovereignty of the American States over virtually the whole of the continent with the statement that any attempt to establish a new European "colony, and by its establishment to acquire sovereign rights for any European power, must be regarded as an inadmissible encroachment."[20] What the Secretary of State was prepared to propose on behalf of the United States was that to "prevent any such new European colonies, and to warn Europe beforehand that they are not hereafter to be admitted, the President wishes you to propose a joint declaration of the several American States, each, however, acting for and binding only itself, that within the limits of their respective territories no new European colony will hereafter be allowed to be established."[21] While it was clear that the United States itself was not prepared to give any commitment to defend the territorial integrity of the Southern republics, those States themselves perceived the need to lend each other support should the occasion arise. Article 2.1 of the Treaty drawn up at Lima in 1848 laid down that certain acts constituted breaches of the treaty: among those listed was if "any foreign nation shall occupy or attempt to occupy any portion of the territory included within the boundaries of the Confederated Republics, or shall make use of force to exclude such territory from under the rule and domain of the said republic under any pretence whatsoever".[22]

Although this instrument, like so many others between the Latin-American States, never came into force, the underlying principle was generally accepted. It was closely related to the principle of good neighbourliness — that there should be no interference in the internal affairs of other Latin-American States, and that there should be respect for their territorial integrity. A treaty of 1856 between Peru, Chile and Ecuador contained an undertaking in Article 13 "not to cede or alienate in any form, to another State or Government, any part of its territory". And, by Article 14, each of the contracting States agreed "to respect the independence of others, and, in consequence, to prevent in their territory, by all means in their power, the collection or preparation of elements of war, the enlisting or recruiting of soldiers, the storage of arms or equipping of vessels for hostile operations against any of the others, and to prevent political emigrees from abusing the privilege of asylum, laboring or conspiring against the established order" in any such State or against its Government. In 1865 those States were joined by Bolivia, Colombia, Salvador and Venezuela in a Treaty of Union and Defensive Alliance[24] which guaranteed "the independence, sovereignty and integrity of their respective territories" (Article I) and which included, among acts amounting to a breach of that undertaking, those "intended to deprive

20. Ibid, 165.
21. Ibid, 165-6.
22. Ibid, 171.
23. Ibid, 176.
24. Ibid, 179.

any of the contracting Nations of a part of their territory with the intention of appropriating their dominion or ceding it to another Power" (Article II. 1). On the same date, these States entered into a Treaty for the Preservation of Peace,[25] Article 6 of which was similar in terms to Article 14 of the 1856 agreement.

The principle of no conquest has had many subsequent reaffirmations. It was used by way of analogy as one basis for the Drago doctrine that force should not be employed by a creditor State as a means of forcing a debtor State to meet its obligations. In his letter to the Argentine Ambassador in Washington of 29 December 1902,[26] Drago, the Argentine Minister of Foreign Relations, commented, in terms which masked his country's earlier disenchantment with the Monroe doctrine over the Falklands dispute, that the "collection of loans by military means implies occupation to make them effective . . . Such a situation seems obviously at variance with the principles many times proclaimed by the nations of America, and particularly with the Monroe doctrine, . . . a doctrine to which the Argentine Republic has heretofore solemnly adhered." Later in the same letter the Foreign Minister stated, in relation to the Venezuelan debt, that the "only principle which the Argentine Republic maintains and which it would, with great satisfaction, see adopted . . . by a nation that enjoys such great authority and prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe".

The early initiatives at collaboration amongst the Latin-American States had been directed towards some form of confederation,[27] but it was not until the First International Conference of American States in 1890 that a significant co-operative venture was undertaken in the form of a Customs Information Bureau.[28] However, successive meetings of Inter-American Conferences adopted resolutions or treaties incorporating pronouncements on the no conquest principle. In the Montevideo Convention on the Rights and Duties of States of 1933, which contained the well-known definition of a State in Article 1, it was also provided, in Article 11, that the contracting States "establish as a rule of their conduct the precise obligation not to recognise territorial acquisitions or special advantages which have been obtained by force".[29] At the 1936 Inter-American Conference for the Maintenance of Peace, Declaration XXVII, entitled "Principles of Inter-American Solidarity and Co-operation", stated among the "principles . . . accepted by the American community of Nations" the "proscription of territorial conquest" so that, "in consequence, no acquisition made through violence shall be recognised".[30] Similarly Declaration XXVI on "Non-Recognition of the Acquisition of Territory by Force" adopted by the Eighth

25. Ibid, 181.
26. Ibid, 189-91.
27. The texts of the earliest calls are contained in Alvarez, *The Monroe Doctrine:* see the Declaration of Chile 1810, ibid, 113-6; and Bolivar's "letter from Jamaica" of 1815, ibid, 116-8.
28. Text in Gantenbein, op cit, 701-5.
29. Gantenbein, op cit, 761.
30. Ibid, 773.

Inter-American Conference in 1938, after stating that it was "desirable to co-ordinate, reiterate and strengthen" a number of earlier "declarations and statements", dating from the Congresses of Panama and Lima, reiterated, "as a fundamental principle of the Public Law of America, that the occupation or acquisition of territory or any other modification of territorial or boundary arrangements obtained through conquest, by force or by non-pacific means shall not be valid or have legal effect."[31] Finally, of course, after more than a century of repetition, the principle was restated in Article 17 of the Charter of the Organisation of American States and was at the heart of the Collective Security undertakings in Articles 24 and 25 of that instrument.

Although many of the pronouncements quoted above were directed as much against intra-continental disturbances of the territorial status quo as against external interference, the necessary consensus to apply the no conquest principle existed in greater measure vis-a-vis European powers. Despite the lip service paid to this principle and to that of *uti possidetis,* the former Spanish administrative divisions were modified, sometimes because of a degree of uncertainty as to where the boundaries were, but also because some of the new Republics proved more aggressive colonisers than others. For example, the original boundary between Argentina and Chile was almost certainly regarded as being the chain of the Andes as far as Cape Horn.[32] However, the 1881 Boundary Treaty between the two countries contained an acknowledgment by Argentina that a large part of Patagonia and the Straits of Magellan had, during the previous half century or more, fallen under Chilean control and thus become Chilean territory.[33] In other words, this instrument amounted to recognition of the consequences of a period of Chilean settlement which had disturbed and replaced whatever boundary the *uti possidetis* principle might originally have dictated.

