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COMMENT

DISPUTED SOVEREIGNTY IN THE FALKLAND ISLANDS: THE ARGENTINA-GREAT BRITAIN CONFLICT OF 1982

NICOLAS J. WATKINS*

I. INTRODUCTION

The Colony of the Falkland Islands and Dependencies lies in the South Atlantic Ocean three hundred miles east of the southern tip of South America.¹ The Falkland Islands themselves consist of East Falkland and West Falkland, separated by the Falkland Sound, and an additional one hundred smaller islands. Although the Falklands are a British crown colony,² sovereignty over them is also claimed by Argentina. This comment analyzes and evaluates the competing British and Argentine claims to the Falkland Islands and thereby attempts to determine the legality of actions taken by Argentina and Great Britain in the armed conflict between the two countries which occurred in 1982.

When the events upon which a nation bases a claim to sovereignty over territory occurred over three hundred years ago, evidence of an acquisition of sovereignty is often scant. Yet, in the area of international law relating to claims of title to territory, nothing is more important than the history of events upon which each claimant founds its claims. Often, the success of a claim to sovereignty has turned upon the performance of an act which at first might have seemed innocuous. For this reason, the following account of the 1982 conflict and the historical background to the dispute over sovereignty in the South Atlantic are necessarily long and detailed.

The dispute between Argentina and Great Britain and their respective claims to territorial sovereignty over the Falkland Islands dates back to the eighteenth century.³ It appeared to be a "rather abstract quarrel between the two nations, neither of which had a vital national interest at stake."⁴ Indeed, it seemed as though it was a dispute which was "neither important enough to resolve, nor

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1. 4 *ENCYCLOPEDIA BRITANNICA* 38 (15th ed. 1982).

2. 5 *CHAMBERS ENCYCLOPEDIA* 549 (1973) [hereinafter *CHAMBERS*].

3. See J. GOEBEL, JR., *THE STRUGGLE FOR THE FALKLAND ISLANDS* (1927).

4. *The Sunday Telegraph*, Oct. 10, 1982, at 8, col.2.

unimportant enough to forget."⁵ However, this was to change drastically on April 2, 1982.

II. INVASION

After years of sporadic efforts to make Great Britain submit to Argentina's claims to the islands, which Britain had controlled since 1833, Argentina decided to take them by force. On April 2, 1982, the Argentine militia invaded the Falkland Islands. On the following day, the United Nations Security Council adopted Resolution 502⁶ which demanded the immediate withdrawal of all Argentine forces from invaded territories, including the Dependencies, South Georgia, and the Sandwich Islands, which had been occupied during the last week of March. In addition, Resolution 502 called for the cessation of hostilities and called on the governments of Argentina and Great Britain "to seek a diplomatic solution to their differences and to respect fully the purposes and principles of the Charter of the United Nations."⁷

Ten members voted for the resolution while four, including Russia, abstained. Only Panama voted against it. It was clear Argentina had miscalculated, for the Argentine foreign minister, Señor Nicanor Costa Mendez, had earlier assured the ruling Argentine military junta that Russia, a permanent member of the Council whose negative vote would have constituted a veto, would bar any resolution.⁸

Indeed, the drastic action taken by the junta turned out to be a costly mistake, both politically and in terms of lives lost during the two-and-one-half month long conflict.⁹ Apparently believing that the Falklands lacked strategic importance, the Argentine generals never really thought that the British would fight. However, they underestimated the political climate in Britain and domestic pressure on Margaret Thatcher, the British prime minister.

Within twenty-four hours of the invasion, Mrs. Thatcher had formed a personal view that a successful take-over of the Falklands would be a great national humiliation and would also mean the fall of her government. "This impression was reinforced . . . by a hur-

5. *Id.*

6. S.C. Res. 502 (April 3, 1982) (currently unavailable in SCOR Supp).

7. *Id.*

8. The Sunday Telegraph, *supra* note 4, at 8, col. 4.

9. Argentine casualties during the hostilities totalled 1,200. British casualties amounted to 255 dead and 777 wounded. Over 10,000 Argentine prisoners were returned to Argentina after their surrender. See Kreslins, *Chronology 1982*, 61 FOREIGN AFF. 714, 741 (1982).

ried canvas of Tory opinion throughout the country."¹⁰ The House of Commons met for the first Saturday session since the Suez crisis of 1956; the atmosphere was one of "fury, incomprehension and recrimination."¹¹ One Tory member of the House of Commons, Mr. Edward du Cann, declaimed that "the defence of our realm begins wherever British people are."¹² For the opposition, Mr. John Silkin characterized the invasion as "aggression of a Fascist dictatorship and a Fascist junta,"¹³ while Mr. Foot, the leader of the opposition, insisted that "foul and brutal aggression does not succeed in our world."¹⁴ It was in this mood that the vanguard of the British fleet was assembled and dispatched to the South Atlantic on April 6, 1982, in order to retake the Falkland Islands and reestablish British pride and sovereignty.

During the three weeks it took for the British fleet to travel the 8,000 miles to the Falklands, efforts were made to find a diplomatic solution.¹⁵ These attempts to avoid military conflict between Argentina and Great Britain consisted of the long-distance shuttle diplomacy of United States Secretary of State Alexander Haig. However, despite his efforts, negotiations failed, for Argentina insisted that *before* any negotiations could begin, the issue of sovereignty had to be resolved in her favor.¹⁶ For the United Kingdom, this would remove the whole point of negotiating, which was to resolve disputed claims to sovereignty.¹⁷ It would also practically constitute a British submission to Argentina's use of force.

On April 25, British forces, in a two-hour battle, recaptured South Georgia Island.¹⁸ Although no formal concessions were made on sovereignty, the British Government nevertheless repeatedly offered peace plans.¹⁹

On April 30, the United Kingdom declared a two-hundred-mile "Total Exclusion Zone" around the Falkland Islands and warned that any ship entering it would be sunk.²⁰ Argentina had imposed a similar air and sea blockade two days before. Two days later, the

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. See Purcell, *War and Debt in South America*, 61 FOREIGN AFF. 660, 661-62 (1982).

16. *Id.* at 662.

17. *Id.*

18. The Sunday Telegraph, *supra* note 4, at 9, col. 3.

19. *Id.*

20. Kreslins, *supra* note 9, at 740.

Argentine cruiser *General Belgrano*, which was menacing the British fleet by sailing back and forth outside the southwest edge of the exclusion zone with two destroyer escorts, was torpedoed by the British nuclear submarine *HMS Conqueror*.²¹ The *General Belgrano* sank rapidly. Over three hundred Argentine crewmen were lost.

