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Sovereignty and Decolonization of the Malvinas (Falkland) Islands

by Adrián F. J. Hope*

I. INTRODUCTION

The group of islands which Argentina designates with the name of "Islas Malvinas," and Great Britain, with the name of "Falkland Islands," forms an archipelago centered around two main islands called, under the Argentine denomination, "Gran Malvina" and "Soledad," and under the British one, "West Falkland" and "East Falkland," respectively. This archipelago, which comprises the two large plus some 200 smaller islands, has a total surface of around 6,500 square miles, and is geographically located on the Argentine continental shelf in the South Atlantic Ocean at a distance of around 300 nautical miles east of the Patagonian coast at Río Gallegos and approximately 1,025 nautical miles directly south of Buenos Aires.¹ After the British occupation of the Islands in 1833 the archipelago was made a British Crown Colony and was populated by more than 2,500 or so inhabitants of predominantly British nationality. This population, however, has been dwindling during the latter part of the twentieth century and is currently estimated at around 1,800.² The physical appearance of the Islands has been described by Viscount Bryce, who seems to have visited the Islands in the early part of this century, as "a land without form or expression," "desolate" and "solitary."

Although the dispute concerning sovereignty over the archipelago has existed between England and Argentina since January 2, 1833 when Great Britain took over Puerto de la Soledad (originally called "Port Louis" but since then, "Port

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1. The intersection of the horizontal line drawn to the east of Río Gallegos at 51° 53' south latitude and of the vertical line drawn to the south of Buenos Aires at 58° 21' west longitude would occur at around the center of "Soledad" or "East Falkland." The distance between this point and London is approximately 6,900 nautical miles. All figures given in this article are purely indicative and are only intended to give the reader an approximate notion and in no way claim mathematical exactness.

2. From the year 1931 (when they were around 2,400) until April, 1982 (when they were estimated at around 1,800) the decline has occurred at a rate of at least 25%. The Island's exclusive economic zone is important for fishing purposes and could contain commercially viable deposits of oil and gas. 1 SHACKLETON ECONOMIC SURVEY OF THE FALKLAND ISLANDS 174 (1976). See D. Logan, *Resources of the Falkland Islands*, in *THE FALKLAND ISLAND DISPUTE* 9 (1982).

Stanley") by the force of arms from Argentina, the armed conflict in 1982 was brought about when Argentina, following 149 years of fruitless diplomatic efforts, invaded the archipelago — together with certain other islands in dispute in the South Atlantic³ — on April 2, 1982 in a military operation which — according to the explanations given by the Argentine government immediately after the facts — had been executed in a manner calculated not to give rise to British casualties. From this latter date onwards the international community watched the unfolding of this conflict, first with surprise but then with growing concern as the mediation efforts of the United States, the President of Perú and the Secretary General of the United Nations were unable to avert the collision course on which both governments were embarked. The result of the military contest, as had been anticipated, was that Great Britain prevailed in regaining physical control over the Islands. This occurred on June 14, 1982 and since then the Conservative Government of Great Britain has claimed for its country the role of defender of law and order in the international community and of the alleged rights of self-determination of the local inhabitants who, it is generally recognized, clearly wish to remain a British colony.

The emphasis with which the British government has argued against the use of force on the part of Argentina and for the recognition by the international community of a right of the local British inhabitants to determine the future status of the archipelago has had the effect of obscuring the fact that this controversy began, first and foremost, as a dispute in regard to sovereign rights over territory. Furthermore, this dimension of the problem — the territorial dispute — had expressly and consistently been recognized by a succession of resolutions of the General Assembly of the United Nations specifically dealing with the Malvinas (Falkland) question since 1965.⁴ In any rational analysis of this controversy, a resolution of the issue of sovereignty must necessarily precede any discussion regarding the rights of the Islanders because it calls into question the legitimacy of the British presence itself on the Islands. In this connection, the Islanders, as British subjects, are, strictly speaking, the chief visible representatives of that presence and occupation.

The issue of sovereignty and the colonial nature of the controversy should also be a central consideration in determining whether or not the use of force by Argentina on April 2, 1982 was a violation of the Charter of the United Nations. Although many independent observers have adopted a critical attitude with

3. They were the South Georgia Island ("Isla Georgia del Sur") and the South Sandwich Islands ("Islas Sandwich del Sur"). See § I. A *supra*. A British version of the military aspects of the war can be found in Freedman, *The War of the Falkland Islands 1982*, 61 FOREIGN AFF. 196 (1982). See also THE SUNDAY TIMES OF LONDON, INSIGHT TEAM, WAR IN THE FALKLANDS (1982) [hereinafter cited as WAR IN THE FALKLANDS].

4. G.A. Res. 2065, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6014 (1965); G.A. Res. 3160, 28 U.S. GAOR Supp. (No. 30) at 108, U.N. Doc. A/9030 (1973); G.A. Res. 31/49, 31 U.N. GAOR Supp. (No. 39) at 122, U.N. Doc. A/31/39 (1976); and G.A. Res. 37/9, U.N. Doc. A/RES/37/9 (1982). See note 6 *infra*.

respect to the political wisdom, desirability or appropriateness of the decision of the Argentine government to assert its claim in this manner, a *legal* analysis of this question calls for an examination of Article 2.4 of the U.N. Charter which prohibits threat or use of force which is directed "*against the territorial integrity or political independence of any state.*"⁵ In this respect, a careful study of the territorial dispute is necessary because, hopefully, it will shed some light on the underlying question of whose territory was attacked. There is no doubt that in an age of nuclear weapons strong tendencies will develop to construe the spirit of the Charter as negating the legitimacy of the use of force against territories in dispute. However, this analysis would seem incomplete unless the underlying causes which had given rise to the use of force were not equally examined in light of those very same policies. In this connection, one should consider to what extent the spirit — if not the very letter — of the Charter is not violated when a nation holding an overseas colonial territory taken by force and thereafter consistently claimed by its earlier occupant systematically refuses to submit the controversy to methods of pacific settlement of disputes and for seventeen years withholds *bona fide* efforts to comply with successive General Assembly resolutions prescribing a specific course of decolonization which, in this particular instance, was to be carried out after 1965 by means of a negotiation of the territorial difference with Argentina.⁶

5. Article 2, paragraph 4 of the Charter of the United Nations of June 26, 1945, 59 Stat. 1031 (1945), T.S. No. 993, as amended, 16 U.S.T. & O.I.A. 1134, T.I.A.S. No. 5857 (hereinafter cited as the Charter). On this point a well-known British writer states the following:

Consider again the case where a State claims legal title to territory actually in the possession of another State, and proceeds to use force in order to recover its possession. If in fact its claim is justified, that is to say, if it does indeed have the legal title to the sovereignty, then it would seem that this is not an employment of force contrary to the provisions of Article 2 (4) of the Charter. It cannot be force used against the territorial integrity or political independence of another State because the actor State is merely occupying its own territory. The matter is one within its domestic jurisdiction.

R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 72 (1963) [hereinafter cited as JENNINGS]. The Argentine government has argued that the April 2, 1982 invasion was a response to a British ultimatum threatening the use of force against Argentina unless it evacuated a group of 43 Argentine workmen who had been contracted by one Mr. Davidoff to dismantle a whaling station at Leith on the South Georgia Islands pursuant to a contract which had been awarded to Mr. Davidoff in 1979. See the address of the Foreign Minister of Argentina to the General Assembly of the U.N. on Oct. 1, 1982, reprinted in *La Nación* (Buenos Aires), Oct. 2, 1982, at 1-3, col. 1. The British government was aware of this contract and had requested Mr. Davidoff, who had visited the site of the whaling station twice before, to furnish a list of the personnel that would be involved in the job. Davidoff had done this; however, upon arrival at Leith the workers hoisted the Argentine flag. The British government reacted with an ultimatum and sent HMS *Endurance* to evict the workers from the island. The Argentine Navy responded by sending the ship *Bahía Paraíso*, a vessel used for supplying its bases in the Antarctic, to prevent eviction. On March 30, news from London indicated that a nuclear submarine had left Gibraltar for the Antarctic together with a conventional submarine. London's Independent Television Network program, "*News at 10*," said that: "[A]s well as the subs, a Royal Navy tanker was also on its way." On April 2, Argentina reacted by occupying the Malvinas, South Georgia and Sandwich Islands.

6. General Assembly Resolution 2065, *supra* note 4, after taking formal notice of a dispute "concerning sovereignty" over the Islands had recommended that Great Britain and Argentina "proceed without delay with the negotiations recommended by the Special Committee (on Decolonization) . . . with a view

A. *The Scope of the Controversy: Other Territories in Dispute*

The dispute over the Malvinas described above forms part of a more general controversy between Great Britain and Argentina involving several other islands and territories in the South Atlantic Ocean. These other islands, some of which were also involved in the South Atlantic War, are the following: (1) *South Georgia*, an island located some 730 nautical miles to the east-southeast of the Malvinas

to finding a peaceful solution to the problem." *Id.* at 58, para. 1. By 1973 Argentina had opened up communication between the Islands and the continent and on December 14, 1973, in its 2202nd plenary meeting the General Assembly issued Resolution 3160, *supra* note 4, which formally expressed "its gratitude for the continuous efforts made by the Government of Argentina, in accordance with the relevant decisions of the General Assembly, to facilitate the process of decolonization and to promote the well-being of the population of the Islands." *Id.* However, the absence of any progress on the sovereignty issue was also recorded in the same Resolution, which further expressed, on the one hand, that it was: "Gravely concerned at the fact that eight years have elapsed since the adoption of Resolution 2065 (XX) without any substantial progress having been made in the negotiations;" and, on the other: "Declare[d] the need to accelerate the negotiations between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland . . . in order to arrive at a peaceful solution of the conflict of sovereignty between them concerning the Falkland Islands (Malvinas)." *Id.* at 108, para. 2.

Again in 1976 the General Assembly, in its 85th plenary meeting of December 1 of that year, expressed its gratitude "for the continuous efforts made by the Government of Argentina, in accordance with the relevant decisions of the General Assembly to facilitate the process of decolonization and to promote the well-being of the population of the islands" and requested the two parties "to expedite negotiations concerning the dispute over sovereignty, as requested in General Assembly Resolution 2065 (XX) and 3160 (XXVIII)." G.A. Res. 31/49, *supra* note 4, at 122, para. 2 & 3. On April 3, 1982, the day after the Argentine occupation of the Islands, the 2350th meeting of the Security Council of the United Nations convened at the request of Great Britain, issued by a vote of ten in favor to one against (Panamá) with four abstentions (China, Poland, Spain and U.S.S.R.) the following resolution:

The Security Council

Recalling the statement made by the President of the Security Council at 2345th meeting of the Security Council on 1 April 1982 (S/14944) calling on the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to refrain from the use or threat of force in the region of the Falkland Islands (Islas Malvinas),

Deeply disturbed at reports of an invasion of 2 April 1982 by armed forces of Argentina, Determining that there exists a breach of the peace in the region of the Falkland Islands (Islas Malvinas),

1. Demands an immediate cessation of hostilities;
2. Demands an immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas);
3. Calls on the Governments of Argentina and the United Kingdom to seek a diplomatic solution to their differences and to respect fully the purposes and principles of the Charter of the United Nations.

S.C. Res. 502, U.N. Doc. S/RES/502 (1982), *reprinted in* 21 I.L.M. 679-80 (1982).

It should be noted that in Resolution 502 the Security Council did not determine that the invasion of April 2, 1982 was an "act of aggression," which it could have done under Article 39 of the Charter. It simply determined that there was "a breach of peace" without stating explicitly which party was responsible for such breach. On the nature of Security Council determinations under Article 39 of the Charter, see generally M. VIRALLY, *L'ORGANISATION MODIALE* 451-56 (1972). On May 26, 1982 the same body adopted by unanimous vote a further resolution requesting the Secretary General to undertake a renewed mission of good offices bearing in mind Resolution 502 (1982) and "to enter into contact with the parties with a view to negotiate mutually acceptable terms for a ceasefire." (S.C. Res. 505, U.N. Doc. S/RES/505 (1982), *reprinted in* 21 I.L.M. 680-81 (1982). On June 1, 1982 a draft resolution calling both parties to a ceasefire in the South Atlantic was vetoed by Great Britain and the United States. See J. A. Conte Grand, *Malvinas: Cuestiones de Principio y Frustacion del derecho*, La Ley, July 28, 1982.