In a more robust fashion, the Chilean seizure of Tarapaca, Tacna and Arica in the war with Bolivia and Peru between 1879 and 1883 remained a cause of friction for half a century. By the Treaty of Ancon 1883, Tarapaca was surrendered permanently by Peru to Chile, and Tacna and Arica were to remain in Chile's possession for ten years when a plebescite was to be held to determine the future of the provinces. However, because of disagreements between Peru and Chile,[34] the plebescite was never held. Eventually, in 1929, a compromise was agreed to in which Tacna was returned to Peru, but Peru accepted the permanent loss of Arica to Chile.[35]

31. Ibid, 789.
32. Although the Argentina-Spain Treaty of Recognition, Peace and Amity of 1859 (text in 53 BFSP 307) contained in Article I only a general reference to the territories of the new State, Article I of the equivalent treaty between Chile and Spain (text in Chilean Memorial, Annex 4, in the *Beagle Channel* case) was more specific, defining the Republic of Chile as being composed inter alia of "all the territory stretching from the Atacama desert to Cape Horn, and from the Andes Mountains to the Pacific Ocean".
33. See the discussion of the 1881 Treaty by Greig in "The Beagle Channel Arbitration" (1980) 7 Aust YBIL 332, 335-9.
34. Amongst other matters, Peru accused Chile of discriminating against Peruvian nationals in such a way as to ensure an answer favourable to Chile in the plebiscite: the question of whether this amounted to a sufficiently serious breach of the treaty to bring it to an end was submitted to arbitration in 1922: award in 2 UNRIAA 923.
35. The agreement was constituted by a proposal of the U.S. President dated 14 May 1929, to

In relation to disputes, such as the Falklands sovereignty issue, however, continental sympathies have outweighed personal differences. In the debate on 13 November 1964 in the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (the Committee of Twenty-Four or the Special Committee on Decolonisation, as it is variously called), the representative of Chile (a State which in many matters tends to be at loggerheads with neighbouring Argentina) spoke in favour of the Committee's recommendation that the governments of Britain and Argentina should enter into negotiations with a view to finding a peaceful solution of the problem in terms that were entirely sympathetic to the Argentine position:[36]

> "His delegation's position was also prompted by considerations of American solidarity. The problem of the Malvinas Islands affected the entire continent, first, because it frustrated the continent's desire for unification, and secondly because it conflicted with the agreements reached at the First Meeting of Consultation of Ministers for Foreign Affairs and at the Ninth and Tenth International Conferences of American States, proclaiming the continent's opposition to colonialism and to the occupation of American territories by extra-continental powers."

The Latin-American line was to reject the British argument that "the principle of the non-recognition of the right of conquest was valid only from the time of its incorporation into written international law", a reference to the intertemporal law which would limit application of the no conquest principle to the last half century or so.[37] In the first place, the no conquest principle had been accepted a century earlier into the Public Law of America; and, secondly, a title based upon conquest in a colonial situation was not validated by the intertemporal law. In Latin-America a distinction had long been drawn between two types of territory, which were later classified by Resolution XXXIII of the Conference of American States at Bogota in 1948 as "peoples and regions subject to a colonial regime" on the one hand, and "territories occupied by non-American countries" (such as the Falklands) on the other. This distinction was later reflected in paragraphs 2 and 6 of the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)). In practical terms the difference between the two situations is that only the first category is subject to the principle of self-determination, based on the wishes of the inhabitants. In the second case, the de facto occupation has been effected by a non-indigenous population settled there by the colonial power and who therefore have no right of self-determination. Accordingly, the dispute is subject to the general procedures for pacific settlement laid down in the UN Charter.[38]

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which the two governments notified their acceptance, Chile by a letter to the American Ambassador in Santiago dated 15 May 1929, Peru by a letter to the American Ambassador in Lima: texts in (1929) 23 AJIL docs section 183-7.

36. UNGA OR (XIX), Annex No. 8 (Part 1) (Doc A/5800/Rev1), 438.
37. Statement of the representative of Uruguay as a member of Sub-Committee III of the Committee of Twenty-Four, ibid, 443.
38. See the same statement, ibid.

In the early stages of the open hostilities around the Falklands in April 1982, the OAS passed a resolution[39] which recited a number of matters. It referred to the Inter-American Treaty of Reciprocal Assistance which required the peaceful settlement of the dispute, to "the unchanging principle of the inter-American system that peace be preserved" and to the fact that "all the American States unanimously reject the intervention of extra-continental or continental armed forces in any of the nations of the hemisphere". It also called attention to "Argentina's rights of sovereignty over the Malvinas (Falkland) Islands, as stated in some important resolutions passed by various international forums, including the Declaration of the Inter-America Juridical Committee on January 16, 1976, which states: "That the Republic of Argentina has an undeniable right of sovereignty over the Malvinas Islands'."

Conflict of principles

It is not entirely satisfactory to separate out the various factors which led to the use of force by Britain, because the ultimate decision to do so was almost certainly based upon a combination of them. However, if any assessment is to be made of the relevance of the British action to legal issues, some attempt must be made to distinguish factors of one type from those of another.

There were undoubtedly important aspects of national pride and status involved. Territory under British administration and control had been taken in a most insulting manner and a substantial foreign garrison established there almost as a taunt that Britain could not do anything about the seizure even if it wished to do so. In a wider perspective, Britain's economic decline had increasingly given rise to slighting references to its unjustified position within various UN bodies, the most obvious being its position as a permanent member of the Security Council. To an extent, Britain could point to its status as a nuclear weapon state as justification for its privileged position. However, if it was powerless to prevent the taking of territory by Argentina, was its nuclear arsenal alone sufficient to support the case for its permanent membership? Furthermore if Britain was unable to protect the Falklands, did that not suggest that various other British islands, or territories the existence of which was guaranteed by Britain, were equally open to seizure by a determined foreign power?

There were also internal political factors which militated in favour of a military response. The British government was vulnerable to accusations that it had been caught totally unprepared and that it was to blame for a national humiliation.[40] In purely party political terms, the government had much to gain from action and a good deal to lose from acquiescence.