The Argentine response was immediate. On May 4, the British destroyer *HMS Sheffield*, was hit by a French-made Exocet missile.²² Over the next two weeks, British warships and aircraft attacked Argentine positions on the east side of East Falkland Island, around the capital of Port Stanley and its airfield.²³

Back in the United Kingdom, there was a feeling of anticipation. Last minute negotiations were still going on. On the morning of May 20, Señor Perez de Cueller, Secretary-General of the United Nations, remarked that "the patient is in intensive care but still alive."²⁴ Later that day, however, Sir Anthony Parsons borrowed the metaphor when he stated: "Our view is that the patient died at midday."²⁵

Indeed, by May 21, British forces were on the Falkland Islands and a firm beachhead had been established at San Carlo, on the west side of East Falkland Island.²⁶ Now began the great "yomp"—Marine slang for a forced march across rugged terrain. By June 2, the British were within seven miles of Port Stanley.²⁷ Twelve days later, on June 14, the Argentine forces on the Falklands surrendered to the British.²⁸ Major General Moore, the commander of the British Land Forces, declared that "[t]he Falkland Islands are once more under the Government desired by their inhabitants."²⁹

Using the classical analysis of territorial acquisition under international law, this comment will analyze the legal foundations upon which the respective British and Argentine claims to the Falkland Islands are founded. On the basis of the results of such an analysis, an examination will be made of the legality of the actions taken by the combatant nations in the 1982 conflict. First, however, the his-

21. *Id.* See also The Sunday Telegraph, *supra* note 4, at 9, col. 4.

22. The Sunday Telegraph, *supra* note 4, at 9, col. 5.

23. Kreslins, *supra* note 9, at 741.

24. The Sunday Telegraph, Oct. 17, 1982, at 10, col. 4.

25. *Id.*

26. Kreslins, *supra* note 9, at 741.

27. The Sunday Telegraph, *supra* note 24, at 11, col. 2.

28. Kreslins, *supra* note 9, at 741; The Sunday Telegraph, Oct. 24, 1982, at 10, col. 7.

29. The Sunday Telegraph, *supra* note 28, at 10, col. 7.

torical background to the dispute over the Falklands will be described and the competing claims to the islands identified. The traditional modes of territorial acquisition will be applied to these claims in order to evaluate their strengths and weaknesses under international law. Only then will it be possible to determine the legality of actions taken by Great Britain and Argentina during the armed conflict of 1982 in terms of both customary international law and the United Nations Charter.

III. HISTORICAL BACKGROUND TO THE DISPUTE

The Falkland Islands were first sighted by Europeans at the end of the sixteenth century. The first known landing was by the British in the person of Captain Strong in 1690. However, the first known settlement was not until the latter half of the eighteenth century.³⁰ East Falkland was colonized in 1764 with the founding of Port Louis as a staging post for the French penetration of the Pacific.³¹ After protests from Spain, who claimed dominion over all South America,³² the settlement on East Falkland was formally sold to Spain three years later.³³

Meanwhile, on West Falkland, the British remained active. In 1765, after a survey of the Falklands was taken, a British squadron established a settlement at what later came to be called Port Egmont.³⁴ In 1769, the Spaniards, having earlier forcibly removed the French, resolved to send the British home as well.³⁵ The Spanish intendant at Buenos Aires sent a force of 1,400 soldiers to expel the settlers. The British surrendered and the Spanish occupied Port Egmont on June 10, 1770.³⁶

In the following year, however, under the threat of war between Britain and Spain, Spain disavowed the action of the Governor of Buenos Aires and delivered up the settlement at Port Egmont to

30. 5 CHAMBERS, *supra* note 2, at 549.

31. Metford, *Falklands or Malvinas? The Background to the Dispute*, 44 INT'L AFF. 463, 467 (1968).

32. *Id.* Spain claimed sovereignty over the Falkland Islands through a papal grant of authority. Between the fifteenth and seventeenth centuries, the reigning Popes granted Christian monarchs the right to acquire territory in the possession of heathens and infidels. The powers of the Pope over these territories were, however, disputed. For further discussion of these papal grants, see M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 124-28 (1926).

33. Glover, *International Law in the Falkland Islands*, 1982 NEW ZEALAND L.J. 191.

34. 5 CHAMBERS, *supra* note 2, at 549; Metford, *supra* note 31, at 467.

35. Metford, *supra* note 31, at 467.

36. *Id.*

the British without prejudice to their right of sovereignty.³⁷ Unfortunately, however, due to the high cost of keeping the settlement in proportion to its overall value, the British were forced to withdraw in 1774.³⁸ Even so, evidence of British sovereignty, in the form of a plaque reiterating British rights, was left behind.³⁹

In the absence of the British, the Spanish reasserted their sovereignty over the Falklands. Although they left West Falkland alone after 1777, the Spaniards maintained a settlement at Port Louis (now named Soledad) on East Falkland and appointed a governor who remained there until 1806.⁴⁰ After the withdrawal of the Spanish garrison in 1811, Spain took no further interest in the Falkland Islands which, except for occasional foreign whalers, remained uninhabited until 1820.⁴¹

In 1820, after the Napoleonic invasion of Spain, which caused the links between the Spanish Crown and the Spanish possessions overseas to be broken, the Government of the United Provinces of La Plata claimed the group of islands as a former Spanish possession.⁴² After an unsuccessful effort to establish a settlement, a successful private attempt was made by Louis Vernet, a naturalized Argentinian, who was subsequently appointed Governor of the Falkland Islands in 1829.⁴³ The British protested sharply against this action by Argentina, and made it clear to the Argentines that they had acted without giving any consideration to British rights in the islands.⁴⁴ According to the British, the naval force at Port Egmont had been withdrawn in 1774 for reasons of economy, but sovereignty had not been abandoned.⁴⁵

In 1831, Vernet arrested three American ships for alleged illegal fishing. One ship escaped, one was allowed to fish on the condition that Vernet shared in the profits, and the third was taken to Buenos Aires for its captain to stand trial.⁴⁶ Thereupon, the United States, believing that Argentina had no right to the islands and

37. 5 CHAMBERS, *supra* note 2, at 549.

38. Metford, *supra* note 31, at 468.

39. *Id.*

40. 5 CHAMBERS, *supra* note 2, at 549.

41. Metford, *supra* note 31, at 468.

42. 5 CHAMBERS, *supra* note 2, at 549. Much of the Argentine case for sovereignty rests upon her claim that upon independence from Spanish rule she inherited the rights which Spain had abandoned.

43. *Id.*

44. See Metford, *supra* note 31, at 472.

45. *Id.*

46. *Id.* at 473-74.

that Vernet was undertaking an act of piracy, dispatched a warship and demilitarized the Argentine port of Soledad in December of the same year.⁴⁷ Twelve months later, the British took formal possession of Port Egmont and, in January, 1833, the Argentines at Soledad surrendered to a small British squadron.⁴⁸

Since 1833, the Falkland Islands have been in the continuous and uninterrupted possession of the United Kingdom.⁴⁹ Although Argentina has protested sporadically in the twentieth century, she did not decide to pursue her claim to the Falkland Islands through the United Nations until the 1960's. In 1965, Resolution 2065⁵⁰ was adopted, by which Argentina and the United Kingdom were invited to seek a negotiated settlement to the problem.