(about 1000 nautical miles east of the Patagonian coast); (2) *South Sandwich Islands*, a group of islands to the southeast of South Georgia; (3) *South Orkney Islands* (in Spanish, "Islas Orcadas del Sur"), a group lying some 640 nautical miles southeast of the Malvinas; (4) *South Shetland Islands*, a group lying about 525 miles due south of the Malvinas and about 800 nautical miles north of the Antarctic continent; and (5) *Graham Land*, a mountainous peninsula around 600 nautical miles long which juts out from the Antarctic continent. From the viewpoint of British municipal legislation, the Letters Patent of July 21, 1908, later amended by the Letters Patent of March 28, 1917, established these five territories as "Dependencies of the Falkland Islands." However, most of the "Dependencies" (excluding South Georgia and South Sandwich Islands) have been placed under a distinct colonial unit named "British Antarctic Territory."⁷ Furthermore, the Anglo-Argentine controversy over these islands could be at the center of an even broader, but for the time being dormant, dispute concerning sovereignty over the Antarctic.⁸

In 1947, and following increasing tension between both countries, Great Britain proposed that the dispute concerning the then so-called "Falkland Islands Dependencies" be submitted to judicial settlement by the International Court of Justice, but the Argentine Government turned down the proposal. The proposal was reiterated after 1947 with the same result until eventually, on May 4, 1955, Great Britain submitted a unilateral application instituting proceedings before the Court against Argentina and Chile. However, since neither of the defendant states were subject to compulsory jurisdiction the application was finally rejected.⁹

7. The 1908 Letter Patent are in 101 BRITISH AND FOREIGN STATE PAPERS (1907-1908), at 76 (R. Brant & W. Maycock eds. 1912). The 1917 Letter Patent are in 111 BRITISH AND FOREIGN STATE PAPERS (1917-1918), at 16 (E. Parkes ed. 1921). See generally Waldo, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 327 (1948) [hereinafter cited as Waldo]. Since Order in Council of March 2, 1962, territories situated to the south of 60° south latitude between 20° and 80° west longitude from a separate colony called "British Antarctic Territory" (Statutory Instrument 1962, No. 400). D. Sabate Lichtschein, *El Problema Jurídico de la Antártida*, in PROBLEMAS ARGENTINOS DE SOBERANÍA TERRITORIAL 26-27 n.18 (1979). This includes what Britain designates as Graham Land, Coats Land, Alexander Island, the South Shetland Islands and the South Orkney Islands. See the text of the order, in Spanish, in 2 J.L. MUÑOZ AZPIRI, HISTORIA COMPLETA DE LAS MALVINAS 443 (1966) [hereinafter cited as MUÑOZ AZPIRI]. This essential book sets forth the official correspondence on the Malvinas dispute generally.

8. P. C. Jessup has noted that: "One of the principal British Antarctic claims is that to the Falkland Islands Dependencies, based on the sector theory and resting upon the projection on longitudinal lines outward from those islands." Jessup, *Sovereignty in Antarctica*, 41 AM. J. INT'L L. 117, 118-19 (1947). Territorial claims to the Antarctic were placed in abeyance by the Antarctic Treaty of Dec. 1, 1959 between Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the U.S.S.R., the United Kingdom and the United States. T.I.A.S. No. 4780, 402 U.N.T.S. 71; *Official Documents, Conference on Antarctica* (Wash. D.C., Oct. 15-Dec. 1, 1959), 54 AM. J. INT'L L. 476 (1960).

9. *Registry of I.C.J., Antarctica Cases* (United Kingdom v. Argentina & United Kingdom v. Republic of Chile), in 1955-1956 I.C.J. Y.B. 77-78 (1956). It is interesting to note that the British unilateral application seems to have been made "for the purpose of avoiding any risk of the extinguishment of its claims by prescription . . . (and thereby) challenging alleged encroachments by Argentina and Chile on the Falkland Islands Dependencies." J.L. BRIERLY, THE LAW OF NATIONS 117 (6th ed. 1965).

British writers have criticized the Argentine unwillingness to submit to judicial settlement claiming that this attitude testified to the weakness of the Argentine legal position.¹⁰ However, it must be emphasized that these proposals involved, not the Falklands themselves, but only their so-called "Dependencies." Moreover, at the time these proposals were made, British state activities in the area and their expansion towards the Antarctic — in competition with Argentina — were being directed from and based on Britain's occupation of the Malvinas. Therefore, submission to the International Court of Justice would have implied that the Court might take into account the British presence in Malvinas in assessing the relative intensity, effectiveness and legal significance of the state activities of each litigant in the so-called "Falkland Islands Dependencies" without this analysis being influenced or affected in any way by the underlying territorial dispute involving the Malvinas themselves. This attitude was consistent with what had happened in the past when Britain had rejected *all* proposals for amicable settlement of the Malvinas dispute made by Argentina in the nineteenth century, including arbitration.¹¹ Here again, in the post-World War II proposals, the legitimacy of the British presence on the Islands, a decisive factor in approaching the more general controversy involving legal title to what Britain herself has described as their "Dependencies," was deliberately removed from the scope of judicial inquiry.¹²

10. [A] United Kingdom proposal that the particular problem of sovereignty in the Falkland Islands Dependencies should be referred to the International Court has been rejected both by Argentina and Chile, neither of whom are subject to compulsory jurisdiction. At first sight, no dispute could be more suited to judicial settlement than a difference as to legal rights in uninhabited territory. But these two states decline judicial investigation and propose settlement by an international conference. They presumably have the expectation that at a conference any defects in their titles would be lost in legal controversy and ultimately made good by Pan-American politics.

Waldock, *supra* note 7, at 312. The same opinion has more recently been expressed by J. Fawcett, *Legal Aspects*, in *THE FALKLAND ISLANDS DISPUTE*, 5, 6 (1982) [hereinafter cited as Fawcett].

11. On Argentine proposals to Great Britain for arbitration of the Malvinas dispute, see P. GROUSSAC, *LAS ISLAS MALVINAS* 11-22 (A. Cartina trans. 1982 ed.) [hereinafter cited as GROUSSAC]. The original French text appears in 6 *ANALES DE LA BIBLIOTECA NACIONAL DE BUENOS AIRES* 401-579 (1910). See also G. Cohen Jonathan, *Les Isles Falkland (Malouines)*, 17 *A.F.D.I.* 235 (1972) [hereinafter cited as Cohen Jonathan]. See also notes 130-37 *infra*.

12. See British note of Dec. 21, 1954 and the Argentine response dated May 4, 1955, in MUÑOZ AZPIRI, *supra* note 7, at 438-42. It should be further noted that Argentina had entered into arrangements with Chile providing for the mutual recognition of each others rights to the Antarctic between 25° and 90° west longitude in which both parties had pledged to act in concert in quest of recognition of their rights. Therefore, judicial settlement would have required Chilean Agreement also. These arrangements consisted of a joint statement by Argentina and Chile dated July 12, 1947 which was later cast in an agreement signed in Santiago de Chile on March 4, 1948. I. RUIZ MORENO, *HISTORIA DE LAS RELACIONES EXTERIORES ARGENTINAS (1810-1955)*, at 251-53 (1961). The British proposal for judicial settlement in the "Dependencies" was also discussed in the Fourth Committee of the General Assembly, General Assembly, Tenth Session, Fourth Committee, Summary Record of the 472nd meeting, 10 U.N. GAOR C. 4 at 11, U.N. Doc. A/C. 4/SR. 472, para. 35 (1955). The Argentine response denied that a relationship of dependency could be stated to exist between the Malvinas and their so-called "Dependencies" and, if such a relationship did in fact exist, since the Malvinas was Argentine territory, such

B. *The Scope of this Article*

This article only intends to deal with the question of the Malvinas themselves since the author estimates these islands to be, at present, the central point of contention between both states. However, this narrowing of the subject matter does not mean that this author is taking a position on the question of whether or not a distinction can or should be made between the controversy over the Malvinas, on the one hand, and that involving their so-called dependencies, on the other.

The author believes — and attempts to show — that the Argentine claims to the Malvinas are firmly based not only on generally accepted rules of international law governing the acquisition of sovereign rights over territory, but also on the fact that the international community at large, acting through successive General Assembly Resolutions, on the one hand, has characterized the existing status of the islands as a colonial situation within the meaning of Resolution 1514 of December 14, 1960 which, therefore, must be brought to a speedy and unconditional termination and, on the other hand, has identified Argentina, by reason of its territorial dispute over the Islands, as the relevant counterpart with whom Great Britain must negotiate for the purposes of bringing about decolonization. Therefore, precisely because of the role assigned by the United Nations to the territorial dispute in the context of decolonization, this article first examines the historical background of the case and the question of sovereignty in terms of general international law and then describes how this question has evolved in terms of the “newer” — and by what some people believe to be the “higher” — law of decolonization.

II. HISTORICAL BACKGROUND OF THE DISPUTE

If Great Britain had not sought to invoke legal justifications for its act of force, the inquiry of this article could have been circumscribed to questions such as whether the Islands were a *res nullius* in 1833, the applicability of the notions of conquest, acquisitive prescription and other related issues. However, it is a well-known fact that governments have always tended to invoke legal, or at least ethical, grounds to support their actions and in the case of the Falklands, Great Britain claimed that it had a prior title to the archipelago which had not been relinquished by it. In the context of the Anglo-Argentine dispute this contention was first advanced in the only British letter of protest on the question of the Malvinas issued prior to the British occupation. This letter was written by the British Chargé d'Affaires in Buenos Aires on November 19, 1829, and consisted of a complaint directed against an Argentine decree, dated June 10 of the same

other territories should also be Argentine. General Assembly, Tenth Session, Fourth Committee, Summary Record of the 479th meeting, 10 U.N. GAOR C. 4 at 67, U.N. Doc. A/C. 4/SR 479, paras. 20-23 (1955).

year, which had recognized Argentine jurisdiction over the Islands.¹³ There Mr. Woodbine Parish stated that such measures were incompatible with the sovereign rights of Great Britain, which the letter alleged were originally derived from *prior discovery and subsequent occupation*.¹⁴ The same rationale was later reaffirmed by Viscount Palmerston in 1834 in his letter of response to the Argentine protests which had followed the events of 1833.¹⁵ It is in view of these allegations that appreciation of the legal position of the parties, as in 1833, calls for an analysis of the history of the archipelago since the time of their discovery focusing, in particular, on the dispute which had arisen between England and Spain over the Islands during the latter part of the eighteenth century.

A. *Discovery*

The question of who discovered the Malvinas or Falkland Islands has been one of the most intensely debated issues in this whole controversy. The protagonists

13. Said decree provided that the Malvinas Islands and those adjacent to Cape Horn shall from then on be governed by a "Comandante Político y Militar." The Decree was published in *La Gaceta Mercantil* (No. 1635), June 13, 1829, at 2, cols. 3 and 4. The English text of the decree appears in 20 *BRITISH AND FOREIGN STATE PAPERS* (1832-1833), at 314 (1836).

14. The British Chargé d'Affaires to the Buenos Aires Minister, Nov. 19, 1829, 20 *BRITISH AND FOREIGN STATE PAPERS* (1832-1833), at 346 (1836).

The Undersigned, His Britannic Majesty's Charge d'Affaires, has the honor to inform His Excellency General Guido, the Minister in charge of the Department of Foreign Affairs, that he has communicated to his Court the Official Document, signed by General Rodriguez, and Don Sylvador Maria del Carril, in the name of the Government of Buenos Ayres, and published on the 10th of June last, containing certain provisions for the Government of the Falkland Islands.