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39. Text in (1982) 21 ILM 669. The OAS reaction was of undoubted *political* importance though of doubtful *legal* validity as being in conflict with both Article 2.4 of the UN Charter and SC Resolution 502: see Norton Moore's comment in (1982) 76 AJIL 830-1.
40. Even prior to the Falklands invasion, on 19 March 1982 a group of Argentine nationals had landed on South Georgia, ostensibly to carry out salvage operations. As they had not obtained permission to enter the territory, Britain sought Argentine assistance in arranging their departure. On 25 March, however, further equipment was put ashore from an Argentine ship and the Argentine government announced that the group would be given the full protection of Argentine warships which were in the area. When a statement on this

In addition, there were, in British eyes, two moral issues: the principle that disputes should be settled by peaceful means and not resolved by force; and the unacceptable fact that British people had been brought under the control of a military regime with a well publicised disregard of basic human rights.[41] If the Islands were to be handed over to Argentina, it could only be done on the basis of guaranteed civil rights for the inhabitants.

These last two issues had of course legal connotations. If the UN Charter prohibitions on the use of force and exhortations to resolve disputes by peaceful means are to have any content, then a resort to force cannot be allowed to succeed. As for the self-determination issue, the Latin-American argument was in many ways bogus. The population established in the Falklands from the 1840s onwards predated European, or indeed any, settlement of many of the remote areas of South America.[42] Thus the Islanders had as much of a claim to be regarded as the inhabitants of the territory as did the European and other settlers who later moved southwards on the mainland, dislodging or destroying most of the original Indian population of those regions. There is no basis here for denying the Islanders a right of self-determination on the ground that they are only "occupiers" of the territory on behalf of a colonial power.

The Argentine argument depends therefore upon the notion of integrity, that the Islands were, until 1833, an integral part of the continent which had been occupied by an extra-hemispheric power. Apart from the doubts which have already been expressed as to the historical accuracy of this proposition, there are also two important issues of contemporary international law at stake, namely the ambit of the right of self-determination and the scope of paragraph 6 of General Assembly Resolution 1514.

In June 1946, the Secretary-General, in pursuance of a call by the General

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situation was made by a Government Spokesman in the House of Commons on 30 March, Mr Healey, replying on behalf of the Opposition, observed that this "feeble statement will lead many, even on this side of the House, to agree for once with *The Daily Telegraph* that Her Majesty's Government's conduct in this affair appears to be both foolish and spineless": in other words, as Mr Healey also put it, "the Government have been responsible for a grave dereliction of duty" (HC Deb, Vol 21, col 164). Subsequently when, on 3 April 1982, the Prime Minister, Mrs Thatcher, announced the fact of the Argentine invasion of the Falklands themselves, Mr Foot, as leader of the Opposition, stated that "the British Government have been fooled by the way in which the Argentine junta has gone about its business" which was something that the Government "must answer for" (HC Deb, Vol 21, col 640).

41. On this point at least the British Government and Opposition were united. As Mr Foot stated in reply to the Prime Minister's statement to the House of Commons on 3 April 1982 (HC Deb, Vol 21, col 639):

> "The people of the Falkland Islands . . . are faced with an act of naked, unqualified aggression, carried out in the most shameful and disreputable circumstances. Any guarantee from this invading force is utterly worthless — as worthless as any of the guarantees that are given by this same Argentine junta to its own people.
>
> We can hardly forget that thousands of innocent people fighting for their political rights in Argentina are in prison and have been tortured and debased. We cannot forget that fact when our friends and fellow citizens in the Falkland Islands are suffering as they are at this moment."

42. See the observations of Secretary of State Livingstone to Baylies, U.S. Charge d'Affaires in Buenos Aires, in a letter of 26 January 1832: Moore, *Digest of International Law*, Vol 1, 882.

Assembly in Resolution 9(I),[43] requested Member States to list the territories under their jurisdiction which they regarded as non-self-governing within the ambit of Chapter XI of the Charter. Amongst those enumerated by the United Kingdom was the Falkland Islands, and the list drawn up by the Secretary-General on the basis of this and similar information provided by other States, was noted by the Assembly in resolution 66(I) which established an ad hoc committee to recommend procedures to be followed in future for collating information and co-ordinating UN responses.[44]

To the inclusion of the Falklands by Britain, Argentina made public objection on the basis of its prior claim to sovereignty over the Islands. However, from the British point of view, the effect of the listing was to place Britain under the obligations of Chapter XI, in particular those of developing self-government and assisting the inhabitants in the progressive development of their free political institutions (Article 73.b). In addition, paragraph 2 of General Assembly Resolution 1514 (XV) proclaimed the right of self-determination by virtue of which all peoples were to have the right "freely [to] determine their political status". Furthermore, this entitlement was linked with the processes whereby a non-self-governing territory would reach a full measure of self-government in accordance with Resolution 1541 (XV). According to Principle VI of the annex to that resolution a non-self-governing territory could achieve that measure of self-government not only by emergence as a sovereign independent State, but also by free association with an independent State or by integration with an independent State. However, free association "should be the result of a free and voluntary choice by the peoples of the territory concerned" (Principle VII); while integration "should be the result of the freely expressed wishes of the territory: peoples acting with full knowledge of the change in their status" (Principle IX). Britain had consulted the wishes of the Islanders on a number of occasions and they had not opted for either free association or integration with Argentina. Indeed the Argentine invasion of the Islands had been in derogation from the rights granted by these instruments for all people to determine their political future.