Both Argentina and Great Britain have looked to the foregoing events in support of their claims to the Falkland Islands. The next stage in the discussion is to analyze each nation's claims for their legal validity under the modes of territorial acquisition in customary international law in order to determine which nation was sovereign over the Falkland Islands immediately before the 1982 invasion.

IV. APPLICATION OF INTERNATIONAL LAW TO THE CLAIMS MADE BY ARGENTINA AND GREAT BRITAIN

Territorial sovereignty is "[t]he right of a state to function within a certain territory, unimpeded by any interference from the outside."⁵¹ Sovereignty over territory can be acquired through discovery, occupation, conquest, annexation, cession, accretion, and prescription.⁵² Due to the very nature of the dispute between Argentina and Great Britain, however, discovery, occupation and prescription are the modes of acquiring title most relevant to the present analysis.

Even so, before embarking on the actual examination of the methods of territorial acquisition, it should be noted that in considering the legal implications of the facts outlined above, the intertemporal law has to be borne in mind. That is, a "judicial fact must be appreciated in the light of the law contemporary with it,

47. *Id.* at 474. See also 5 CHAMBERS, *supra* note 2, at 549.

48. 5 CHAMBERS, *supra* note 2, at 549.

49. Metford, *supra* note 31, at 476.

50. G.A. Res. 2065, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6014 (1965).

51. 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 241 (1963).

52. For detailed discussion of each of these modes of territorial acquisition, see 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 398-469 (1980).

and not of the law in force at the time when a dispute in regard to it arises or fails to be settled."⁵³ Thus, the determination of the validity of the respective claims of Argentina and Great Britain must be made in light of the international law in force in the seventeenth, eighteenth and nineteenth centuries.⁵⁴

Moreover, "title in international law is a relative conception, whereas title in municipal law is an absolute one."⁵⁵ This is because neither party to such territorial disputes, due to the time gone by and the vast amount of evidence involved, is able to produce an absolute title.⁵⁶ Thus, as the *Island of Palmas* case established, a court should weigh the claims of the respective parties to determine which has the superior title.⁵⁷ As a result, the strength of one state's claim will depend not only upon the validity of that claim, but also upon the relative strength of the other state's claim and the extent to which the other state has acquiesced in or challenged the former's claim to the disputed territory.⁵⁸

The vital legal point in the dispute, therefore, is precisely to what extent valid titles had been acquired by either Argentina or Great Britain before the recent activity began. The *Island of Palmas* case established that where one of the countries has actually displayed its sovereignty, it must be shown that the territorial sovereignty continued to exist "and did exist at the moment which for the decision of dispute must be considered as critical."⁵⁹ Unfortunately, however, the *Island of Palmas* case provides no guidelines for the determination of the critical date. In the *Legal Status of Eastern Greenland* case,⁶⁰ the Permanent Court of International Justice selected the moment when Norway openly challenged Denmark's rights over Eastern Greenland as the critical date. Further, in the *Minquiers and Ecrehos* case,⁶¹ the International Court of Justice defined the critical date as that date "after which the acts

53. *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (1928), reprinted in 22 AM. J. INT'L L. 867, 883 (1928).

54. For a criticism of the application of the intertemporal law in such situations, see Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735 (1928).

55. 1 D.P. O'CONNELL, INTERNATIONAL LAW 407 (1970).

56. Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 223 (1965).

57. See Note, *Jurisdiction over Palestine—An Analysis of the Conflicting Arab-Israeli Claims of Legal Title*, 11 VAND. J. TRANSNAT'L L. 271, 278-79 (1978).

58. *Id.* at 281.

59. Jessup, *supra* note 54, at 743.

60. *Legal Status of Eastern Greenland (Nor. v. Den.)*, 1931 P.C.I.J., Ser. A/B, No. 53, at 42.

61. *Minquiers and Ecrehos (U.K. v. Fr.)*, 1953 I.C.J. 47. For a thorough treatment of the case, see Johnson, *The Minquiers and Ecrehos Case*, 3 INT'L & COMP. L.Q. 189, 208 (1954).

or omissions of the parties cannot affect the legal situation."⁶² Thus, the court determined the critical date to be when the French Government had made a definite claim to sovereignty in respect of each of the disputed islets.⁶³

From these cases, therefore, even though there are no specific guidelines, it might be reasonable to suggest that, by analogy, the critical date for the purposes of the present Argentina-Great Britain dispute is the moment immediately preceding the invasion of the Falkland Islands by Argentina. The legality of Argentina's act of invasion hinges upon the validity or relative superiority of her claim to sovereignty immediately prior to that invasion. The invasion was a definite claim of sovereignty over the Falkland Islands, and it was the moment when the dispute between Argentina and Great Britain came to a head.

With this background, it is now necessary to apply the modes of acquiring sovereignty over territory in international law to the respective claims of Argentina and Great Britain.

A. *Discovery*

In the *Island of Palmas* case, the United States based its claim partly upon an alleged Spanish title by a sighting of the island in the sixteenth century.⁶⁴ However, this was a minority view, for the preferred position is that not even at that time was discovery alone sufficient for title without some manifestation of possession.⁶⁵ Such manifestation of possession could take the form of a formal annexation of territory by symbolic act.⁶⁶ Indeed, the diplomatic correspondence of Spain, England, France and the Netherlands, particularly during the sixteenth century, shows that the foreign offices of these nations, from the latter part of the fifteenth to the end of the seventeenth centuries, considered discovery with symbolic taking of possession as a sufficient basis for establishing legal title to *terra nullius*.⁶⁷ Thus, "there has been a tendency to equate discov-

62. *Minquiers and Ecrehos*, 1953 I.C.J. at 57.

63. Y. BLUM, *supra* note 56, at 217.

64. *Island of Palmas*, 22 AM. J. INT'L L. at 879-84.

65. Waldo, *Disputed Sovereignty in the Falkland Island Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 322 (1948).

66. Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 POL. SCI. Q. 111, 112 (1938).

67. *Id.* at 111-20. For a similar view, see A. KELLER, O. LISSITZYN & F. MANN, *CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400-1800*, at 148 (1938) (hereinafter cited as A. KELLER).

ery with mere visual apprehension."⁶⁸ However, a bare sighting—even when accompanied by disembarkation and exploration—has never been treated as a basis of title. At least before the eighteenth century, formal symbolic annexation was required.⁶⁹

However, due to the appearance of other powers, such as France and England, which opposed Spanish and Portuguese claims to sovereignty over three-quarters of the world in the sixteenth century,⁷⁰ a change occurred in the conception of the significance of symbolic annexation.⁷¹ The posting of signs was not perceived to be a substitute for effective possession, which bestowed the full possessory title.⁷² Thus, the symbolic acts were interpreted as a way of showing to the world that an inchoate title to the territory discovered had been acquired. This rendered it *terra prohibita* as far as other states were concerned, but which did not at once bestow absolute control of the territory upon the state which had posted signs.⁷³

Formal annexation was, therefore, an announcement of the intention to occupy and gave an inchoate title, which was usually respected provided it was soon followed by a real possession.⁷⁴ Unless the inchoate title was perfected by effective possession within a reasonable time, it would perish or lapse, and other nations would be free to annex and occupy the territory.⁷⁵ That is, after symbolic annexation, a state had to, in some degree, "manifest its will to act as sovereign and actually exercise sovereignty as and when occasion demands."⁷⁶ Moreover, as the Permanent Court pointed out in the *Eastern Greenland* decision, "in many cases the tribunal has been satisfied with very little in the way of evidence of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims over areas in thinly populated or unsettled countries."⁷⁷

To summarize, there is a sharp distinction which can be drawn

68. Simsarian, *supra* note 66, at 111.

69. A. KELLER, *supra* note 67, at 148-49. See also D.P. O'CONNELL, *supra* note 55, at 408.

70. See *supra* note 32.

71. Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 457-58 (1935).