The Undersigned has received the Orders of his Court to represent to His Excellency General Guido, that, in issuing this Decree, an authority has been assumed, incompatible with His Britannic Majesty's Rights of Sovereignty over the Falkland Islands.

These Rights, founded upon the original discovery and subsequent occupation of the said Islands, acquired an additional sanction from the restoration, by His Catholic Majesty, of the British Settlement, in the year 1771, which, in the preceding year, had been attacked and occupied by a Spanish Force, and which act of violence had led to much angry discussion between the Governments of the 2 Countries.

The withdrawal of His Majesty's Forces from these Islands, in the year 1774, cannot be considered as invalidating His Majesty's just rights. That measure took place in pursuance of a system of retrenchment, adopted at that time by His Britannic Majesty's Government; but the marks and signals of possession and property were left upon the Islands: when the Governor took his departure, the British Flag remained flying, and all those formalities were observed which indicated the rights of ownership, as well as an intention to resume the occupation of the Territory, at a more convenient season.

The Undersigned, therefore, in execution of the Instructions of his Court, formally protests, in the name of His Britannic Majesty, against the pretensions set up, on the part of the Argentine Republic, in the Decree of 10th June, above referred to, and against all acts which have been, or may hereafter be, done, to the prejudice of the just rights of sovereignty which have heretofore been exercised by the Crown of Great Britain.

The Undersigned, &c.

H.E. Don Tomas Guido.

WOODBINE PARISH.

Id. at 346-47. For a refutation of the statement that restoration of the British settlement implied recognition of British sovereignty, see § III *infra*.

15. Viscount Palmerston to Don Manuel Moreno, Jan. 8, 1834, 22 *BRITISH AND FOREIGN STATE PAPERS* (1833-1834), at 1384 (1847). See also the paragraph of the letter written by the Earl of Aberdeen to Manuel Moreno on Feb. 15, 1841 transcribed at note 122 *infra*.

of this discussion, however, have failed to distinguish between a discovery which is relevant for the purposes of geography and cartography and a discovery which is capable of establishing state sovereignty over new territories. In the latter case discovery demanded more than just visual apprehension and required some kind of act of appropriation, whether symbolic or otherwise — usually the hoisting of a flag or the planting of a cross — manifesting an intention, analogous to the *animus rem sibi habendi* of Roman law, to incorporate that territory to the sovereignty of the state in whose interest this act was performed.¹⁶ This is so because discovery, according to the classical exposition of international law, is associated with the notion of occupation as an original, as opposed to a derivative, mode of acquiring new territories and, in this connection, there was the essential condition that the person carrying out such acts be properly commissioned by his government for such purposes.¹⁷ Discovery alone, even a discovery indicating an intent to appropriate, without a subsequent effective display of state functions over the new land, was generally understood to confer only

16. "To discover a thing is not only to capture it with the eyes but to take real possession thereof." H. GROTIUS, *DE MARE LIBERUM* 11 (1916). Modern research clearly discloses that:

[T]hroughout this lengthy period, (1400-1800) no state appeared to regard mere discovery, in the sense of "physical" discovery or simple "visual apprehension," as being in any way sufficient *per se* to establish a right of sovereignty over, or a valid title to, *terra nullius*. Furthermore, mere disembarkation upon any portion of such regions or even extended penetration and exploration therein was not regarded as sufficient itself to establish such a right or title. Nor did merely giving names to regions, capes, headlands, islands, valleys, peninsulas, rivers, streams, gulfs, harbors or bays have any such results. It should be added, however, that the term "discovery" was often rather loosely applied, and, in some instances . . . may have been intended to include the performance of a formal ceremony of taking possession.

A. S. KELLER, O. J. LISSITZYN & F. J. MANN, *CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS, 1400-1800*, at 148-49 (1938). In the *Clipperton Island Award* (Fr. v. Mex.) Mexico invoked, *inter alia*, succession to a title by discovery obtained by Spain. The Arbitrator addressed this point by saying:

However, even admitting that the discovery had been made by Spanish subjects, it would be necessary to establish the contention of Mexico, to prove that Spain not only had the right, as a State, to incorporate the island in her possessions, but also had effectively exercised that right. But that has not been demonstrated at all.

Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island, 26 AM. J. INT'L L. 390, 393 (1932); *Clipperton Island Award* (Fr. v. Mex.), 6 I.L.R. 105, 106 (Victor Emmanuel III, King of Italy, Sole Arbitrator, 1931). See Dickinson, *The Clipperton Island Case*, 27 AM. J. INT'L L. 130 (1933); Von Der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448 (1935).

17. Occupation is an act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. . . . And it must be emphasized that occupation can only take place by and for a State; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

1 L. OPPENHEIM, *INTERNATIONAL LAW* § 220, at 275 (8th ed. 1905). The same definition appears in 1 L. OPPENHEIM, *INTERNATIONAL LAW (PEACE)* § 220, at 555 (H. Lauterpacht ed. 1955) [hereinafter cited as *OPPENHEIM, PEACE*].

Occupation is an *original*, as distinguished from a *derivative*, mode of acquisition of territory. It involves the intentional appropriation by a state of territory not under the sovereignty of any other state. . . . Occupation is usually — though not necessarily — associated with the discovery of the territory in question by the occupying state.

1 G. H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 59, at 401 (1940).

inchoate title which, in practice, represented only an option or temporary bar to occupation by another state.¹⁸ Furthermore, the traditional view has been that an *inchoate title* of discovery is required to be completed within a reasonable period of time by effective occupation or settlement because if this second step did not occur the *inchoate title* could perish.¹⁹ For this reason, the British allegation in regard to the Falklands made in 1833 should be interpreted as resting, not on discovery alone, but on the cumulative effect of discovery plus settlement. By contrast, the Spanish claim did not rest on discovery. It was based, as this article indicates later, not on rules of international customary law, but on a complex system of treaties which defined a sphere of influence reserved to Spain.

The first discovery of the archipelago of the Malvinas has been attributed to: Amerigo Vespucci in 1501, who was in the service of the King of Portugal; Esteban Gomez, who was a member of the Magellan expedition of 1519-1520 in the service of the King of Spain; Captain Pedro de Vera, who was in charge of one of the ships of the Garcia de Loayza expedition in 1525 also in the service of Spain; Alonso de Camargo in 1540 in the service of the Bishop of Plasencia; John Davis in 1592, a member and alleged deserter of Thomas Cavendish's

18. W. E. HALL, A TREATISE ON INTERNATIONAL LAW § 32, at 127 (8th ed. 1924) [hereinafter cited as HALL]. E. de Vattel in the eighteenth century had expressed this notion in the following words:

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.

E. DE VATTEL, THE LAW OF NATIONS, Bk. I, Ch. XVIII, *reprinted in* 3 THE CLASSICS OF INTERNATIONAL LAW 84-86 (C. G. Fenwick trans. & J. B. Scott ed. 1916) [hereinafter cited as VATTEL]. See generally I R. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW §§ 237-64, at 195-212 (1854) [hereinafter cited as PHILLIMORE].

19. Vattel goes on to say:

But it is questioned whether a nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy. . . . Hence the Law of Nations will only recognize the *ownership* and *sovereignty* over 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.

VATTEL, *supra* note 18, at 85. The Arbitrator in the *Palmas Island* case stated that "an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered" and that because Spain had not taken any steps towards effective occupation the inchoate title could not prevail against the Netherlands which had displayed effective occupation prior to the critical date of the dispute (*i.e.*, 1898 when Spain ceded the island to the United States). *Palmas Island Case* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 831 (1931). The Arbitrator in the *Clipperton Island* case stated also that Mexico's historic right (if any) was not supported by any manifestation of sovereignty over the island, and that therefore, in November, 1958 when France proclaimed her sovereignty over Clipperton, that island was a *territorium nullius* and therefore "susceptible of occupation." *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*, 26 AM. J. INT'L L. 390, 393 (1932); *Clipperton Island Award* (Fr. v. Mex.), 6 I.L.R. 106-07 (Victor Emmanuel III, King of Italy, Sole Arbitrator, 1931).

second expedition to the South Atlantic; and Richard Hawkins²⁰ in 1594 in the service of Queen Elizabeth I of England.²¹ There is a general consensus, however, that the landfall struck by the Dutch navigator, Sebald de Weert at 50° 41' south latitude on January 24, 1600 on his return to Holland after a frustrated attempt to traverse the Magellan Strait was one of the islands of the group.²²

Now, it should be emphasized that none of the intrepid navigators mentioned above even landed there nor performed any acts which could be taken as manifesting the intention of acquiring the Islands for their respective sovereigns. With reference to the Spanish explorers this attitude might be explained by the fact that Spain regarded these territories as falling within her exclusive domain²³ and therefore may have felt that a formal act of discovery and possession was unnecessary. In regard to other explorers, their lack of enthusiasm probably lay, as Goebel says, in the fact that: "None of the navigators related tales of the beauty and wealth of the islands such as would lure on adventurous and roman-

20. It seems that Hawkins had a commission from the Queen but it was for the purposes of discoveries in the East by way of the Strait of Magellan. He described his discovery as "goodly champion country, and peopled; we saw many fires." (It is a well-known fact that the entire archipelago of Malvinas was uninhabited by indigenous people and, furthermore, did not have trees for firewood). Hawkins gave this land, which was probably Tierra del Fuego, the name of Hawkins Maiden-Land. This he appears to have done in honor of Queen Elizabeth I, "my sovereigne lady and mistress, and a Maiden Queene, and at my cost and adventure, in a perpetuall memory of her chastitie, and remembrance of my endeavours" (note the words: "at my cost and adventure."). Observations of Sir Richard Hawkins, Knight, in his Voyage into the South Sea (Hakluyt Society, Works, no. 1, 1848), *quoted in* J. GOEBEL, JR., THE STRUGGLE FOR THE FALKLAND ISLANDS 34-37 (1927) [hereinafter cited as GOEBEL]. The text quoted shows also that Hawkins did not make a landing. Another perspective on the activities of British navigators such as Hawkins can be found in A.J.T. TAVARES K., *PIRATAS DE AMÉRICA* (1963).

21. See generally GOEBEL, *supra* note 20, at ch. I; C. BARCIA TRELLES, *EL PROBLEMA DE LAS ISLAS MALVINAS* (1943) [hereinafter cited as BARCIA TRELLES]; M. HIDALGO NIETO, *LA CUESTIÓN DE LAS MALVINAS, CONTRIBUCIÓN AL ESTUDIO DE LAS RELACIONES HISPANO-INGLESAS EN EL SIGLO XVIII*, at ch. VI (1947) [hereinafter cited as HIDALGO NIETO]; V. F. BOYSON, *THE FALKLAND ISLANDS* (1924) [hereinafter cited as BOYSON]; GROUSSAC, *supra* note 11, at 11-22, 69-101; R.R. CAILLET-BOIS, *LAS ISLAS MALVINAS*, at ch. I (1948) [hereinafter cited as CAILLET-BOIS]; L.H. DESTEFANI, *LAS MALVINAS EN LA ÉPOCA HISPANA, 1600-1811*, at ch. II (1981) [hereinafter cited as DESTEFANI]. The work of Hidalgo Nieto is based on research conducted in the Official Archives of Seville and contains a valuable list of documents which are numbered in Roman letters. These documents are cited as HIDALGO NIETO, DOCUMENT (with the Roman numeral indicating the number given such document and the page indicating where it appears in the edition cited above).

22. See note 21 *supra*. They all seem to agree. However, Goebel attributes the "first" discovery to Camargo. GOEBEL, *supra* note 20, at 17-33. See also DESTEFANI, *supra* note 21, at 56. According to the statements made on September 9, 1964 by José María Ruda, the Argentine delegate before Subcommittee III of the Special Committee of the United Nations for the Application of Resolution 1514 (XV), the first discoverer was the pilot Esteban Gomez of the Magellan expedition in the year 1520. General Assembly, Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Sub-Committee III, Summary Record of the 25th meeting, U.N. Doc. A/AC. 109/SC. 4/SR.25 (1964) [hereinafter cited as Ruda Report]. See also *El Derrotero Argentino, Servicio de Hidrografía Naval*, pt. III, Supp. No. 1, ch. VI, 211 (1981).