Great play had been made by Latin-American States of paragraph 6 of Resolution 1514 (XV) which denounced any "attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country" as "incompatible with the purposes and principles of the Charter of the United Nations". This alleged rule had been employed in various forms in an attempt to deny to a number of colonial territories an independent right of self-determination.[45] There was some support in UN practice for arguing that paragraph 6 took precedence over paragraph 2 in cases of "colonial enclaves", that is of small, non-viable areas on the mainland territory of another State (usually itself a former colonial territory).[46] Not that Britain would admit

43. Text in UN Year Book 1946-47, 520-1.
44. Ibid, 572.
45. In the *Western Sahara* case, ICJ Rep 1975, p 12, Morocco, Mauritania and Algeria all advanced different views as to the relationship between paragraphs 2 and 6 of Resolution 1514 (XV), see at 29-30.
46. See further below, p 61.

such an exception to what it regarded as the over-riding right of a people to choose for itself its political destiny.[47]

But even if such an exception did exist, it was not applicable to the Falklands, which are 350 miles at least from the nearest point on the Argentine mainland (and were considerably further from the nearest inhabited point in 1833). Moreover, in 1820 Argentine rights to the Islands were far from obvious because there were two other potential claimants. In the first place, there was no evidence that Spain had relinquished what it regarded as its entitlement to the Islands as part of the Spanish Empire which it retained after the secession of the United Provinces of Rio de la Plata in 1816.[48] Alternatively, it could be argued that the true successor to Spain was Uruguay and not Argentina. Uruguay did not separate from the United Provinces until 1828, but the last Spanish settlement on the Islands had been withdrawn on orders issued from Montevideo, not Buenos Aires. Moreover, according to one Uruguayan writer,[49] it had been the Spanish "navy of Montevideo" which, from "its base in the Malvinas, exercised authority over those and the islands and lands of the south; over everything in the surrounding waters within 10 leagues of them". Indeed, at the time of the original U.S. confrontation with Argentina in the early 1830s, the United States formally asked: as the "ancient Vice Royalty of Rio de la Plata is now divided between several distinct Nations" (Bolivia, Paraguay and Uruguay as well as Argentina), if "the sovereign rights of Spain to those Southern Islands, descended to the ancient Vice Royalty of Rio de la Plata, by virtue of the Revolution", how was it possible to decide "to which one of these several Sovereignties" should these rights be "assigned"?[50]

Thus, given the uncertain status of the Islands in the period from 1811-33, the British, by establishing the first stable population on the Islands and administering them without interruption for a period of nearly 150 years, were entitled to regard their claim as established according to all the normal rules and practices of International Law and relations. To allow such a title to be challenged would amount to acknowledging that many territorial adjustments achieved de facto rather than de jure could similarly be questioned.

Traditionally (by which is meant according to the law in force prior to the developments brought about by the Covenant of the League of Nations and Kellogg-Briand Pact), disputes could be resolved by (1) negotiations, (2) arbitration, or (3) the threat or use of force. The long history of inter-Empire

47. See the British reaction to Resolution 2353 (XXII) which in effect rejected the almost unanimous choice of the inhabitants of Gibraltar in a referendum to retain their ties with Britain in preference to passing under Spanish sovereignty: discussed by Franck and Hoffman, "The Right of Self-Determination in Very Small Places" (1976) 8 NYU Jo Int Law 331, 373-4.
48. This analysis of the situation was one of those suggested by the U.S. Charge d'Affaires to the acting Minister of Foreign Affairs in Buenos Aires in a letter dated 10 July 1832: text in 20 BFSP 338, 348.
49. Crawford, *Uruguay Atlanticense y los derechos a la Antartida*, 65 (translation supplied).
50. The same letter of 10 July 1832 from the U.S. Charge d'Affaires to the acting Minister of Foreign Affairs in Buenos Aires: 20 BFSP, 349. Vernet's response in his Memorandum of 10 August 1832 was forwarded to the U.S. Charge d'Affaires by the Acting Foreign Minister: ibid, 369 at 417-8.

rivalries by the major European Powers in the Americas saw the employment of all three methods, although (1) and (3) were by far the predominant. The Falklands crisis of 1770-1 was a microcosm of the rivalries and the means whereby they were adjusted. The solution achieved by Britain in 1833 was through the use of force, not primarily as an act of occupation or conquest, but as a method of dispute resolution.

Viewed in this light much of the disputation about whether and in what circumstances conquest is an effective means of acquiring title, whether the Islands were *terra nullius* at various stages in their history, or whether prescription is available to disinherit a claimant which continues to protest against the adverse possession, is of less significance. Indeed, this approach gains some support from the reaction of the United States to Argentina's attempts to persuade the Americans to apply the Monroe doctrine to Britain's presence on the Islands. As late as 1886 the Secretary of State found it necessary to inform the Argentine Government that as "the resumption of actual occupation of the Falkland Islands by Great Britain in 1833 took place under a claim of title which had been previously asserted and maintained by that Government, it is not seen that the Monroe Doctrine, which has been invoked on the part of the Argentine Republic, has any application to the case. By the terms in which that principle of international conduct was announced, it was expressly excluded from retroactive operation."[51] Such an approach might be open to the objection that whether the act of force finally disposes of the matter depends upon the ultimate acceptance of the changed situation by the other party. Once again, therefore, one would become involved in a discussion of whether protests alone are sufficient to prevent the possessory title of the acquirer becoming absolute.

Turning to the contemporary scene, negotiation remains the principal means of dispute settlement. Force is in theory proscribed, with a corresponding increase in the use of institutional means of settlement through the United Nations, or of judicial procedures. However, the scope for the use of force within the Charter provisions is not entirely clear. Many excuses are employed by States which decide to resort to force. Self-defence is an obvious choice. National liberation is a ready catch-phrase to support internal revolution with outside assistance. And if national liberation is part of the decolonisation (and self-determination) process, then it is a small step to the employment of force in the interests of decolonisation and national integrity. In the Argentine view, the Malvinas, as territory under foreign occupation, had to be restored to the national territory as part of the final decolonisation of Latin-America.

This line of reasoning is supported by reference to the call by the General Assembly in Resolution 2065 (XX) of 16 December 1965 which *invited* "the Governments of Argentina and the United Kingdom . . . to proceed without delay with the negotiations recommended by the Special Committee [of Twenty-Four] with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United

51. Bayard, Secretary of State, to Quesada, 18 March 1886: Moore, *Digest of International Law*, Vol 6, 435.

Nations and of General Assembly resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas)". If, after 16 years, no formula had been found for resolving the differences between the two sides, Argentina might well ask whether the status quo was thus to be perpetuated? In the case of Goa, a Portuguese territory on the Indian sub-continent, its seizure by India in 1961 did not bring any strong adverse reaction from the international community. India believed that it had no alternative but to liquidate a colonial situation in a part of the world from which other colonial powers had long since withdrawn. If both sides continue to adhere to entrenched positions, and where the maintenance of the status quo by procrastination is in effect to preserve the disputed rights of one of the parties, is not the use of force justified as part of the decolonisation process?