72. *Id.* at 453-54.

73. *Id.*

74. M. LINDLEY, *supra* note 32, at 136-37.

75. *Id.* See also Von der Heydte, *supra* note 71, at 453-54.

76. Waldo, *supra* note 65, at 325.

77. Legal Status of Eastern Greenland (Nor. v. Den.), 1931 P.C.I.J., Ser. A/B, No. 53, at 45.

between the position taken prior to 1700 and that assumed during the latter part of the eighteenth century and thereafter. Before 1700, the nations generally recognized that discovery accompanied by symbolic taking of possession was enough to create legal title to *terra nullius*. In the eighteenth century, however, with the emergence of new powers to oppose the claims of Spain and Portugal, and with the consequent increase in exploration and settlements, occupation became the test used to determine the extent of asserted legal title to territories.

If the presumption is made that, at the time of the first landing on the Falkland Islands by Captain Strong in 1690, valid title to *terra nullius* could be acquired by formal symbolic annexation, then Britain's claim to sovereignty based upon discovery would be unassailable (if Captain Strong did in fact make a formal annexation). However, due to the transition taking place in international legal theory at that time, it is not certain that such a conclusion can be reached.

Although there had been early sightings of the Falklands before 1700, settlements were not established on East and West Falkland until 1764 and 1765, respectively.⁷⁸ If it is assumed that formal annexation alone was insufficient to acquire legal title, and that a manifestation of sovereignty in the form of "effective occupation" was required, Spain (through France) might found claims upon her discovery and annexation of the Falklands at the turn of the eighteenth century. The argument would be that the settlement established in 1764 amounted to an effective manifestation of sovereignty within a reasonable time and was sufficient to turn an inchoate title acquired through the initial annexation into a full possessory title.

However, the argument might fail on two grounds. First, there is no evidence that the French discovered and landed on the Falkland Islands before the English. Indeed, the first known landing was by Captain Strong in 1690. Second, even if there were a French discovery before 1690, a settlement (which was later sold to Spain) by the French in 1764 was not established within a time sufficiently reasonable to create a full possessory title beyond the already acquired inchoate title.

Conversely, the British would argue at this stage of the analysis that an inchoate title had been acquired by them which was subsequently turned into a full possessory title in 1765. Again, however,

78. See *supra* notes 30-35 and accompanying text.

the argument is weak. Not only might the seventy-five years between the initial discovery and the subsequent settlement be too long—causing the initial inchoate title established by annexation to lapse—but the existence in 1764 of the French settlement on West Falkland was an inconsistent claim to sovereignty which prevented Britain from manifesting her possession effectively.

On the above interpretation, it is reasonable to submit that any title which had been acquired through discovery after 1690 was, at most, an inchoate title which was evanescent and, absent any subsequent manifestations of sovereignty, the territory was open to annexation and occupation by other nations. On these grounds, any claim based on discovery after 1690 which Argentina (claiming title through Spain who acquired title by purchase from the French) or Great Britain has to sovereignty over the Falkland Islands is ineffective. Consequently, if either nation is to successfully claim title to the Falklands, the claim must be based on other grounds.

B. Occupation

If, as the above analysis might indicate, neither Argentina nor Great Britain can make a claim to title over the Falklands based upon acts of discovery, claims might be grounded upon occupation as a mode of acquisition of title to territory. "Occupation" is "the intentional appropriation by a state of territory not under the sovereignty of any other state."⁷⁹ "Effective occupation" is a term of art denoting not physical settlement, but the actual, continuous and peaceful display of the functions of a state."⁸⁰ Although not referring specifically to the term "effective occupation," the Permanent Court of International Justice in the *Eastern Greenland* decision did refer to a title derived from a "continued display of authority."⁸¹ The court determined that a claim to sovereignty based on this concept "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."⁸²

According to Waldock, the element of an intention and will to act as sovereign means no more than that "there must be positive evidence of the pretensions of the particular state to be sovereign

79. G. HACKWORTH, *supra* note 52, at 401.

80. Waldock, *supra* note 65, at 334.

81. *Eastern Greenland*, 1931 P.C.I.J., Ser. A/B, No. 53, at 45-46.

82. *Id.*

over the territory."⁸³ Moreover, this evidence may be either published assertions of title or tangible acts of sovereignty.⁸⁴ The element of effective and continuous display of state authority is, however, susceptible to more detailed analysis. The three leading authorities on effective occupation, the *Island of Palmas*⁸⁵ case, the *Eastern Greenland* decision,⁸⁶ and the *Clipperton Island*⁸⁷ case, provide that the "exercise or display" of sovereignty must be 1) peaceful, 2) actual, 3) sufficient to confer a valid title to sovereignty, and 4) continuous.⁸⁸

The peaceful exercise of sovereignty is what distinguishes occupation from prescription.⁸⁹ Thus, there must not be an usurpation of another's subsisting occupation, nor must that occupation be contested from the start by competing acts of sovereignty.⁹⁰ That the exercise or display of sovereignty must be actual requires that it be genuine. The arbitrator in the *Clipperton Island* case stated that "[i]t is beyond doubt that by immemorial usage having the force of law, . . . the actual, and not the nominal, taking of possession is a necessary condition of occupation."⁹¹ Further, the court said that this taking of possession "consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there."⁹²

However, it should be noted that the court stated in the *Eastern Greenland* decision that in thinly populated or uninhabited areas, very little exercise of sovereign rights is needed in the absence of any competition.⁹³ Moreover, it had been noted earlier that the exercise or display of sovereignty does not have to make a noticeable impact in every nook and cranny of the territory.⁹⁴ Thus, "the density of the acts constituting the exercise or display of sovereignty varies according to the circumstances of each territory and, in particular, according to whether it is inhabited or uninhabited."⁹⁵

83. Waldock, *supra* note 65, at 334.

84. *Id.*

85. *Island of Palmas*, 22 AM. J. INT'L L. at 867.

86. *Eastern Greenland*, 1931 P.C.I.J., Ser. A/B, No. 53, at 44.