23. The Malvinas Archipelago lay clearly to the west of the Tordesillas line and the Spanish claim rested on treaties precluding discovery by third states. See § III *infra*.

tic souls to a closer examination of these windswept roosts of the penguin; and decades were to pass before men were to set foot upon their shores."²⁴

During the seventeenth century the Islands, however, were visited in 1617 by the Dutch expeditions of Le Maire and Schouten, possibly in 1684 by William Ambrose Cowley, who claimed to have discovered islands which he named Pepys Islands but which afterwards were proved not to exist, and in 1690 by a John Strong, who sailed between the two principal islands and gave the passage which separated them the name of "Falkland Sound."²⁵ Although the Islands were clearly identified on many maps since the *Islario de Santa Cruz* of 1541 — which was an official map — under the name of *Islas Sanson*, a somewhat accurate depiction of the Islands appears in Frezier's Map of 1716, where they are called *Isles Nouvelles*. During the eighteenth century they were frequented by sailors from the French port of St. Maló, which is why the first French settlers called them "Malouines."

In summary, on the issue of discovery, the following observations can be made: (1) the evidence tends to indicate that the British did not discover the archipelago; (2) even if one was to concede that they had, no acts were performed, symbolic or otherwise, manifesting the intention (*animus*) to acquire the Islands for the British crown until the years 1765 and 1766;²⁶ (3) even if such acts had been performed it is questionable that either Davis or Hawkins (whose professional activities were not altogether clear) had properly been commissioned to make discoveries in those regions; (4) there is no evidence that Britain had asserted any claims to the *Malouines* on the basis of such alleged discoveries during the period in question; (5) assuming *ad arguendum* that Britain had effected a proper discovery and had claimed the Islands, in light of the Spanish allegations, which were based on treaties signed with England acknowledging a sphere of interest reserved to that power,²⁷ it is questionable that the islands could have been considered a *res nullius* at that time; and (6) if in spite of all these arguments one still was to concede that the discoveries did give England certain rights, these would have been in the nature of an *inchoate title* which would have had to have been followed up by effective occupation within a "reasonable" period of time and this did not occur until the year 1766, *i.e.*, 174 years *after* Davis' alleged discovery and two years *after* another power had made a first settlement.

24. GOEBEL, *supra* note 20, at 46.

25. "The visit of Strong was the first landing of Englishmen on the Falklands. It was of no conceivable legal consequence, for it involved neither a mere formal taking possession of the islands, nor an occupation." *Id.* at 137. The origin of the name "Falkland" is controversial. It is likely that it was given in honor of Anthony, Viscount Falkland (1659-1694) who was a Commissioner of Admiralty at the time and later First Lord. *Id.* at 136 n.44.

26. See § II.B *infra*.

27. See § III *infra*.

B. Colonization

In contrast to the issue of discovery — which has given rise to conflicting claims between candidates of different nationalities — the general facts relating to the first and subsequent settlements on the archipelago, as such and to the knowledge of this writer, have so far not been disputed.

The first colonizer of the Malvinas was Louis Antoine de Bougainville who established in early 1764 a settlement of around 29 people, founded Port Louis on the main eastern island and solemnly declared the group of islands a possession of the French king. The Bougainville expedition had benefited from the official patronage of the Duc de Choiseul, the famous minister of Louis XV, and was organized and equipped from the French Port of Saint-Maló. In 1765 Bougainville, who had left his colony under the charge of Governor Nerville, returned to the Islands with further reinforcements and the number of settlers, after a third visit, increased to about 130 people.²⁸

In early 1765, almost one year after Bougainville had founded his colony on the main eastern island, Commodore John Byron, after making some surveys of the coast of the main western island, took formal possession in the name of George III on a spot in Saunders Island he called Port Egmont. Saunders Island lies to the northwest of the Gran Malvina (West Falkland). It is important to note that Byron's expedition did not leave a settlement.²⁹ A year later, in 1766, and two years after the founding of Port Louis by Bougainville, a first British settlement was secretly established in Port Egmont and for a period of around fourteen months this establishment on Saunders Island coexisted with Bougainville's colony, until the latter was formally transferred to Spain. Although the French settlers had suspected the possible existence of a British enclave in the area, the first encounter between both parties did not take place until December 4, 1766 when Captain MacBride sailed into Port Louis. Following an exchange of

28. CAILLET-BOIS, *supra* note 21, at 85. Goebel claims they reached 150. GOEBEL, *supra* note 20, at 226. Bougainville's occupation had been ratified by a sealed document signed by Louis XV and dated September 12, 1764. CAILLET-BOIS, *supra* note 21, at 83. It should be noted that since August 15, 1761 France and Spain were linked together by an alliance which has gone down in history with the name of the Family Compact (*i.e.*, between the Bourbon family which ruled both countries). 1 G. F. MARTENS, *RECEUIL DE TRAITÉS D'ALLIANCE, DE PAIX, DE TREVE, DE NEUTRALITÉ, DE COMMERCE, DE LIMITES, D'ÉCHANGE ETC. ET PLUSIERS AUTRES ACTES SERVANT A LA CONNAISSANCE DES RELATIONS ÉTRANGÈRES DES PUISSANCES ET ÉTATS DE L'EUROPE* 16 (1817). The commission of Bougainville, according to the explanations given in Aranjuez by the French Ambassador on May 9, 1766 at the request of Bougainville, was aimed at establishing a commercial colony in order to preserve for the House of Bourbon access to the South Sea. HIDALGO NIETO, *supra* note 21, at 3.

29. The chief remnant of the Byron expedition appears to have been a vegetable garden. According to Dr. Brown's "Anglo Spanish Relations in American in the Closing Years of the Colonial Era" (*quoted in* GOEBEL, *supra* note 20, at 232 n.36) the act of possession took place on January 23, 1765. There the flag was raised and the surgeon of the *Tamar* "surrounded a piece of ground near the watering place with a fence of turf and planted it with many esculent vegetables as a garden, for the benefit of those who might hereafter come to this place." *Cf.* HIDALGO NIETO, *supra* note 21, at 5.

notes, Governor Neville showed MacBride Bougainville's commission and the English captain sailed away.³⁰

Meanwhile, when the news of the French settlement reached Europe, Spain demanded explanations and protested to the French court. The negotiations to which this incident gave rise resulted in the formal recognition on the part of France of the Spanish rights to the Islands and provisions were made for their formal restitution to Spain against reimbursement to Bougainville of all expenses incurred in making his settlement. Pursuant to these arrangements, on April 2, 1767 the Spanish flag was hoisted and solemn delivery of the colony was taken from Bougainville in person by Spanish authorities sent out specifically for this purpose. The first Spanish governor of the Islands was Felipe Ruiz Puente.³¹

The next incident on the archipelago was an encounter in late November, 1769 between a schooner which the new Spanish governor had dispatched to make a survey of the Islands and a British frigate under the command of Captain Anthony Hunt. During this encounter, and to everyone's astonishment, the English Captain delivered a written warning, supported by menacing cannon shots, that the Spanish settlement should leave the Islands within six months.³² The suspicion that the English had established themselves somewhere in the neighborhood began to be confirmed and shortly thereafter a more significant

30. In his letter of December 4, 1766 MacBride stated that "Falkland Islands were first discovered by the Subjects of the Crown of England, sent out by the Government for the Purpose." MacBride to Neville, HIDALGO NIETO, *supra* note 21, at 6. Governor Neville responded with a note stating that the *Jason*, i.e., the British frigate, should evacuate because the islands were a possession of the French king. *Id.* at 7. The next day MacBride responded by saying he had only come to "examine these Islands Accurately" and requesting to "execute this Service in an amicable manner." MacBride to Neville, Dec. 5, 1766, *id.* at 7. This exchange shows that England knew of the French settlement before it was later transferred to Spain. Therefore its absence of protest against that transaction, under this perspective, becomes significant.

31. HIDALGO NIETO, *supra* note 21, at 12; GOEBEL, *supra* note 20, at 230.

32. The text of the letter of Captain Hunt, which is transcribed below, was a response to the courteous inquiries from the Spanish about what he was doing in those regions and invoking "good treaties" between both states.

Sir:

I have received your letters by the Officer acquainting me that the Islands and Coast thereof belong to the King of Spain your Mayesty: In return I am to acquaint you that the said Islands belong to his Britannick Mayesty my Master by right of discovery, as well as Settlement; and that the Subjects of no other Power whatever can have any right to be settled in the said Islands, without leave from his Britannick Mayesty; or taking the Oaths of allegiance, and submitting themselves to his Government; as subjects of the Crown of Great Britain.

I do therefore in his Mayestys Name and by his Orders, warn you to leave the said Islands, (and) in order that you may be the better enabled to remove your effects; you may remain six months from the date hereof, at the expiration of which you are expected to depart accordingly.

I am, Sir, your most obedient
humble Servant,
Anthony Hunt.

Falkland Islands.
December the 10th. 1769.

HIDALGO NIETO, DOCUMENT XIII, *supra* note 21, at 617.

expedition was launched from Buenos Aires for the specific purpose of discovering the English settlement under the command of Captain Fernando Rubalcava. This expedition actually entered the bay at Port Egmont on February 17, 1770 and remained there for eight days. Again both parties exchanged notes and following this encounter Rubalcava sailed over to Puerto Soledad to report his findings. At last the exact location of the English establishment had been identified. The next step was the dispatch of an expedition by the Spanish governor in Buenos Aires, Francisco Bucareli, consisting of four frigates which sailed from Montevideo on May 11, 1770. The expedition was under the command of Juan Ignacio de Madariaga and on June 10, 1770 the Spanish succeeded in evicting all English presence from Port Egmont by force.

The forcible expulsion of the English garrison from Port Egmont almost precipitated war between England and Spain. A diplomatic settlement of the matter, however, was reached after a very elaborate and secret negotiation which took place in London between the Spanish ambassador to the Court of St. James and the British government. This negotiation concluded on January 22, 1771 with an exchange of notes by which the Spanish agreed to restore Port Egmont to the *status quo ante*. The reinstatement of the British garrison at Port Egmont, together with the Spanish disavowal of the use of force, was effected for the purpose of repairing the offense caused to the British king. However, this was conceded under an express qualification, which the English accepted, that such restoration "cannot nor ought in any way to affect the question of the prior right of sovereignty over the Malouine Islands, otherwise called Falkland's Islands."³³

It has been stated that the Anglo-Spanish negotiation contained an essential secret promise on the part of Great Britain to the effect that once honor had been repaired in the form of a physical restitution of Port Egmont the British would evacuate the settlement in due course. The Spanish writer, Camilo Barcia Trelles confirms this interpretation as does the American writer, Julius Goebel, Jr. Manual Hidalgo Nieto, however, has expressed doubts about it.³⁴ Whatever is

33. See the text of the declarations in note 48 *infra*.

34. HIDALGO NIETO, *supra* note 21, at 227-31. Goebel, however, discusses the matter in detail in Chapter VII of his book and concludes that the Secret Promise in fact existed. See, in the same sense, GROUSSAC, *supra* note 11, at 134-143; CAILLET-BOIS, *supra* note 21, at ch. IX; BARCIA TRELLES, *supra* note 21, at 56. In this connection more recent research has disclosed that an anonymous eighteenth century writer (who was, however, never refuted at the time he wrote) stated that:

[T]he subsequent conduct of government proved, that there were secret stipulations on the part of Great Britain, which the ministry did not choose should meet the eye of parliament. For, though Falkland's Islands, Port Egmont, its forts, and other dependencies, were restored to the English, on the 16th September 1771, in conformity to his Catholic Majesty's declaration, yet in 1774, orders were sent out for evacuating the place: which was done accordingly, and no settlement has since been made there. . . .