Here we come to the crux of the matter: the fundamental issue of the role of law in dispute settlement and the extent to which a State may go in adhering to, or even enforcing, the application of its view of the law in the circumstances of the case. In the example of Goa, India had a choice between continuing to press for the withdrawal of the Portuguese administration (which, if Southern Africa was any guide, may have taken fifteen years longer, although no one could have estimated in advance the period of time this would have taken), or of asserting what it conceived to be its rights (or what would be accepted, ex post facto, as within its rights) by the use of force to "reintegrate" the national territory. Once the take-over was effected, Portugal was faced with a choice between a counter-use of force (which was militarily impossible), an immediate acceptance of the *fait accompli,* or an attempt to have India's action branded as aggression by the Security Council with a view to bringing pressure on that country to withdraw. In the event, India's estimate of the probable reaction by the international community was correct in that the Security Council failed to agree upon an appropriate condemnatory resolution. In the longer term, it seemed likely that the Indian possession would come to be accepted, and, indeed, Portugal formally recognised Indian sovereignty over the territory in 1974.

Although Argentina would have taken account of similar factors to those which influenced India in deciding upon the use of force, the two situations were different in a number of respects. Goa was on the mainland, whereas the Malvinas were some 350 miles from the nearest point on the coast. Goa's population was almost entirely Indian,[52] whereas the population of the Falklands was almost entirely British.[53] However, the most significant difference was that the territorial unity between Goa and India was geographically obvious, a factor which has not been recognised in relation to off-shore island territories.[54] Thus, for the Argentine action to be justified in

52. According to a question put on 19 December 1961 by Mr Wyatt to Prime Minister MacMillan, which was not answered, the 1950 Portuguese census showed "only 800 Europeans living in Goa, who were transient Portuguese administrators, and 316 people of mixed descent, the rest of the 650,000 being officially described as Indians": HC Deb, Vol 651, Col 1129.
53. It is not disputed that the population is "almost exclusively of British origin": UN Year Book 1965, 476.
54. See the discussion in Sureda, AR, *The Evolution of the Right of Self-Determination,* 172-7.

any way it was necessary to classify (and have the classification accepted by other States) the population as being non-native so that they could be regarded as occupiers rather than inhabitants.

In the event, the reaction of the international community was different in 1982 from what it had been in 1961. The Security Council, by Resolution 502 of 3 April 1982,[55] expressed the fact that it was *deeply disturbed* at reports of the Argentine invasion of the Islands on the previous day and *determined* that there existed a "breach of the peace" in the region. The Council then (1) *demanded* an immediate cessation of hostilities, (2) *demanded* an immediate withdrawal of all Argentine forces from the Islands, and (3) *called upon* the two States to seek a diplomatic solution to their differences and to respect fully the purposes and principles of the UN Charter. However, although condemnation of the Argentine action was widespread in Western Europe[56] and among Commonwealth countries,[57] there was strong support for Argentina's action among some Latin-American States.[58] However, although the preponderant view was hostile to what was seen as breach of the principle that disputes should be resolved by peaceful means, this did not signify universal approval of Britain's resort to force in pursuance of what it regarded as its inherent right of self-defence under Article 51 of the UN Charter.

The Soviet Union, which, together with China, Poland and Spain, had abstained in the vote on Resolution 502, was inevitably hostile to the sending of a British task force.[59] The United States, having tried unsuccessfully through the good offices of Secretary of State Haig to bring about a negotiated settlement,[60] gave its support to the British attempt to regain the Islands. As fighting intensified around the Islands, there was some waivering of support amongst members of the EEC. The economic sanctions which had been imposed in April were renewed for seven days only on 17 May and the renewal for an indefinite period on 24 May was not accepted by Italy and Ireland.[61]

Amongst Latin-American States, support for the Argentine position was almost universal, although the extent to which individual States were prepared to go in giving expression to that support varied widely. Panama was the only member of the Security Council to vote against Resolution 502 (Guyana, a regional Commonwealth country, voted in favour). The main countries of South America to take a reserved stance on the matter were

55. Text in (1982) 21 ILM 679.
56. On 2 April 1982, the Foreign Ministers of EEC Members jointly condemned the invasion (Keesing's Contemp Arch, 11 June 1982, 31529), and on 10 April the Member States issued a declaration which recalled that they had "already condemned . . . the flagrant violation of international law posed by Argentina's armed action" and stated that "in a spirit of solidarity" they had decided to take a series of economic measures against Argentina (ibid, 31532). See also the resolution of the European Parliament condemning "unreservedly" the Argentine invasion (ibid).
57. Principally countries of an "old Commonwealth" (ibid 31533).
58. Ibid, 31534.
59. Ibid, 31533.
60. The texts of the various proposals are set out in Dept of State Bulletin, October 1982, 83 et seq.
61. Keesing's Contemp Arch, 24 Sept 1982, 31713.

Argentina's traditional rivals, Brazil and Chile. Brazil remained neutral, while Chile, acutely aware of the hostilities which had nearly broken out over Argentina's refusal to accept the award in Chile's favour in the *Beagle Channel* arbitration,[62] denounced the seizure of the Falklands by Argentina as "irresponsible behaviour" which revealed "the weakness of its arguments".[63]

In the OAS, despite opposition from the United States, a resolution was passed (360 of 21 April 1982), which, after referring to the statement by the Argentine representative "describing the measures that the Argentine Government has adopted in exercise of the right of legitimate self-defence", decided to convene the Organ of Consultation provided for under the Inter-American Treaty of Reciprocal Assistance (the so-called Rio Treaty). Subsequently, on 28 April 1982, this body adopted a resolution[64] which was entirely favourable to the Argentine position. Having recited Argentina's rights of sovereignty, and made mention of Security Council resolution 502 "all of whose terms must be fulfilled", the first operative paragraph was directed to the United Kingdom, and urged that country "immediately to cease the hostilities it is carrying on within the security region defined by Article 4 of the Inter-American Treaty of Reciprocal Assistance and also to refrain from any act that may affect inter-American peace and security." In contrast, the resolution only urged Argentina (which after all was at that stage in occupation of the Islands) "likewise to refrain from taking any action that may exacerbate the situation". However, from the British point of view, perhaps the more important aspect was that the limited support actually received by Argentina from other Latin-American States did not extend to invoking Article 3 of the Rio Treaty, paragraph 1 of which provides:

> "The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations."