87. *Clipperton Island* (Fr. v. Mex.), reprinted in 26 AM. J. INT'L L. 390 (1932).

88. Waldock, *supra* note 65, at 335.

89. See *infra* notes 109-111 and accompanying text.

90. Waldock, *supra* note 65, at 335-36.

91. *Clipperton Island*, 26 AM. J. INT'L L. at 393.

92. *Id.*

93. *Eastern Greenland*, 1931 P.C.I.J., Ser. A/B, No. 53, at 45-46.

94. *Island of Palmas*, 22 AM. J. INT'L L. at 877.

95. Waldock, *supra* note 65, at 336.

Indeed, such conclusions can also be made with regard to the third element constituting an exercise or display of sovereignty: that the display should be sufficient to confer a valid title to sovereignty. What is sufficient will, similarly, "depend upon all the circumstances."⁹⁶ If the territory has a large population, elaborate administrative machinery may be required. However, if the land is remote "or incapable of accommodating more than a small or transitory population, a rudimentary administrative organization may be all that is required."⁹⁷ In fact, according to Lindley, in the case of small islands used only for the purpose of a particular business such as the catching and canning of fish, the presence of one official may be enough.⁹⁸ Thus, it seems that the essential ingredient is not whether there are present on the territory sufficient forces to repel foreign intrusion, or whether the land is being efficiently exploited, but whether enough control has been established over the territory to provide security to life and property there.⁹⁹

The final element necessary for a showing or exercise of authority is that such display be continuous. Regardless of any intention to the contrary, failure to show continuing state activity will be fatal to the proof of title by occupation.¹⁰⁰ However, as pointed out by Judge Huber:

Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ depending on whether inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.¹⁰¹

Thus, it would seem that if a state were to exercise sovereignty over a territory, it would be possible for people to come and go as necessary, depending upon the type of territory involved.

When the above ingredients necessary for a showing of an actual exercise of sovereignty are present, and there is also a will and intention to act as sovereign, then the two elements necessary for effective occupation are satisfied. The task now is to apply this

96. M. LINDLEY, *supra* note 32, at 159.

97. *Id.*

98. *Id.*

99. *Id.* at 159-60.

100. See Waldo, *supra* note 65, at 337.

101. Island of Palmas, 22 AM. J. INT'L L. at 877.

analysis to the historical facts surrounding the settlement of the Falkland Islands.

The first settlements on the Falklands were in 1764 and 1765.¹⁰² Thus, the arguments for effective occupation by Argentina and Britain begin at this point. It must be remembered that Argentina claims any title she might have gained through Spain on the basis that she inherited the Falklands when Argentina became independent from Spain in 1811. If Spanish title can be shown, the case for an Argentine title over the Falklands is strengthened.

Although occupation of the Falkland Islands at some time can be demonstrated by Spain, it is submitted that, since 1811, it has not been sufficient to satisfy the requirements outlined above which are necessary for an effective occupation to provide title. Not only can it be said that Spain did not intend to act as sovereign, but also it is clear that the second prong of the test for effective occupation—sufficient exercise or display of sovereignty—is not satisfied either. On West Falkland, the Spanish, after forcibly removing the British from Port Egmont, did return the settlement to Britain in 1771, and did disavow any rights to sovereignty. Moreover, Spain's occupation of East Falkland began in 1767 when it bought the settlement at Port Louis from France. However, Spain withdrew from Port Louis in 1811, and took no further interest in the Falkland Islands.

No nation asserted title to the Falklands again until 1820 when the newly-independent Argentine government claimed the Falklands as a former Spanish possession. On the basis of the near ten-year absence of any exercise or display of sovereignty by Spain between 1811 and 1820, combined with the absence of an intent by Spain to act as sovereign, it is submitted that even if Argentina's claims to inheritance from Spain were valid, Spain had not effectively occupied the Falkland Islands. Any assertion of Spanish title ended in 1811.

Moreover, any purported occupation by Argentina after 1820 was also ineffective. Although Argentina tried to administer the Falkland Islands by the appointment of successive governors on the islands for the next thirteen years, the British did protest against Argentina's claims in 1829 and did repossess the Falklands in 1833.

Indeed, it can be argued that Britain had acquired title to the Falklands by this time. That the British withdrew from the islands

102. See *supra* notes 30-36 and accompanying text.

in 1774 is not dispositive of any issue of abandonment. In the *Clipperton Island* case, it was stated:

There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.¹⁰³

Similarly, in contrast to the Spanish withdrawal in 1811, the mere fact that the British left the Falklands for economic reasons is insufficient to imply the forfeiture of Britain's already-protected acquisition of title. The British clearly did not have any intention (*animus*) of abandoning the islands, for they left behind evidence of British sovereignty in the form of a plaque reiterating British rights.

As the above analysis shows, sufficiency of the exercise of sovereignty varies with the circumstances of each case. The Falklands were originally uninhabited, and lie in a remote and desolate part of the South Atlantic. It has already been shown that, in such circumstances, sovereignty need not be exercised at every possible moment.¹⁰⁴ Thus, Argentina's attempts to acquire sovereignty by effectively occupying the Falkland Islands after 1820 were inconsistent with the prior acquisition of proper title to the islands by Great Britain. In conclusion, then, it seems that the main weaknesses in the British claim to sovereignty based on effective occupation might be that British sovereignty was contested by competing acts of sovereignty by Spain and/or Argentina. If this is so, then neither Argentine nor British claims to title are indefeasible.

C. *Acquisitive Prescription*

If a claim to title by prescription on the part of Argentina is to be successful, it must be established that Britain abandoned the Falkland Islands in 1774 in such a way as to allow Argentina to establish a prescriptive title by 1833. On the other hand, for Britain to claim a prescriptive title, it must be shown that British sovereignty had not only been manifested in 1765, but continued uninterrupted after the British withdrawal in 1774.

Prescription as a means of acquiring title to territory is such a

103. *Clipperton Island*, 26 AM. J. INT'L L., at 394.

104. See *supra* note 101 and accompanying text.

vague concept that some writers have denied that it exists.¹⁰⁵ To such international law scholars, the main objection was that no time could be fixed within which a title by prescription could be established.¹⁰⁶ However, it is the view of the majority of writers that the doctrine of "acquisitive prescription" does in fact exist in international law.¹⁰⁷ This seems reasonable in view of the underlying reason for its existence, namely, that "a state of things which actually exists and has existed for a long time should be changed as little as possible."¹⁰⁸

Finally, the doctrine of acquisitive prescription arises in two forms: (1) immemorial possession, in which the origin of an existing state of affairs is uncertain and, since it is impossible to prove whether the origin of this state of affairs is legal or illegal, is presumed to be legal; and (2) that type of prescription akin to the *usucapio* of Roman law, in which, although the title was originally defective, possession suffices to remedy it.¹⁰⁹ Thus, acquisitive prescription has been defined as:

[T]he means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states . . . have acquiesced in this exercise of sovereignty.¹¹⁰

From this definition, it can be seen that there are certain criteria which have to be satisfied before prescription can be allowed. "There must be, positively, an actual *assertion of sovereignty* supported by its exercise for a *long period*, and there must be, negatively, an *acquiescence* in the claim by the other party."¹¹¹ These preconditions for acquisitive prescription must now be examined more closely, and then applied to the historical facts of the Falk-

105. J.L. BRIERLY, *THE LAW OF NATIONS* 167 (1963). Scholars who have denied the existence of prescription in international law include Heffter, de Martens and Rivier.