THE HISTORY OF LORD NORTH'S ADMINISTRATION, TO THE DISSOLUTION OF THE THIRTEENTH PARLIAMENT OF GREAT BRITAIN 30 (printed for G. Wilkie, 1781). Although the writer of this article is not resting his case on this point, the existence of this promise, in this writer's opinion, is demonstrated beyond dispute by R. ZORRAQUIN BECU, INGLATERRA PROMETIÓ ABANDONAR LAS MALVINAS; ESTUDIO HISTÓRICO Y JURÍDICO DEL CONFLICTO ANGLLO-ESPAÑOL (1975) [hereinafter cited as ZORRAQUIN BECU].

the truth of this matter, the fact remains that in May, 1774, for alleged reasons of economy, the British settlement of Port Egmont was duly evacuated. An inscription, however, was engraved on a lead plate and affixed to the blockhouse. The inscription stated:

Be it known to all nations that the Falkland Islands, with this fort, the storehouses, wharfs, harbors, bays, and creeks thereunto belonging are the sole right and property of His Most Sacred Majesty George the Third, King of Great Britain, France and Ireland, Defender of the Faith, etc. In witness whereof this plate is set up, and his Britannick Majesty's colors left flying as a mark of possession by S. W. Clayton, commanding officer at Falkland Islands, A.D. 1774.³⁵

Two years later the Spanish Captain Juan P. Callejas found this singular object and took it back to Buenos Aires. Some thirty years later Colonel Beresford, who led the first of the two full-scale British invasions of Buenos Aires in 1806, allegedly took the lead plate back to London after his defeat.³⁶

After the British evacuation of 1774 the Spanish remained the exclusive, undisputed and uninterrupted possessors of the entire archipelago and a continuing succession of Spanish governors consolidated the colonial administration.³⁷ In January, 1810 Gerado Bordas, Commander of the Spanish garrison at Puerto Soledad, received news of the Napoleonic invasion of Spain. However, it was not until January, 1811 following the establishment of a locally created government in Buenos Aires (May 25, 1810) that the Spanish Governor of Montevideo, Gaspar de Vigodet, ordered the evacuation of the Malvinas and dispatched a vessel to carry out these instructions. From that moment onward until 1820 the archipelago remained without any visible state authority. It was nevertheless visited by sealers and whalers of various nationalities who hunted and fished in the region at their unfettered discretion. Meanwhile, the revolutionary process which had commenced in Buenos Aires in 1810 continued its course and the independence from Spain was officially proclaimed on July 16, 1816.

III. SPANISH TITLES TO THE ISLANDS

When Bougainville recounted the history of the transaction between Spain and France of 1767, he pointed out that France had relinquished the *Malouines* in favor of Spain pursuant to a principle of European public law. In this connec-

35. GOEBEL, *supra* note 20, at 410.

36. II *Revista de la Biblioteca Nacional*, No. 6, 301 (1938); B. DEL CARRIL, *EL DOMINIO DE LAS ISLAS MALVINAS* 31 (1964) [hereinafter cited as DEL CARRIL]; CAILLET-BOIS, *supra* note 21, at 150 n.4. This circumstance, however, has legal significance in that it clearly evidences that high ranking British military officers in 1806 who had, furthermore, been commissioned to effect a military conquest of Buenos Aires, under whose jurisdiction Malvinas stood, were on notice that it had been removed.

37. *See* note 51 *infra*.

tion, he stated that the payment he received of 618,108 French livres had been an act of generosity of the Spanish Crown given by way of compensation for the transfer of the colony and of all its establishments to Spain, the costs of which had been defrayed entirely by his Compagnie de St. Maló.³⁸

The principle of European "public law" mentioned by Bougainville was embodied by a complex network of treaties establishing an international *status quo* which reflected the balance of power obtained from time to time between the principal nations of Europe. These nations were in constant competition with each other and in the age of mercantilism and colonial expansion control of the sea was probably one of the major points of contention between them.

At the outset of this competition Spain had been favored by the well-known bulls *Inter-coetera* (May 3 and 4, 1493) of Pope Alexander VI which had assigned to the monarchs of Castille and Leon an exclusive right of occupancy and control over all areas, including the sea, to the west of an imaginary line running from pole to pole drawn 100 leagues west of the Azores and Cape Verde Islands. Shortly thereafter this grant was extended by another bull dated September 26, 1493 but was later amended by the Treaty of Tordesillas of June 3, 1494 between Spain and Portugal, which moved the demarcation line 270 leagues further to the west. The Treaty of Tordesillas was confirmed by the bull *Ea Quae* issued twelve years later by Pope Julius II. Under these arrangements Spain and Portugal were assigned spheres of exclusive influence for the purposes of discovery, trade and colonization.

Although there is no question but that these arrangements were legally binding on Spain and Portugal as against each other, the extent to which either of these states could evoke such Papal grants against third party states such as England and France has been questioned.³⁹ However, notwithstanding this

38. I L.A. BOUGAINVILLE, VOYAGE AUTOUR DU MONDE, PAR LA FREGATE DU ROI "LA BOUDEUSE" ET LA FLUTE "L'ETOILE" EN 1766, 1767, 1768 ET 1769, at 46 (2d ed. 1772).

39. The text of the bull which begins with the words "*Inter Coetera divini majestatis beneplacito*" (in Latin and Spanish) can be found in I C. CALVO, RECUEIL COMPLET DES TRAITÉS, CONVENTIONS, CAPITULATIONS, ARMISTICES, ET AUTRES ACTES DIPLOMATIQUES DE TOUS LES ETATS DE L'AMERIQUE LATINE, (DEPUIS L'ANNÉE 1493 JUSQU'A NOS JOURS) 4-15 (1862) [hereinafter cited as C. CALVO, RECUEIL]. It clearly is intended to prohibit, under severe penalties, other nations from even getting near those areas. Note the language used in this connection:

Ac quibuscumque personis cujuscumque dignitatis, etiam imperialis et regalis, status, gradus, ordinis vel conditionis, sub excommunicationis latae sententiae poena, quam eo ipso si contrafecerint incurrant, districtius inhebemus ne ad insulas et terras firmas inventas et inveniendas, detectas et detegendas versus Occidentem et Meridiem, fabricando et construendo lineam a polo artico ad polum antarcticum, sive terrae firmae et insulae inventae et inveniendas sint versus aliam quamcumque partem, . . .

Id. at 12. Note the words "inventas et inveniendas, detectas et detegendas" in relation to the issue of discovery by third states. Although the writer is not resting his case on the validity of the Papal bulls *per se*, there are, however, reasons to believe that by operation of the principle of intertemporal law they were binding on England. In this connection, at the time of the bulls England was a Catholic country and recognized the papal "auctoritas" of the medieval system which gave the Pontiff an ascendancy over the Christian princes. In this respect it should be remembered that Pope Hadrian IV by the bull

discussion and simply because of their constant invocation by Spain and Portugal, these bulls played a significant political role in the configuration of the public law of Europe until the time of the American Revolution and in the establishment of *status quo* to which England became associated through treaties.

With respect to navigation and commerce in the South Atlantic, the following treaties between England and Spain should be remembered: (1) *Treaty of Madrid of July 8/18, 1670*. This treaty, known as the American Treaty, was an extension of the Peace Treaty of 1667 which had terminated war between England and Spain. It confirmed the Spanish recognition of the English colonies in North America. However, as a counterpart of this recognition, Article 8 thereof provided that the subjects of the British king shall not navigate nor engage in commerce in ports and places held by the Catholic king and vice versa;⁴⁰ (2) *Treaty of Madrid of March 27, 1713*. This was a preliminary treaty of peace which followed the well-known *Assiento Treaty* of March 26, 1713 by which the South Sea Company had been given the monopoly of slave trade in Spanish America. Article 14 thereof provided that the British Crown had agreed to promulgate the strongest prohibitions "under the most rigorous penalties, that no ship of the English nation shall venture to pass to the South Sea" or engage in commerce in any places in the Spanish Indies except for slave trade which could be carried out only in the northern ports and in Buenos Aires;⁴¹ (3) *Treaty of Utrecht of July 13, 1713*. Article 8 of this Treaty provided that one of the essential conditions of peace was that commerce and navigation with West Indies belonging to Spain

Laudabiliter of 1155 gave King Henry II a patent to conquer Ireland. This bull begins with the words "Laudabiliter & fatis fructuose de gloriose nomine tuo propagando" and can be found in 1 J. DUMONT, CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS (pt. 1), at 80 (1726). See generally A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 21 (1947) (Spanish Trans., F. JAVIER OSSET, REVISTA EDITORA DE DERECHO PRIVADO (1949); 199 JOHN OF SALISBURY, METALOGICUS, (OPERA OMNIA) PATROLOGIAE LATINEAE 825 (1855), quoted in GOEBEL, *supra* note 20, at 50 n.4. Under this precedent one could argue that England was estopped from contesting the authority of the Pope to issue *Inter Coetera*. An illustration of papal "auctoritas" is when the Pope deposed King John following his excommunication in 1212; but when Philippe August was appointed to carry out this decision, John appears to have repented and accepted back his Kingdoms of England and Ireland from the Pontiff. G. STADTMULLER, GESCHICHTE DES VOLKERRECHTS 80 (1951) (A. Truyol y Serra, Spanish trans. 1961). With respect to the instructions given by Henry VII to John Cabot in 1496 and the conclusions drawn by Westlake from them, see GOEBEL, *supra* note 20, at 85. But there is further to this shortly after *Inter Coetera* King Henry VII (whose navy was basically insignificant), far from lodging any protests against the papal grants, began to pursue negotiations for a royal marriage with Spain. Henry VIII himself, prior to his own matrimonial problems, received in the year 1521 the title of Defender of the Faith. 4 D. HUME, THE HISTORY OF ENGLAND 36 (1807). Those who are familiar with the policies and procedures of the Church of Rome will appreciate the unlikelihood that such a distinction would have been bestowed upon the head of a state that was openly challenging prerogatives which, as is evident from the text of both *Inter Coetera* and *Laudabiliter*, the Holy See firmly believed to possess in those days in connection with its mission of preaching the faith in new lands. It seems quite evident that England's opposition to the bulls came out into the open only *after* the British reformation.

40. 1 C. CALVO, RECUEIL, *supra* note 39, at 162, 168-69. 11 THE CONSOLIDATED TREATY SERIES (1168-1671), at 383 (English translation at 395) (C. Parry ed. 1969).

41. 2 C. CALVO, RECUEIL, *supra* note 39, at 102, 105-06. 27 THE CONSOLIDATED TREATY SERIES (1710-1713), at 455 (English translation at 462) (C. Parry ed. 1969).

should remain as it was at the time of Charles II except for the *Assiento*;⁴² (4) *Treaty of Utrecht of December 9, 1713*. This Treaty of Friendship and Commerce expressly confirmed and reenacted the Anglo-Spanish treaty of 1670.⁴³ These arrangements were further ratified by the Treaties of Madrid of June 13, 1721, of Seville of November 9, 1729 and of Aix La Chapelle of October 18, 1748.⁴⁴

The cumulative import of these treaties in relation to the issue of navigation should be interpreted in light of the traditional Spanish claims to a closed sea in all areas surrounding her colonial territories. This point had rigorously been sanctioned by the Papal bulls and the assertion of this prerogative thereafter had become an essential cornerstone of Spanish external policy. This policy sought to assure Spain an exclusive sphere of commercial interests which precluded by implication the creation of any English establishments whatsoever within her domains. In this connection, the treaties cited above furnish the necessary background which explains the surreptitious nature of the British establishment at Port Egmont, which at the time it was made had been kept a rigorous secret,⁴⁵ the absence of any British diplomatic protests at the time of the transfer of the Islands from France to Spain, the need for the British reliance on the questionable theory of discovery and the underlying legal assumptions upon which the 1771 settlement between England and Spain were premised.