The role of law in the settlement of disputes

The Falklands crisis illustrates in a striking manner two fundamental, but related, difficulties with regard to international dispute settlement: the defectiveness of the procedures available to the parties and the inadequacies of International Law as a contributor to the process.

The deficiencies in the machinery for dispute settlement are exaggerated in the case of a territorial dispute. As long as it remains unresolved, both parties may be in a position where they can plausibly invoke the right of self-defence, in derogation from the obligation to settle the dispute by peaceful means. It is true that Article 2 of the UN Charter requires all members to act in accordance with certain principles, including, in paragraph 3, the require-

62. See Greig, op cit. 383.
63. Ibid, 11 June, 1982, 31534.
64. OAS Resolution I of 28 April 1982, adopted by 18-0 with 3 abstentions (including the United States): text in Dept of State Bull, June 1982, 86-7.

ment that they "shall settle their international disputes by peaceful means". However, while Article 51 is expressed in absolute terms (nothing in the Charter is to "impair the inherent right of individual or collective self-defence"), Article 33.1 expresses the latter undertaking in qualified terms:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

If the parties fail to settle their dispute by these means, then Article 37.1 requires them to refer it to the Security Council. What are not spelt out are the courses which are open to the parties if the Security Council is unable to assist in resolving the matter.

Where negotiations, prior to the reference to the Council, have already proved abortive, there could well be reluctance to revert to a process which has already failed. The Argentine seizure of the Islands was predicated on the pointlessness of continuing the process of negotiation (as well as on the proclaimed rightness of its case). The irony of the aftermath of the successful British counter-offensive was that the roles of the two sides were reversed. It was Argentina which wished to return to the negotiating table, while Britain maintained that the time was not yet right for a resumption of this process. The latest General Assembly resolution[65] *requested* "the Government of Argentina and the United Kingdom 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)".

Nor, for the time being, is there much greater likelihood of success for the more elaborate forms of negotiation, involving the possibility of third party conciliation, good offices or mediation. In the aftermath of the Argentine invasion, U.S. Secretary of State Haig was directed by the President to proceed to London and Buenos Aires at the invitation of the British and Argentine Governments, in pursuance of the initiative the President had already taken in messages to those two countries.[66] The United States subsequently placed a proposal before the parties which involved a withdrawal of the forces of both sides, the establishment of a tripartite interim authority for the Islands, and co-operation in the development of the Islands, while a framework for negotiations was worked out for a final settlement taking into account the interests of both sides and the wishes of the inhabitants.[67] This plan was rejected by Argentina on the ground that it must receive a guarantee of eventual sovereignty or an immediate role in the administration of the Islands that would lead to sovereignty.[68]

With the collapse of this initiative, the role of peace-maker was assumed by

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65. Resolution 37/9 of 4 November 1982, based upon a revised draft A/37/L.3/Rev 1 prepared by 20 Latin-American States, including Argentina.
66. See the White House Statement of 7 April, 1982: Dept of State Bull, June 1982, 81.
67. Text of the proposed Memorandum of Agreement of 27 April 1982 in Dept of State Bull, October 1982, 85-6.
68. For the Argentine response of 29 April 1982, see ibid, 86-7.

the UN Secretary-General, again without success.[69] Following the recapture of the Islands by the British task-force, the General Assembly repeated the invitation earlier made by the Security Council to the Secretary-General "to undertake a renewed mission of good offices in order to assist the parties in complying" with the request to resume negotiations to find a peaceful solution to the sovereignty dispute over the Islands.

If these various procedures do not hold out immediate hope of success, the question may be asked whether some form of judicial determination of the dispute is not possible. A pronouncement of legal conclusions deduced from the material which has been considered in this paper could be obtained, as a result of an agreement between the parties to submit the matter either to the International Court or to an ad hoc arbitral tribunal.

There are disadvantages in this possibility. Neither side has shown any great enthusiasm for the submission of the dispute to arbitration or judicial settlement in pursuance of the obligation contained in Article 33.1 of the UN Charter. When the question of the adequacy of Argentina's protests about Britain's continued presence on the Islands was discussed, reference was made to the terms of Argentina's objections to Britain's application to the International Court in the *Antarctica* cases.[70] However, while Argentina expressed the view in the clearest way that it did not believe that the dispute as to sovereignty with regard to certain Antarctic territories could be dealt with in isolation from the dispute over the Malvinas, the statement fell far short of an offer to submit the latter dispute to the Court at the same time as the dispute over the Antarctic territories. Moreover, at the time of the 1982 confrontation, the United States raised with both sides the possibility of the sovereignty issue being submitted to the Court, but neither showed any interest in pursuing such an idea.[71]

In the past, the United Kingdom has been careful to avoid any chance of the dispute being submitted to arbitration or judicial settlement. An internal British Foreign Office Memorandum of 3 February 1936[72] had attached to it several annexes of particular interest. Annex I contained a statement of British policy with regard to the South Orkney Islands, which, the document suggested, was "to a considerable extent bound up with that of the Falkland Islands".[73] From the British point of view, the longer the matter lay dormant the better because they did not wish to disturb their then excellent relations with the Argentine Government. However, if, as a result of popular agitation, Argentine politicians found it necessary to prosecute their country's claims more forcibly, the United Kingdom would have to consider a

69. The failure of the mission was reported to the Security Council on 21 May 1982 and noted in Security Council Resolution 505 which requested the Secretary-General to renew his mission of good offices: text in (1982) 21 ILM 680.
70. See above, pp 39–40.
71. See the statement of 5 August 1982 of Assistant-Secretary Enders to the Subcommittee of Inter-American Affairs of the House Foreign Affairs Committee: text in Dept of State Bull, October 1982, 78 at 85.
72. Godwin, H, Memorandum on "The Falkland Islands and Dependencies": text in PRO, FO 371/22499, 143.
73. Ibid, 8.