106. M. SORENSON, *MANUAL OF PUBLIC INTERNATIONAL LAW* 324 (1968).

107. See JOHNSON, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L. 332, 334 (1950).

108. *Grisbadama Case* (Swed. v. Nor.), Hague Ct. Rep. (Scott) 121, 130 (Perm. Ct. Arb. 1910). See also D.P. O'CONNELL, *supra* note 55, at 423.

109. M. WHITEMAN, *supra* note 51, at 144-45. See also I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 144-45 (1966).

110. JOHNSON, *supra* note 107, at 353.

111. D.P. O'CONNELL, *supra* note 55, at 423.

lands dispute in order to determine the validity of claims by Argentina and Great Britain grounded upon prescription.

1. There Must Be An Actual Assertion Of Sovereignty By The Prescribing State

This means that there must be an actual display or exercise of authority on the part of the claiming state, in the same way that such a condition is necessary for effective occupation.¹¹² Indeed, it has already been shown that there were assertions of sovereignty over the Falkland Islands by both British and Spanish forces.¹¹³ However, Spain disavowed any assertion of sovereignty in favor of the British in 1771, and although the Spanish did settle at Port Louis, the settlement was withdrawn in 1811. Even so, from 1820 until 1833, it might successfully be argued that Argentina did assert sovereignty over the islands, although the relevance of the British protest must be considered.

Indeed, the British assertion of sovereignty must rest upon actual occupation until withdrawal in 1774 and thereafter upon the evidence of such assertion supported by the plaque left behind. After 1833, however, the repossession of the Falklands by the British must surely be sufficient evidence of an assertion of sovereignty. On this reasoning, therefore, it seems that, at least at some period of time, both Argentina (through Spain) and Britain have asserted their sovereignty over the islands.

2. The Assertion Of Possession Must Endure For A Long Period Of Time

The question which this second element of prescription raises is: How much time must elapse before a prescriptive title is acquired? Although older authors have insisted on immemorial possession,¹¹⁴ the modern view is that the length of time required to gain a prescriptive title depends upon each particular case.¹¹⁵ For example, in the *British Guiana-Venezuela Boundary Dispute*, fifty years was found sufficient to create valid title.¹¹⁶ To determine the spe-

112. See *supra* notes 82-88 and accompanying text.

113. See *supra* notes 30-49 and accompanying text.

114. Grotius favored 300 years, while de Martens and Rivier believed that immemorial possession was necessary. See Johnson, *supra* note 107, at 347.

115. I. BROWNLEE, *supra* note 109, at 148.

116. *British Guiana-Venezuela Boundary Dispute* (Brit. Guiana v. Venez.), 89 B.F.S.P. 157 (1896).

cific period required in the instant case would, therefore, be a difficult task. It is submitted, however, that the thirteen years from 1820 to 1833 is certainly insufficient for title to be acquired by Argentina, while the 150 years since 1833 is probably more than enough for Great Britain to assert sovereignty and thereby acquire title to the Falkland Islands.

3. *There Must Be An Acquiescence In The Assertion Of Possession*

To allow acquisitive prescription to operate in instances where possession has been maintained by force would be contrary to the very purpose of the doctrine.¹¹⁷ However, prescription can operate where the original act of taking possession was forcible, even if the subsequent possession was peaceful, for in such cases it seems that the requisite subsequent acquiescence was present and that, therefore, the purpose of the doctrine is not defeated.¹¹⁸ Moreover, this is so even if the vanquished state protests diplomatically, for protests of this kind are not sufficient acts to overcome the presumption of acquiescence.¹¹⁹

Even so, protests might not always have been insufficient to overcome this presumption of acquiescence.¹²⁰ In the *Chamizal Arbitration* decision¹²¹ involving the United States and Mexico, good title to a tract of land was claimed to be owned by the United States. Such a contention was founded upon prescription after possession of the territory had been maintained without disturbance, interruption or challenge. In concluding that "the possession of the United States . . . was not of such a character as to found a prescriptive title," the Commissioners stated:

Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted and unchallenged from . . . 1848 until the year 1895, when, in consequence of the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary, it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and federal governments, *have been constantly chal-*

117. Johnson, *supra* note 107, at 345.

118. *Id.* at 346.

119. *Id.* But see I. BROWNLIE, *supra* note 109, at 147.

120. I. BROWNLIE, *supra* note 109, at 147.

121. *Chamizal Arbitration (U.S. v. Mex.)*, reprinted in 5 AM. J. INT'L L. 806 (1911).

lenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.¹²²

However, more recent developments have affected the potential value of the diplomatic protest to interrupt peaceful possession.¹²³ These developments consist in the creation of international institutions to which resort can be had in order to prevent the formation of prescriptive titles.¹²⁴ As the Commissioners said in the *Chamizal Arbitration* decision, "[i]n private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose."¹²⁵ This international judicial machinery now exists, for the establishment of the League of Nations and the Permanent Court of International Justice in 1919, and then of the United Nations and International Court of Justice in 1948, has modified the former practice whereby the diplomatic protest was the only method, short of war, of interrupting peaceful possession. It can be argued that as a result of these developments the diplomatic protest as a method of interrupting peaceful possession has, since 1919, been relegated to the background. Now, if the matter is a proper one for determination by the General Assembly or the International Court of Justice, failure to refer a matter to the appropriate body must be presumed to amount to acquiescence even if, for propaganda purposes or other reasons, "paper protests" are made from time to time.¹²⁶

The fact that Great Britain protested against Argentine actions in 1829 is very relevant in determining whether the British acquiesced to possession of the Falklands by Argentina. Argentine protests against British action after 1919, absent a referral by Argentina of the dispute to either the League of Nations or United Nations, must be considered less relevant, and cannot amount to an interruption of British possession. Thus, the governance of the Falklands by Argentina from 1820 to 1833 must be considered to have been interrupted by British protests in 1829.

However, after 1833, there is no evidence of official protests by Argentina before 1919, and any protests after this time were not

122. *Id.* (emphasis added).

123. See MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L L. 293, 310 (1953).

124. *Id.*

125. *Chamizal Arbitration*, 5 AM. J. INT'L L. at 807.

126. Johnson, *supra* note 107, at 342, 346.

followed by a referral of the dispute to the appropriate international body. Indeed, there is evidence that Argentina specifically refused to refer the matter to either the International Court of Justice or the General Assembly of the United Nations. Argentina clearly failed to satisfy this precondition for a prescriptive title, while Britain has had uninterrupted possession of the Falkland Islands since 1833.