In connection with this latter point, there is a precedent which shows that England understood these assumptions along the same lines. In 1748 Admiral Lord Anson⁴⁶ had persuaded the British government to establish a colony in the South Atlantic, preferably in "Pepys or Falkland Islands" or in Tierra del Fuego, and the British Admiralty started working on the project. The Spanish ambassador in London, the Irishman Richard Wall, learned about it and protested. In view of this protest the Duke of Bedford instructed the British ambassador in Madrid to discuss the expedition with the Spanish Minister Carvajal but to express that "there is no intention of making any settlement in either of those islands." The Spanish minister firmly resisted the expedition and as a result of these objections the British project was dropped altogether.⁴⁷ This precedent,

42. 2 C. CALVO, *RECUEIL*, *supra* note 39, at 115, 118. 28 THE CONSOLIDATED TREATY SERIES (1713-1714), at 429 (English translation at 325) (C. Parry ed. 1969).

43. 2 C. CALVO, *RECUEIL*, *supra* note 39, at 130, 152. 28 THE CONSOLIDATED TREATY SERIES (1713-1714), at 429 (English translation at 458) (C. Parry ed. 1969).

44. 2 C. CALVO, *RECUEIL*, *supra* note 39, at 205; A. DEL CANTILLO, *TRATADOS, (CONVENIOS Y DECLARACIONES DE PAZ Y DE COMERCIO QUE HAN HECHO CON LAS POTENCIAS EXTRANJERAS LOS MONARCAS ESPAÑOLES DE LA CASA DE BORBÓN)* 198, 247, 314 (1843) [hereinafter cited as DEL CANTILLO, *TRATADOS*]; 31 THE CONSOLIDATED TREATY SERIES (1718-1724), at 303 (C. Parry ed. 1969); 33 THE CONSOLIDATED TREATY SERIES (1727-1732), at 253 (C. Parry ed. 1969); 38 THE CONSOLIDATED TREATY SERIES (1746-1750), at 297 (English accession at 328 and Spanish accession at 340) (C. Parry ed. 1969).

45. GOEBEL, *supra* note 20, at 235-42; ZORRAQUIN BECU, *supra* note 34, at 27-29; 1 COLECCIÓN DE DOCUMENTOS RELATIVOS A LA HISTORIA DE LAS ISLAS MALVINAS 155-58, 162-66, 202-04 (Instituto de Historia Argentina, Facultad de Filosofía y Letras, Universidad de Buenos Aires, 1957).

46. G. ANSON, *A VOYAGE ROUND THE WORLD IN THE YEARS MDCCXL, I, II, III, IV*, at 91 (R. Walter compiler 1748).

47. GOEBEL, *supra* note 20, at 194-202.

together with the subsequent precedent represented by the recognition by France of the Spanish rights to the *Malouines* in circumstances where Spain had not yet performed a single act of appropriation or possession on the archipelago itself, should be considered a significant indication that the Islands were generally believed to belong to Spain simply by virtue of their geographical proximity to the South American Continent.

Concerning the 1771 settlement by which Spain agreed to the restitution of the British fort at Port Egmont, the text of these documents shows that this was done solely for the purpose of redressing an offense to the British king whose forces had been attacked in times of peace and by no means could be taken as a Spanish recognition of British title to that establishment. On the contrary, these documents show, on the one hand, an express reservation of rights on the part of Spain over the entire archipelago and, on the other, an "acceptance" of such reservations on the part of Great Britain.⁴⁸ Britain not only accepted the reserva-

48. The word "counterdeclaration" which is used in Palmerston's note to Moreno of January 8, 1834 (22 BRITISH AND FOREIGN STATE PAPERS (1833-1834), at 1384, 1387 (1847)) was an inaccurate reading of the 1771 State Papers. DEL CARRIL, *supra* note 36, at 52-53. The change is not without significance. The text in French, as it appears in 2 G. F. MARTENS, RECUEIL DES PRINCIPAUX TRAITÉS (1771-1779), at 1, 2 (2d ed. 1843) sets out the English declaration under the heading of "Acceptation de la Grand Bretagne." See also 44 THE CONSOLIDATED TREATY SERIES (1767-1772), at 425-26 (C. Parry ed. 1969) and the text in Spanish in 2 C. CALVO, RECUEIL, *supra* note 39, at 393, 395 and in DEL CANTILLO, TRATADOS (1700-1842), *supra* note 44, at 519. The full English text of the exchange of notes appears in 3 C. JENKINSON, TREATIES 234 (1875). It reads as follows:

Spanish Declaration

His Britannick Majesty having complained of the violence which was committed on the 10th of June, 1770, at the island commonly called the Great Malouine, and by the English Falkland's Island, in obliging, by force, the commander and subjects of his Britannick Majesty to evacuate the port by them called Egmont; a step offensive to the honour of his crown; the Prince de Masserano, Ambassador Extraordinary of his Catholick Majesty, has received orders to declare, and declares, that his Catholick Majesty, considering the desire with which he is animated for peace, and for the maintenance of good harmony with his Britannick Majesty, and reflecting that this event might interrupt it, has seen with displeasure this expedition tending to disturb it; and in the persuasion in which he is of the reciprocity of sentiments of his Britannick Majesty, and of its being far from his intention to authorize anything that might disturb the good understanding between the two Courts, his Catholick Majesty does disavow the said violent enterprise, and, in consequence, the Prince de Maserano declares, that his Catholick Majesty engages to give immediate orders, that things shall be restored in the Great Malouine at the port called Egmont, precisely to the state in which they were before the 10th of June, 1770: For which purpose, his Catholick Majesty will give orders to one of his Officers, to deliver up to the Officer authorized by his Britannick Majesty and his subjects which were at that place the day above named, agreeable to the inventory which has been made of them. The Prince de Masserano declares, at the same time, in the name of the King, his master, that the engagement of his said Catholick Majesty, to restore to his Britannick Majesty the possession of the port and fort called Egmont, cannot nor ought in any wise to affect the question of the prior right of sovereignty of the Malouine Islands, otherwise called Falkland's Islands. In witness whereof, I the underwritten Ambassador Extraordinary have signed the present declaration with my usual signature, and caused it to be sealed with our arms.

London, 22nd. January, 1771.

British Acceptance:

His Catholick Majesty having authorized the Prince of Masserano, his Ambassador Extraordinary, to offer, in his Majesty's name, to the King of Great Britain, a satisfaction for the injury done to his Britannick Majesty by dispossessing him of the port and fort of Port

tion but it also accepted, by implication, the continued existence of the Spanish colony at Puerto Soledad. This circumstance constitutes a clear, albeit implicit, disavowal of Captain Hunt's earlier threats against the Spanish settlers, even though during the 1771 negotiations England had been unwilling to concede this point expressly on paper as the Spanish had requested. Furthermore, whether for alleged reasons of economy or in fulfillment of a secret promise, the undisputed fact remains that the British settlement was unilaterally withdrawn from Port Egmont in 1774.

Sixty years later Viscount Palmerston — in a note of response dated January 8, 1834 to the Argentine minister's earlier protests — developed the argument that visible signs of possession had been left on the Islands to indicate Britain's intention to return at some point in the future and that those signs were sufficient to sustain British sovereignty.⁴⁹ In other words, if according to classical international law the act of abandonment of territory on the part of a state, which is the counterpart to occupation, requires on the one hand, physical withdrawal of all state activities, and on the other, the intention to disassociate such territory from the relinquishing state's general territory (*animus derelinquendi*), the second of these conditions was not met in the case of the Falklands. However, in relation to this assertion, the following observation should be made: (1) all physical signs of British sovereignty, including the buildings, had deliberately been destroyed by the Spanish settlers after the British had left; (2) the inscription left by the blockhouse had been removed from the site and taken to Buenos Aires and the English knew about it;⁵⁰ (3) the attitude of a state that

Egmont; and the said Ambassador having this day signed a declaration, which he has just delivered to me, expressing therein, that his Catholick Majesty, being desirous to restore the good harmony and friendship which before subsisted between the two Crowns, does disavow the expedition against Port Egmont, in which force has been used against his Britannick Majesty's possessions, commander, and subjects; and does also engage, that all things shall be immediately restored to the precise situation in which they stood before the 10th of June, 1770; and that his Catholick Majesty shall give orders, in consequence, to one of his Officers to deliver up to the Officer authorised by his Britannick Majesty, the port and fort of Port Egmont, as also all his Britannick Majesty's artillery, stores, and effects, as well as those of his subjects, according to the inventory which has been made of them. And the said Ambassador having moreover engaged, in his Catholick Majesty's name, that what is contained in the said declaration shall be carried into effect by his said Catholick Majesty, and that duplicates of his Catholick Majesty's orders to his Officers shall be delivered into the hands of one of his Britannick Majesty's Principal Secretaries of State within six weeks; his said Britannick Majesty, in order to shew the same friendly disposition on his part, has authorised me to declare, that he will look upon the said declaration of the Prince de Masserano, together with the full performance of the said engagement on the part of his Catholick Majesty, as a satisfaction for the injury done to the Crown of Great Britain. In witness whereof, I the under-written, one of his Britannick Majesty's Principal Secretaries of State, have signed these presents with my usual signature, and caused them to be sealed with our arms.

London, 22nd. January, 1771.

GOEBEL, *supra* note 20, at 359-60.

49. Palmerston to Moreno, 22 BRITISH AND FOREIGN STATE PAPERS (1833-1834), at 1385-86 (1836).

50. See note 36 *supra*. The English writer Sir Robert Phillimore has criticized the theory of the British Officers of 1774 who believed that British alleged sovereignty could be retained on Falkland Islands by means of an inscription unaccompanied by acts of a *de facto* possession and recognizes that: "The mere

vacates a piece of territory for such an extended period of time, even if for alleged reasons of economy, is not exactly in a position to support a claim to sovereignty and such attitude tends, if anything, to confirm lack of interest therein; and (4) it is difficult to see how an international court, even applying eighteenth century customary international law, could have held that an inscription on a piece of lead constituted a better title than the open, continuous, effective and peaceful display of state sovereignty over the archipelago generally on the part of Spain during the thirty-seven years which followed the British withdrawal.⁵¹

erection of crosses, landmarks, and inscriptions is ineffectual for acquiring or maintaining an exclusive title to a country of which no real use is made." 1 COMMENTARIES ON INTERNATIONAL LAW 273 (2d ed. 1954); PHILLIMORE, *supra* note 18, at 211 n. h. Sir Thomas E. Holland, referring to the same episode appears to agree with Phillimore in LECTURES ON INTERNATIONAL LAW 116-17 (Walker ed. 1933) [hereinafter cited as HOLLAND]. There Holland also quotes the case of Santa Lucia in the Antilles where the English settlers had been worsted by the natives in 1640. Then "in 1650 the French occupied the island as derelict, but England contended that her claim was not abandoned, the English settlers having been expelled by force. . . . It would appear, Holland notes, that the French claim to treat the islands as derelict in 1650 was well founded." *Id.* See VATTEL, *supra* note 18. See also 1 D.P. O'CONNELL, INTERNATIONAL LAW 512 (1965) [hereinafter cited as O'CONNELL].