number of alternative policies. One of the possibilities would be arbitration which, in relation to South Orkneys, created no legal difficulties because, on the advice given to the Foreign Office, Britain had a strong case which "would stand at least a 70 per cent chance of winning".[74] The reason for not wishing to go to arbitration was political: the fact that, once the precedent was established, it would be difficult to resist any argument for having the Falkland sovereignty issue litigated, something the British Government was not prepared to countenance. In the words of the memorandum:[75]

> "So far back as 1844 the Argentine Government made a request for arbitration in the case of the Falkland Islands which was categorically refused for the reason that His Majesty's Government are not in any circumstances prepared to envisage the possibility of such an arbitration going against them. The Falkland Islands have been in effective British occupation for nearly a century and have a considerable British population together with extensive British fishing and whaling interests. From the naval point of view the islands are also of considerable strategic importance constituting as they do almost the only base in the South Atlantic."

The significant aspect of this part of the memorandum is its assumption that Britain's claim was more fragile than has generally been admitted. That this inference may fairly be drawn from the document is supported by two further indications. First, in suggesting that arbitration of the South Orkneys might be counter-productive in terms of improving relations with Argentina, the comment was made that if, "as is probable, the Argentine Government failed in their claim, popular resentment might be aroused, leading to an even stronger insistence on the claim to the Falkland Islands, which, from the point of view of the Argentine Government, is the less weak of the two."[76] Secondly, in Annex II of the document, reference was made to the fact that "when drafting the terms of our acceptance of the optional clause (our accession to the General Act was, on this point, identic) Sir Cecil Hurst intended to exclude the possibility of the question of the Falkland Islands being brought before the court".[77] However, it should also be mentioned that there was a note added by W.E. Beckett to this last comment in which he had no doubts whatsoever as to the strength and validity of Britain's claim.[78]

Leaving to one side the policy considerations which led to the Foreign Office advocating such an approach, the question still arises at a more theoretical level of whether the dispute is suitable for judicial determination.

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74. Ibid, 9.
75. Ibid.
76. Ibid.
77. Ibid, 11. The Annex continued by suggesting that it was safe to assume that this objective had been achieved because a dispute, to be subject to the Court's jurisdiction, had to be "with regard to situations or facts subsequent to the said ratification" and in this case the fact of British occupation since 1833 was sufficient to keep the case outside the range of matters covered by the declaration.
78. "In the case of the Falkland Islands, we not only have our long-established claim to sovereignty, but a century-old physical occupation, which is so complete as to render it impossible for the Argentines to introduce any change in the situation": ibid.

In other words, is it a legal dispute in the sense of being capable of settlement by the application of purely legal principles? In two respects the answer to this question would appear to be in the negative. In the first place, it would be difficult to formulate the issue other than in terms of whether the Islands "belong" to A or to B. As the Argentine objective is to secure the return of the Islands, a decision in favour of Britain would be even less acceptable than the decision in favour of Chile in the *Beagle Channel* arbitration. In the case of Britain, even if most of the policy objectives of the 1930s no longer hold good, the overriding consideration still remains that of safeguarding the rights of the Islanders in the light of their wishes. A decision in Argentina's favour, without the opportunity of insisting upon adequate safeguards for the civil liberties of the inhabitants, which only a process of negotiation is likely to be able to achieve, would therefore be unacceptable to Britain.

The second difficulty concerns the law to be applied by any tribunal to which the dispute might be submitted. Under the general rules which operated between European States and which they tended to apply in their dealings with regard to colonial disputes, the forcible taking of the Islands in 1833, particularly as it was in part at least an assertion of an existing claim, followed by a century and a half of undisturbed possession through a population of almost entirely British origin, would have been sufficient to weigh the balance in Britain's favour, and to outweigh doubts stemming from the need for acquiescence to title based upon conquest or prescription.[79] An assessment would then have to be made of the effects, on the content and application of the law, of changing attitudes towards a situation like that of the Falklands which has increasingly been treated by many States as an unjustifiable relic of nineteenth century imperialism.

However, there is a more fundamental issue, and that may be classified as one of "choice of law". In private international law, it is the task of a court to select, from among the various legal systems with which a transaction has substantial connections, the system which the court regards as being the most appropriate to apply. Public international lawyers are less familiar with choice of law problems although they do come across them in relation to certain types of international contract. There the question is whether the agreement is governed by the municipal law of one of the parties, by public international law, or by some form of developing law of international commercial transactions.

The choice in the case of the Falklands situation is somewhat different and has more affinity with investment disputes. Although efforts have been made to produce a legal code which is acceptable to both capital importing and capital exporting States, many disputes are fought over the appropriate philosophy of law to be applied. Developing, or capital importing, countries have a different view of the law from that shared by western, capital exporting, countries. Resolution of a particular dispute will be on the basis of a compromise somewhere on the "scale of favourability" between the demands of one side and the demands of the other. Although international law may play a very small part in deciding where on the scale the adjustment is

79. Hence W.E. Beckett's comments quoted in fn 78 above.

made, the actual outcome may have legal implications. If the settlement is at one end or the other of the scale, it might be used as a precedent supporting the emergence to a dominant position of the principle it appears to favour. If, as is more likely, it falls somewhere near the middle of the scale, it might be viewed as evidence of an emerging principle based upon a synthesis of the two extremes.

In relation to the Falklands, the choice of law and the scale of favourability would be between two combinations of factors. On the one hand, the British claim at its most extreme could be formulated in terms of conquest or physical occupation alone as a basis of title, reinforced by the wishes of the inhabitants of the Islands; while the Argentine position could be formulated in terms of the no conquest and *uti possidetis* principles as claimed to exist in Latin-America from early in the nineteenth century, reinforced by the argument that the present population is the means whereby Britain has carried out its illegal occupation of the territory. A tribunal would therefore have a range of alternatives based upon choosing between two rival concepts of international law, or adopting a synthesis taking account of factors of time and place.