On the basis of the above, therefore, it is reasonable to submit that the argument that Argentina acquired a prescriptive title to the islands between 1764 and 1833 is a weak one. Spain disavowed sovereignty in favor of Britain in 1771 and took no further interest in them after 1777. Moreover, the Argentine governorship between 1820 and 1833 was met with protest from Britain, which held the Falklands continually after that time. No prescriptive title could have been acquired by Argentina, because there was neither acquiescence, nor a period of time long enough to acquire it.

Conversely, Great Britain could arguably have asserted sovereignty successfully over the Falklands since 1764. Even if this were not the case, it is without doubt that British sovereignty was asserted continuously after 1833, and at no time has Argentina, except by military invasion in 1982, not been presumed to acquiesce.

D. Summary

From this analysis of the modes of territorial acquisition, it has been shown that Argentine claims to sovereignty over the Falkland Islands are, at best, weak. Even if Argentina's claim of inheritance from Spain is allowed, the unavoidable conclusion seems to be that, notwithstanding the merits of claims prior to 1833, the continuous holding of the Falklands by Great Britain after 1833 must mean that a title has been acquired by Britain through prescription. The only task remaining is to apply this conclusion to the events surrounding the invasion of the Falkland Islands in 1982 in order to determine the legality of both Argentine and British actions.

V. LEGAL IMPLICATIONS OF THE ARGENTINE INVASION AND THE BRITISH RESPONSE

The starting point in the determination of the legality of the actions taken by Argentina and Great Britain during the Falklands

conflict in 1982 must be the United Nations Charter.¹²⁷ Regardless of to whom the islands belong, the military invasion by Argentina must be illegal in any circumstances. Article 2, paragraph 4, of the Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."¹²⁸ Thus the military action undertaken by Argentina was specifically outlawed; Argentina was clearly the aggressor.

That Argentina acted outside the parameters of the rules laid down by the United Nations Charter was recognized at once by the Security Council when it adopted Resolution 502, which demanded an end to hostilities and the immediate removal of Argentine forces from the Falklands, and called upon Argentina and Great Britain to settle the dispute through negotiation in accordance with the purposes and principles of the Charter.¹²⁹ It must be presumed that this resolution was adopted under articles 39 and 40. Article 39 provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or *decide what measures shall be taken . . . to maintain or restore international peace and security.*"¹³⁰ In turn, article 40 provides that "[i]n order to prevent an aggravation of the situation, the Security Council may, before making the recommendations . . . call upon the parties concerned *to comply with such provisional measures as it deems necessary or desirable.*"¹³¹

However, to be read in conjunction with articles 39 and 40 is article 51 under which Great Britain purported to invoke her right to act in self-defense. Article 51 provides that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, *until the Security Council has taken measures necessary to maintain international peace and security.*"¹³²

127. Article 1 of the Charter asserts that the aims of the United Nations and its Charter are to maintain international peace, to develop international relations and to foster international cooperation in solving problems among nations. For a thorough discussion of the document, see M. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* (3d ed. 1969).

128. U.N. CHARTER art. 2, para. 4.

129. See *supra* note 4.

130. U.N. CHARTER art. 39 (emphasis added).

131. U.N. CHARTER art. 40 (emphasis added).

132. U.N. CHARTER art. 51 (emphasis added).

Even though the Security Council had passed Resolution 502 before Great Britain acted in self-defense, it is evident that Resolution 502 was a "provisional" measure taken under article 40. Further, Great Britain acted according to the terms of the Charter in invoking the right of self-defense under article 51, for article 40 provides also that "such provisional measures *shall be without prejudice to the rights, claims, or position of the parties concerned.*"¹³³ Thus, article 51 could still be validly invoked by Great Britain.

Indeed, not only did article 51 provide Great Britain with sufficient ground upon which to assert her right of self-defense, but adequate foundation was also provided by customary international law. The *Caroline* case¹³⁴ sets out the elements necessary for lawful acts of self-defense. There, a British force from Canada entered upon United States territory, seized the vessel *Caroline* in the State of New York and destroyed her. Great Britain protested and the correspondence which followed is accepted as the classical formulation of the conditions upon which an invasion of territory can be justified under the concept of self-defense.¹³⁵ There must be a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and the action taken must not be "unreasonable or excessive," but "limited by that necessity and kept clearly within it."¹³⁶

Britain's actions in sending the naval task force to the Falkland Islands were necessary. Without such a force, the Falklands could not have been regained by the British, for there was no other way to remove the several thousand Argentine troops which had landed there. Negotiations hitherto had failed. The subsequent action taken by Great Britain was therefore not unreasonable, nor excessive and was limited to the specific aim of retaking the islands as a necessary act of self-defense.

Britain's actions in sending a task force and in retaking the Falklands by military means seem to satisfy both article 51 and the criteria of the *Caroline* case. Moreover, by showing herself to be willing to conduct negotiations through diplomatic channels with United States Secretary of State Haig, Britain also satisfied Resolution 502. Conversely, the presence of Argentine forces on the Fal-

133. U.N. CHARTER art. 40 (emphasis added).

134. 29 B.F.S.P. 1137 (1937). See also Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

135. D.P. O'CONNELL, *supra* note 55, at 316.

136. *Id.* See also M. WHITEMAN, *supra* note 51, at 280.

klands and the refusal to withdraw violated both article 2, paragraph 4, and Resolution 502.

The final events which must be considered consist of the implementation of the exclusion zones and the subsequent sinkings of the Argentine cruiser *General Belgrano* and the British destroyer *HMS Sheffield*.

Notwithstanding the legality of British military action in retaking the islands, it cannot be doubted that the British response to the Argentine invasion of the Falklands in declaring the maritime exclusion zone was justified. The maritime exclusion zone applied to "Argentine warships and naval auxiliaries and it was made clear that other innocent vessels should keep away from the zone in the event of a naval engagement."¹³⁷

It has been asserted by Russia¹³⁸ that the exclusion zone around the islands was illegal under article 2 of the 1908 Geneva Convention on the High Seas.¹³⁹

However, in neither the Geneva Convention on the High Seas, nor the Convention on the Law of the Sea¹⁴⁰ is there reference to circumstances in which such security measures as exclusion zones can or cannot be taken. It seems adequately clear, therefore, that the validity of the creation of a maritime exclusion zone—no matter of what limitations—must depend upon the right of self-defense. Since Argentina has played the role of the aggressor, the establishment of an Argentine maritime exclusion zone must be considered illegal. Conversely, the implementation of a similar zone by Great Britain was a lawful act of self-defense.

The above reasoning begs the question: How could the *General Belgrano* legally have been torpedoed when it was thirty-six miles

137. See Barston & Birnie, *The Falkland Islands/Islands Malvinas Conflict: A Question of Zones*, 7 MAR. POL'Y 14, 20 (1983).