51. Mr. H. S. Ferns, when discussing the transfer of Malvinas from France to Spain and the payment made to Bougainville, states that: "In spite of a capital expenditure of these dimensions the Spaniards cannot be said to have established evidence of continuous and settled occupation." H. S. FERNS, BRITAIN AND ARGENTINA IN THE NINETEENTH CENTURY 225 (1960) [hereinafter cited as FERNS]. However, here is the complete list of Spanish Governors who headed the colony from 1767 until 1811, which can be found in DESTEFANI, *supra* note 21, at 353-54 (Appendix No. 1): 1. Capitán de navío D. Felipe Ruiz Puente (Apr. 2, 1767 to Jan. 23, 1773); 2. Capitán de Infantería D. Domingo Chauri (Jan. 23, 1773 to Jan. 5, 1774); 3. Capitán de Fragata D. Francisco Gil de Lemos y Taboada (Jan. 5, 1774 to Feb. 1, 1777); 4. Teniente de navío Ramón de Carassa y Souza (Feb. 1, 1777 to Nov. 22, 1779); 5. Teniente de Navío D. Salvador de Medina y Juan (Nov. 22, 1779 to Feb. 26, 1781); 6. Teniente de Fragata D. Jacinto Mariano del Carmen Altoglaguirre (Feb. 26, 1781 to Apr. 1, 1783); 7. Capitán de Navío D. Fulgencio D. Montemayor (Apr. 1, 1783 to June 28, 1784); 8. Teniente de navío D. Agustín de Figueroa (June 28, 1784 to May 15, 1785); 9. Capitán de Fragata D. Ramón de Clairac y Villalonga (May 15, 1785 to May 25, 1786); 10. Teniente de Navío D. Pedro de Mesa y Castro (May 25, 1786 to Mar. 15, 1787); 11. Capitán de Fragata D. Ramón de Clairac y Villalonga (May 15, 1787 to Apr. 10, 1788); 12. Teniente de navío D. Pedro de Mesa y Castro (Apr. 10, 1788 to May 16, 1789); 13. Capitán de fragata D. Ramón de Clairac y Villalonga (May 16, 1789 to June 30, 1790); 14. Teniente de navío D. Juan José de Elizalde y Ustariz (June 30, 1790 to Mar. 1, 1791); 15. Capitán de fragata D. Pedro Pablo Sanguineto (Mar. 1, 1791 to Mar. 1, 1792); 16. Teniente de navío D. Juan José de Elizalde y Ustariz (Mar. 1, 1792 to Feb. 1, 1793); 17. Capitán de fragata D. Pedro Pablo Sanguineto (Feb. 1, 1793 to Apr., 1794); 18. Teniente de navío D. José de Aldana y Ortega (Apr., 1794 to June 15, 1795); 19. Capitán de fragata D. Pedro Pablo Sanguineto (June 15, 1795 to Mar. 15, 1796); 20. Teniente de navío José de Aldana y Ortega (Mar. 15, 1796 to Feb. 20, 1797); 21. Teniente de navío D. Luis de Medina y Torres (Feb. 20, 1797 to Mar. 17, 1798); 22. Capitán de Fragata graduado D. Francisco Xavier de Viana y Alzaibar (Mar. 17, 1798 to Apr., 1799); 23. Capitán de Fragata D. Luis de Medina y Torres (Apr., 1799 to Mar. 15, 1800); 24. Capitán de fragata graduado D. Francisco Xavier de Viana y Alzaibar (Mar. 15, 1800 to Mar. 31, 1801); 25. Teniente de navío D. Ramón Fernandez y Villegas (Mar. 31, 1801 to Mar. 31, 1802); 26. Teniente de navío D. Bernardo de Bonavía (Mar. 17, 1802 to July 21, 1803); 27. Teniente de navío D. Antonio Leal de Ibarra y Oxinando (July 21, 1803 to May 21, 1804); 28. Capitán de fragata D. Bernardo de Bonavía (May 15, 1804 to Mar. 21, 1805); 29. Teniente de navío Antonio Leal de Ibarra y Oxinando (Mar. 21, 1805 to Mar. 20, 1806); 30. Capitán de fragata D. Bernardo de Bonavía (Mar. 20, 1806 to the end of Aug., 1808); 31. Primer piloto particular D. Gerardo Bordas (Aug., 1808 to Jan., 1810); 32. Segundo piloto de número de la Real Armada D. Pablo Guillén Martínez (Jan., 1810 to Feb. 13, 1811).

Finally, there is a further precedent which should be mentioned. On October 25, 1790 England and Spain signed a treaty known as the Nootka Sound Convention by which Spain — whose position had been further debilitated since the French Revolution and could no longer rely on the Family Compact — was forced to concede recognition of British rights to establish a colony on the western shore of Vancouver Island. This treaty contained the further concession of free navigation and fishing in the Pacific or the South Seas subject, *inter alia*, to the exception that (i) this should not be a pretext for illicit trade with Spanish settlements and, to this end, the British should not navigate nor fish within a distance of ten maritime leagues “from any part of the coast already occupied by Spain,” and (ii) the following limitation contained in an additional article:

It is further agreed with respect to the eastern and western coasts of South America and the islands adjacent, that the respective subjects shall not form in the future any establishment on the parts of the same coast and of the islands adjacent already occupied by Spain; it being understood that the said respective subjects shall retain the liberty of landing on the coasts and islands so situated for objects connected with their fishing and of erecting thereon huts and other temporary structures serving only those objects.⁵²

Now therefore, even assuming *ad arguendum* that the British inscription left on Malvinas in 1774 could have served as a basis for a claim to sovereignty, because Spain maintained an actual occupation of the Malvinas at the time it was signed, this instrument would have extinguished it.⁵³

IV. ARGENTINE OCCUPATION OF THE MALVINAS (FALKLAND) ISLANDS IN THE NINETEENTH CENTURY

In 1820 the new government of the United Provinces of the Río de la Plata dispatched the frigate “Heroina” under the command of Colonel Daniel Jewitt with specific instructions to take possession of the Malvinas in the name of the new Republic. The frigate arrived at the archipelago in early November and encountered many vessels of different nationalities. There Jewitt notified their masters in writing of his intentions and on November 6, 1820 in a formal ceremony the Argentine flag was raised, gun-salutes were fired and a statement was read declaring the archipelago as territory of the new Republic.⁵⁴

52. 3 C. CALVO, *RECUEIL*, *supra* note 39, at 356; 1 BRITISH AND FOREIGN STATE PAPERS 663 (1790); DEL CANTILLO, *TRATADOS*, *supra* note 44, at 623; 51 THE CONSOLIDATED TREATY SERIES (1790-1793), at 67 (C. Parry ed. 1969); H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 168, at 243 (8th ed. 1866).

53. GOEBEL, *supra* note 20, at 431. The French writer Louis Cavare notes that this Convention recognized the Spanish occupation of the Malouines as a “titre juridiquement valable.” See 2 L. CAVARÉ, *LE DROIT INTERNATIONAL PUBLIC POSITIF* 587 (1962) [hereinafter cited as CAVARÉ].

54. When Jewett arrived at La Soledad, he found disseminated in the Islands, more than 50 foreign vessels. The names of some of these vessels, their masters and the description of the events are in the

In 1823 Jorge Pacheco, who had earned merits for services to the Republic during the war of independence, was given a permit by the Buenos Aires government to colonize the archipelago and was granted thirty leagues of land on Isla Soledad, including the use of fisheries and cattle. Pacheco was then a partner of Louis Vernet, an entrepreneur who was the driving force behind the colonization project. Shortly before the departure of the expedition, and upon Pacheco's request, the government appointed Captain Pablo Areguati as Commander of Soledad Island. Areguati arrived at the Malvinas on February 2, 1824 but it appears that the first attempt to establish a settlement was unsuccessful.⁵⁵ Vernet, however, was not to be dissuaded and a further expedition organized and commanded by Vernet in person arrived at the Malvinas in June, 1826 and thus the settlement was established on a more permanent basis. In January, 1828 a special decree was issued by which Vernet was given a concession of land and fishing rights.⁵⁶ On that same date Pacheco was granted a further concession with respect to other parts of the Malvinas.⁵⁷ In August, 1828 Vernet returned with reinforcements. On June 10, 1829 the Buenos Aires government created the Military and Political Governship ("Comandancia Política y Militar") with jurisdiction over the islands adjacent to Cape Horn in the Atlantic Ocean with headquarters on Soledad Island and at the same time Vernet was appointed as Military and Political Governor.⁵⁸ On August 30, 1829 Vernet returned to the colony clothed in his new investiture and in a formal ceremony held in Puerto Soledad took up his post. From that time onward the size of the colony was increased to more than 100 people and began to prosper.⁵⁹

On July 30, 1831 Governor Vernet seized three American fishing vessels — the *Breakwater* and the *Harriet* of Stonington and the *Superior* of New York — which were violating sealing restrictions. With the master of one of the vessels Governor Vernet made a deal by which the vessel was allowed to continue sealing provided that the Governor would get a share of the profits. The other vessel escaped and the third vessel, the *Harriet*, was made to sail to Buenos Aires to stand trial with Vernet on board.

The American consul in Buenos Aires, George Washington Slacum, protested and threatened reprisals. Shortly thereafter Slacum's protest was supported by

Report of the Political, and Military Commander of the Malvinas dated Aug. 10, 1832, reproduced in 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 369, 419 (1836) [hereinafter cited as Vernet Report].

55. See note 86 *infra*.

56. Decree of Buenos Aires dated Jan. 15, 1828, 20 BRITISH AND FOREIGN STATE PAPERS (1832-33), at 420 (1836).

57. CAILLET-BOIS, *supra* note 21, at 201.

58. Decree of the Government of Buenos Aires dated June 10, 1829, 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 314 (1836).

59. According to 2 FITZROY'S NARRATIVE OF THE SURVEYING VOYAGES OF H.M.S. *Adventurer* AND *Beagle* 266-67 (1839), between 1826 until 1836 the total population was around 100. This information generally coincides with that of Vernet, who claimed that they had reached 150 by 1832. See CAILLET-BOIS, *supra* note 21, at 209.

the presence in Buenos Aires of the *U.S.S. Lexington*, a war ship under the charge of Commander Silas Duncan, who demanded that Vernet be punished for piracy and the *Harriet* released. Naturally, the Buenos Aires government did not yield to this request. Thus, having failed to get satisfaction, Commander Duncan proceeded on his own initiative to Puerto Soledad, where he arrived on December 28, 1831 flying a French flag. Before descending Duncan invited Vernet's lieutenant, Mattheu Brisban, on board but then made him a prisoner. Then he went on shore with his men and destroyed all military installations, sacked the habitations, seized sealskins, put most of the inhabitants under arrest and then left declaring the island free of all government.⁶⁰ As a result of this episode, diplomatic relations between Argentina and the United States were broken and, to the knowledge of this writer, compensation for this act of plunder has never been paid by the U.S. government.⁶¹

On September 10, 1832 the Government of Buenos Aires appointed a new interim Military and Political Commander to the Malvinas and adjacencies and dispatched the gunboat *Sarandí*, under the charge of José María Pinedo, to repair the damages and reinstate law and order in the colony. The *Sarandí* arrived at Puerto Soledad and the new Governor, Esteban Mestivier, took the

60. On February 14, 1832 the Buenos Aires government reacted with a proclamation. 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 327 (1836). Goebel, who examined the log of the *Lexington* in the Library of the U.S. Navy Department, remarks that: "It is curious that there is no notice of any of these transactions in the log-book of the *Lexington*. Perhaps Duncan was a little ashamed of what he had done, or perhaps he feared the effect his actions would have upon his government." GOEBEL, *supra* note 20, at 444-45.

61. On the question of fishing rights, see 1 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW 876 (1906); P. C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 52 (1927); H. A. SILVA, LA ECONOMÍA PESQUERA EN EL VIRREINATO DEL RÍO DE LA PLATA, FUNDACIÓN PARA LA EDUCACIÓN, LA CIENCIA Y LA CULTURA (1978). It is interesting to note that a federal court in Connecticut in an action brought by one of the masters of the captured vessels held that: "[A]n officer of the United States has no right, without express directions from his government, to enter the territorial jurisdiction of a country at peace with the United States, and forcibly seize upon property found there, and claimed by citizens of the United States." *Davison v. Seal-Skins*, 7 F. Cas. 192 (D. Conn. 1835) (No. 3, 661); 1 F. WHARTON, A DIGEST OF INTERNATIONAL LAW § 65, at 444 (1886). Goebel comments that it was proved in that action that Vernet was acting under authority of his government and therefore the action, which had been brought to recover salvage on sealskins originally seized by Vernet and later recaptured by Duncan, could not be sustained. GOEBEL, *supra* note 20, at 444 n.88. Goebel comments:

Regarding Vernet, a word is here in place, as he looms large as the villain of the piece, and he is still embalmed in the amber of the United States' official documents as a scoundrel and pirate.