The latter course would involve a consideration of the material dealt with in this paper and the range of legal issues which have been discussed. The time element requires in particular an adjustment between nineteenth century theories applicable by virtue of the principle of the intertemporal law, and the extent to which that principle has been affected by the decolonisation process. The place element is relevant in two ways. It might be a factor in considering whether the notion of continental or national integrity can be employed to classify a territory as "occupied", rather than "colonised", and therefore as falling outside the scope of the principle of self-determination. However, the continental integrity aspect might also be relevant to the question of where on the scale a tribunal might attempt to find a compromise between European ideas of international law with principles drawn from Latin-American theories of international law.

The question of place (i.e. the position of the Islands in relation to the mainland) would be a relevant factor in a different way. If they were situated much closer to Argentina itself, Argentine arguments about proximity, contiguity, and the unity of its national territory would be so much the stronger. Historically, as has already been explained, Spain attempted to prevent foreign States from trading with its American colonies and, in pursuance of that policy, prohibited foreign ships from approaching within one hundred miles from the coasts of those possessions. The assertion of rights to such a zone undoubtedly strengthened Spanish claims to islands situated within the zone (for the very practical reason that if foreign ships were excluded they could not legitimately have access to the islands in question). The claim was strongly resisted in the Caribbean where Britain and France extended their Empires at the expense of Spain. In the far south, the Falklands did not come within the relevant distance of the American coast so that their status depended upon whether they were themselves part of the coasts from which the zone extended.

This, of course, was an issue which had never been finally resolved. Some support for the Spanish view that the European treaties had amounted to

recognition of Spanish claims to the southern coasts as including the Falklands might be drawn from the failure of Britain to proceed with the 1749 expedition in the face of Spanish protests. However, at that time the Spanish claim to sovereignty over the Islands was at best a fragile one. The exact whereabouts (and, earlier, even the existence) of the Islands had been a matter of conjecture. From the late seventeenth century onwards, when visits to the Islands became more frequent, the visitors were mainly British or French. Hence, with the first settlements, France and Britain placed themselves in a position to assert a better title than Spain. The transfer from France to Spain of the Bougainville colony did no more than place the Spanish claim on a more even footing with that of Britain.

Neither this fact, nor the subsequent events of 1770-4, went far enough to establish the Islands as per se part of the coasts of Spanish America. They still remained subject to a competing claim based on the assertion that the Islands had never come within the protection of the Treaty of Utrecht and other instruments and understandings. Whether or not the British claim might be deemed to have been abandoned in the fifty or more years following the withdrawal of the British settlement in 1774 is not necessarily conclusive on the issue of whether this event involved an admission that the Islands were part of the Spanish Americas.

What is more clear is that, when Argentina made public its claim to the Islands in the late 1820s and early 1830s, Britain voiced its objections. The question of abandonment may have been a critical issue vis-a-vis Spain, but this would not necessarily be crucial vis-a-vis a successor claimant. There had been a hiatus in Spanish control, following the departure of the last resident governor in 1807 and the closing down of the settlement in 1811. Nor had there been any act whereby Spanish rights were formally transferred to the United Provinces of Rio del Plata. As against the latter's pretensions, Britain was certainly entitled to reassert its rights if dormant, or revive them if abandoned, in relation to Spain. Far from supporting the argument that the Islands were an integral part of the continent, the events of 1806-33 rendered the issue even more uncertain.

The British settlement and the strategic significance of the Islands in two world wars came nearest to establishing their independence from the adjacent continent. However, it is to contemporary attitudes that we must look for the final part of the story. Latin-American views as to the status of the Falklands gained support from the hostility of third world countries towards colonial situations, and as to the notion of continental integrity from their less specific opposition to the retention of remote island groups by European colonial powers.

This support does not make the Argentine view correct in law, though it does make it more likely to prevail and therefore be accepted as legally correct. In addition, the clash of ideologies and the existence of rival concepts of international law mean that the Falklands dispute lacks sufficient common ground to make it suitable for judicial settlement.

The Falkland Islands are thus on the boundary between two systems and philosophies of international law. Leaving the position of the inhabitants of the Islands to one side for the moment, the question needs to be asked

whether there was anything in the legal aspects of the dispute that was worth a major maritime conflict and counter-invasion. The principle that force should not be used to settle international disputes was clearly enough spelt out in Security Council Resolution 502 to satisfy Britain's stand on that issue. That Argentina had thus re-established possession of the Islands in derogation of Britain's claim to sovereignty was not in itself a substantial issue. British policy, of encouraging greater contacts between the Islanders and Argentina during the 1970s, was patently designed in the hope of generating a degree of acceptance among the inhabitants for the creation of more formal administrative links with the Argentine government. The tragedy was that the Argentine invasion in such a manner amounted to a challenge to Britain which it could hardly ignore, and totally destroyed any likelihood of the Islanders readily accepting a transfer of sovereignty to Argentina.

The actions of Argentina and Britain were publicly stated to be based upon the validity of their claims to sovereignty. However, in the last analysis, these assertions were either part of a mythology or a deliberate misconception of the nature of international law. The mythology explanation is more obvious in the case of Argentina. As Ferns has written,[80] on the Argentine side "the matter is a popular issue: a massive generality about which large numbers feel strongly but no one can precisely define why. The British presence in the Falklands-Malvinas is for the Argentine nationalists a physical proof of the myths about imperialism which are part of their political stock in trade and, like other non-problems, a means of stimulating latent paranoia." On the other side, British attitudes have been based upon a patriotic appeal to the rights of British people to live in freedom. This response, with its echoes of the Palmerstonian pretensions of a bygone age in justification of Britain's actions in 1982 as in 1833, has only tended to inflame anti-imperialist passions in South America.

From the standpoint of international law there is no definitive answer. The Argentine case is based upon extending the decolonisation concept in an entirely novel way, or at least to a quite different situation. The British reaction has been to assert that the principle of self-determination is applicable to a group of people who originated in, and were not subject to alien occupation by, the alleged colonial power. This is an equally novel application of the legal principle. The Falklands War was not about absolute right, but was the attempt by two countries, each to impose its view of international law on the other. For the international lawyer this is perhaps the ultimate irony.

80. *Argentina*, 254.