138. See Glover *supra* note 33, at 192.

139. 13 U.S.T. 2312, 450 U.N.T.S. 82. Article 2 provides:

The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal states:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas.

140. Convention on the Law of the Sea, U.N. Doc. A/Conf. 62/121 and U.N. Doc. A/Conf. 62/122, opened for signature Dec. 10, 1982.

outside the declared exclusion zone? However, the answer is simple. The zone was set up as a defensive measure. Yet the British, defending the Falklands, did not have to wait for the enemy to attack by entering within the delineated boundary before British forces could open fire. This is because "[t]he law has not traditionally required a State to wait until it is actually attacked before taking measures of self-defense; and in considering whether preemptive reasons are legitimate or not, the capability of weapons, the reaction time and the strategic situations are all factors to be taken into account."¹⁴¹

Moreover, as Bowett¹⁴² has commented, it is generally recognized that "a state may exercise its authority on the high seas in exceptional circumstances where this is necessary to forestall a real threat to its territorial integrity and general security."¹⁴³ Thus, in the circumstances of May 2, 1982, where there was a cruiser and two Argentine destroyers zig-zagging menacingly to and fro near the edge of the exclusion zone, and where the effective range of the Argentine destroyer's guns was over twenty miles, it seems reasonable that action should be taken in self-defense to avert such a threat.

Of course, some may argue that the large cruiser was harmless and was picked on because it was an easier target than the two destroyers. But this is less relevant when it is considered that in any event no zone limit of two hundred miles was required. As it has been shown above, the exercise of the right of self-defense is limited only by the nature of the attack and proportionality of the response. Further, the United Kingdom, in declaring the exclusion zone, added that the measures were "without prejudice to the right of the United Kingdom to take additional measures which may be needed in exercise of its rights of self-defense under article 51 of the United Nations Charter, thereby preserving her right to take defensive measures beyond the exclusion zone."¹⁴⁴

If the attack by the British on the Argentine cruiser *General Belgrano* can be justified as an act of self-defense, the same reasoning must lead one to conclude that the missile attack on the British destroyer, *HMS Sheffield*, was not justified since Argentina was the aggressor in the conflict, not the defender. Moreover, even if Argentina attempted to argue that the *Sheffield* attack was a

141. D.P. O'CONNELL, *supra* note 55, at 316.

142. D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 66 (1958).

143. See Glover, *supra* note 33, at 193.

144. Barston & Birnie, *supra* note 137, at 21.

valid reprisal for the attack on the *Belgrano*, it would still be illegal under article 2 of the United Nations Charter as an unlawful act of force.¹⁴⁵

VI. IN CONCLUSION: PROPOSALS FOR SETTLEMENT

In 1774, the British garrison abandoned the Falkland Islands, but left behind evidence of British rule. In 1832, Great Britain again took possession of the islands amid protests from Argentina, who was claiming to be the successor of the rights of Spain which were acquired by discovery. The British absence from the islands was thus for a period of fifty-eight years. Had Argentina occupied the Falklands effectively during this period, she might have acquired good title. However, it seems that on the return of the British in 1833 the islands were either British or *terra nullius*. In either event, because Great Britain has held the Falklands continuously since 1833, British title is indefeasible. Moreover, such a conclusion is quite valid when it is remembered that title in international law is a relative concept and, therefore, a *superior* title is all that is required.¹⁴⁶

On this conclusion, the action taken by Argentina in invading the Falkland Islands in April, 1982, was not only unjustified, but contrary to general principles of international law. Conversely, the British response constituted a series of lawful acts of self-defense. However, the only apparent outcome of the 1982 conflict has been the fall of a government in Argentina and the rise of a government in Britain. The overriding problem which must still be solved is whether a permanent agreement over the future of the Falkland Islands can be reached between the United Kingdom and Argentina.

In the wake of the Falklands conflict of 1982, it is the writer's view that the United Nations has not acted as decisively as it could have done under the circumstances. The Secretary-General of the United Nations should again invoke article 99 of the United Nations Charter and take the still somewhat simmering dispute over the future of the Falkland Islands to the floor of the General Assembly. Once there, the Assembly should adhere more strictly to its own Charter and apply to this situation the principle of self-determination enunciated in articles 1 and 51 of that document.

In article 1, paragraph 2, of the Charter, one of the purposes of

145. See *supra* note 128 and accompanying text.

146. See *supra* notes 56-58 and accompanying text.

the United Nations is stated to be the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."¹⁴⁷ In article 55, the same formula is used to express the general aims of the United Nations in the fields of social and economic development and respect for human rights.¹⁴⁸ Further, through a number of resolutions, the content of the principle of self-determination has been defined more precisely. Thus, the Colonial Declaration¹⁴⁹ provides that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁵⁰ Under this article, the Falklanders could decide for themselves under whose sovereignty, if any, they wish to live. Since the islanders consider themselves British citizens, and wish to remain so, it is unlikely that Argentina will choose to take this route to settlement on her own initiative. The Secretary-General must at this time be firm.

Perhaps, however, if the governments of the United Kingdom and Argentina were sensible, they would submit their respective claims to the International Court of Justice. If both sides believe that their respective claims have substance, what has each to lose? Moreover, in light of the above analysis and of previous cases in which disputed sovereignty over territory has been treated, this seems to be a classic case for adjudication by the International Court.

The use of the court has been declining in recent years, and if a judicial decision could be made which would end 150 years of quarreling between two nations, the effect on international affairs and relations generally would be valuable. Unfortunately, because submission of a claim to the International Court of Justice is voluntary, and in light of the legal conclusion contained in the above analysis, it is felt that Argentina is unlikely to allow the dispute to be decided in this way.

If, in the ensuing months, when blood might still be boiling and hopes of a transfer of sovereignty or a leaseback arrangement have faded, then it has been suggested that a possibly viable and more neutral alternative might be to incorporate the Falklands Islands into the area covered by the Antarctic Treaty.¹⁵¹ The Treaty,

147. U.N. CHARTER art. 1, para. 2.

148. U.N. CHARTER art. 55.

149. G.A. Res 1514, 15 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6014 (1960).

150. *Id.*

151. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

which entered into force in 1961, is reviewable in 1991.¹⁵² This would be a reasonable, "unemotional date for Great Britain and Argentina, which are both signatories to it, to work towards."¹⁵³ Under the treaty, no military activity, and no pushing of competing claims in the area is permitted.¹⁵⁴ This could be extended to include the Falkland Islands.

In conclusion, however, it must be said that if the outcome of the above legal analysis is to be taken seriously, then it is recommended that the government of the United Kingdom should not submit to any Argentine claim or terms of negotiation. The best route for the United Kingdom is to strive for a judicial determination of title to the islands in the International Court of Justice, for if British title is as indefeasible as it seems, then the United Kingdom has everything to gain and nothing to lose.

152. *The Economist*, Apr. 2, 1983, at 10.

153. *Id.*

154. *Id.*