Vernet was of French origin, but as he had resided for a long time in Hamburg he was generally spoken of as German. He was a man of character and by no means the uncultivated barbarian that he was pictured in the American diplomatic correspondence. Captain Fitzroy in his Narrative (. . .) speaks of the kindness shown a brother officer by Vernet when his ship stopped at the Falklands.

Id. at 435. In *Williams v. the Suffolk Insurance Company*, 38 U.S. (13 Pet.) 412 (1839), the Supreme Court of the United States denied that the Falkland Islands were part of the dominions within the sovereignty of the government of Buenos Aires. 38 U.S. (13 Pet.) at 419-20. However, this conclusion was reached, not on the merits of the case, but as an act of judicial deference to determinations made by the executive branch in the field of foreign relations.

oath of office. Two months later, while the *Sarandí* was away cruising the area, the garrison of soldiers revolted against the governor and killed him. Upon the *Sarandí's* return to Puerto Soledad Commander Pinedo attempted to capture the mutineers. While these efforts were successfully in progress the British warship *Clio* appeared at Puerto Soledad. The captain of this ship, Commander Onslow, called upon Pinedo and informed him that he had come with instructions to take possession of the Islands in the name of his Britannick Majesty. Pinedo firmly protested but was not in a position to offer serious resistance. The next day the British flag was raised and Pinedo returned to Buenos Aires.⁶²

V. TITLES CLAIMED BY ARGENTINA

If an international tribunal was called upon to adjudicate the sovereignty dispute between Great Britain and Argentina the customary procedure would be for it to examine, in Max Huber's words, "which of the states claiming sovereignty possesses a title — cession, conquest, occupation, etc. — superior to that which the other state might possibly bring forward against it."⁶³ However, since international relations are not static, legal evaluation of the titles displayed by each contending state is usually affixed with reference to a certain point in time. In the *Palmas Island* case the issue was formulated in terms of whether on December 10, 1898 Spain, which on that date ceded the island to the United States by the Treaty of Paris, had a superior title than the Netherlands, which had displayed effective possession on Palmas Island since the seventeenth century. In the *Clipperton Island* case (Mexico v. France) the issue was whether on November 17, 1858, when Lieutenant de Kerweguen of the French Navy drew up an instrument proclaiming French sovereignty over Clipperton Island, France thereby acquired a better title to the Island than Mexico, which claimed earlier

62. The Permanent Representative of Great Britain in the United Nations stated that the British takeover of 1833 did not constitute an act of force and that: "British reoccupation of the Islands in 1833 and 1834 was effected without a shot being fired." See generally note 76 *infra*. The use of the word "re-occupation," in relation to Puerto de la Soledad is a total novelty in this discussion because, to our knowledge, England had never maintained any establishments on East Falkland nor, for that matter, on West Falkland. The only establishment Britain had made was that in Port Egmont on Saunders Islands. It seems quite obvious that the unhappy circumstances prevailing in the colony rendered Commander Onslow's mission a relatively easy task. However, it is indeed difficult to visualize how such an expedition would have been successful, in the face of Pinedo's protests, if the *Clio* and its crew had been unarmed. The *Clio* was a warship whereas the *Sarandí* was only an armed schooner and a force from the *Clio* was actually landed by Onslow. GOEBEL, *supra* note 20, at 455. Black's Law Dictionary defines "force" of the type relevant to this kind of situation as: "Such display of physical power as is reasonably calculated to inspire fear of physical harm to those opposing possession of premises by trespasser." BLACK'S LAW DICTIONARY 774 (1968 ed.) The British Representative also insinuated that "herr Vernet" was not Argentine. However, it should be noted that Luis Vernet possessed an Argentine passport (N° 310) which had been issued to him by Rivadavia on September 26, 1821. CAILLET-BOIS, *supra* note 21, at 186.

63. *Palmas Island Case* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 831, 838-39, 845-46 (1931); cf. *Decision of Apr. 5, 1933 of the Legal Status of Eastern Greenland* (Den. v. Nor.), 6 I.L.R. 95 (Perm. Ct. of Int'l Justice, 1933).

titles by discovery from Spain.⁶⁴ In the *Eastern Greenland* case (Denmark v. Norway) the question was whether Denmark had a better title than Norway on July 10, 1931 when Norway issued its proclamation purporting to place portions of Eastern Greenland under its sovereignty.⁶⁵ And in the *Western Sahara* case the General Assembly of the United Nations requested the International Court of Justice to deliver an advisory opinion on whether Western Sahara (Rio del Oro and Sakiet el Hambra) was a *terra nullius* at the time of its colonization by Spain in 1884.⁶⁶ However, in many cases the selection of what is known as a *critical date* is not always an obvious choice and there are some instances where the issue was controversial or where no specific date was chosen by the court.⁶⁷

In the case of the Malvinas, England invoked titles dating from earlier centuries and this renders the selection of a single *critical date* a somewhat complex task. Following the technique used in the *Clipperton Island* case and *Western Sahara* case, one could present the question in terms of whether on November 6, 1820 when Colonel Daniel Jewitt, then a colonel of the Argentine Navy, took formal and solemn possession of the Malvinas in the name of the Buenos Aires government, England had a superior title to the Islands.⁶⁸ However, since England did not protest against that act nor otherwise show any interest in the Islands until November 1829, the controversy did not really "crystallize" — as Jennings would say — until *after* the letter of protest signed by the British Chargé d'Affaires was lodged with the Argentine government. Now, a letter of protest from one state to another in itself does not constitute a root of title and its typical legal effect is to present or keep alive a claim or preclude an interloping adverse possessor from acquiring title by prescription.⁶⁹ Mr. Woodbine Parish's letter could not *per se* have added any merits to the substantive claim of Great Britain which, as the letter itself stated, was based on an allegation of *earlier* titles. Therefore, in view of these circumstances, the more reasonable procedure would be to analyze the position of each party in 1833, which is when Great Britain actually took steps with the intention of reducing the islands to its sovereignty.

64. *Clipperton Island Award* (Fr. v. Mex.), 6 I.L.R. 105, 106-07 (Victor Emmanuel III, King of Italy, Sole Arbitrator, 1931); 2 R. Int'l Arb. Awards 1105; *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*, 26 AM. J. INT'L L. 390 (1931).

65. 1933 P.C.I.J., ser. A/B, No. 53; 3 Hudson, World Ct. Rep. 148 (1938); Decision of Apr. 5, 1933 on the Legal Status of Eastern Greenland (Den. v. Nor.), 6 I.L.R. 95 (Perm. Ct. of Int'l Justice, 1933).

66. *Western Sahara Case*, 1975 I.C.J. 12 (advisory opinion).

67. Professor Brownlie quotes as examples, the *Miquiers and Ecrehos Case* (U.K. v. Fr.), 1953 I.C.J. 47, and the *Argentine-Chile Frontier Case*, 38 I.L.R. 10 (Ct. of Arbitration, 1966), I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 133-34 (3d ed. 1979). See JENNINGS, *supra* note 5, at 31.

68. See note 54 *supra*. James Fawcett has stated that: "For Britain the critical date was January, 1833 when it occupied the Falkland Islands and expelled the Argentine garrison." Fawcett, *supra* note 10, at 6.

69. See note 95 *infra*.

A. *Title by Succession*

The concept that Argentina had succeeded, *in general terms*, to the territorial titles of Spain in the areas comprising the Viceroyalty of the Río de la Plata can be deduced from general rules of international law relating to state succession.⁷⁰ Thus, the Australian writer Daniel P. O'Connell, when discussing imprecisions associated with the doctrine of *uti possidetis* in South and Central America and the Latin American theory of constructive possession, nevertheless admits that: "The proposition that the revolted colonies fell heir in fact to an administrative division of the Empire could be regarded as an application of rules of State succession, and in this sense the doctrine was acknowledged by the United States to be one of law."⁷¹

The admission on the part of Great Britain that the territorial rights of Argentina were derived from Spain generally originated not only from British recognition of Argentine independence, tacitly in 1823⁷² and more expressly with the execution of a treaty of amity, commerce and navigation in February, 1825,⁷³ but also implicitly from the very letter of protest submitted in late 1829. This letter contained the underlying assumption that if Spain had been under a duty to respect British sovereignty over the Falkland Islands in the eighteenth century — and this was the explicit claim — Argentina had to respect that alleged right by virtue of its status as a territorial successor to Spain. It should be further noted that Spain herself took steps towards recognition of Argentine independence when it signed its Preliminary Peace Treaty with Argentina on July 4, 1823.⁷⁴ Therefore, if the British assumption was that Argentina had succeeded Spain in respect of its alleged localized obligations in the Malvinas — which before 1810 were clearly within the jurisdiction of the Viceroyalty of the Río de la Plata and subject to the Viceroy of Buenos Aires⁷⁵ — the counterpart of this assumption was that Argentina had succeeded to whatever rights Spain had in that territory as against England.⁷⁶ Under this analysis, and taking into account

70. "Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an international person." OPPENHEIM, *PEACE*, *supra* note 17, § 80, at 157.

71. O'CONNELL, *supra* note 50, at 491.

72. On December 15, 1823 Foreign Secretary George Canning wrote a letter to the Argentine government appointing Mr. Woodbine Parish as Consul General in Buenos Aires. *Tratados, Convenciones, Protocolos y Demás Actos Internacionales Vigentes Celebrado por la República Argentina*, Imprenta de "La Nación," 8 (Buenos Aires, 1901).

73. 12 BRITISH AND FOREIGN STATE PAPERS (1824-1825), at 29 (1846).

74. 11 BRITISH AND FOREIGN STATE PAPERS (1823-1824), at 225 (1825). 73 THE CONSOLIDATED TREATY SERIES (1822-1824), at 261 (C. Parry ed. 1969). The text of the Argentine law setting forth the basis of the negotiations with Spain dated June 19, 1823 is in 10 BRITISH AND FOREIGN STATE PAPERS (1822-1823), at 1013 (1850).

75. V. G. QUESADA, *VRREINATO DEL RÍO DE LA PLATA* 28, 31, 34, 37, 109 (1881).

76. Sir John Thomson KCMG, Permanent Representative of Great Britain in the United Nations, in his statements to the General Assembly on November 2, 1982, denied that Argentine inherited title to the Islands from the Spanish Empire. However, *see* note 67 and 68 *supra*. The right of territorial

that Spain's retrenchment from the Malvinas was more or less coincidental with, and generally determined by, the events which led to the independence of the United Provinces of the Río de la Plata, Argentina could claim for herself the titles developed by Spain over the Malvinas.

These titles were not only those associated with the public law of Europe in the eighteenth century, including but not limited to the Papal Bulls and their further sanction through treaties, but more specifically: (1) titles of prior occupation and settlement, which had been initiated by the French and later ceded to Spain in 1767; (2) the continued settlement of Spain herself on the Islands for more than half a century; and (3) the express sanction of such *status quo*, partially in 1771, when England accepted the continuing settlement of Spain on Isla Soledad or East Falkland plus a reservation of rights with respect to the entire archipelago, and more completely after the British withdrawal of 1774 and with the Nootka Sound Convention of 1790.⁷⁷

B. *Title by Occupation and Settlement*

Without prejudice to the titles discussed above, it is appropriate to examine here whether Argentina could claim as in 1833 an independent title by occupation and settlement based on its own efforts with respect to the archipelago. The general principle applicable to acquisition of territory based upon occupation was summed up by the Permanent Court of International Justice in 1933 in the following terms: "A claim to sovereignty . . . involves two elements each of which must be shown to exist: the intention and will to act as a sovereign, and some

succession was expressly invoked by Moreno's letter of June 17, 1833, on the basis that England and other powers had recognized Argentina as a state: "Les Provinces-Unies, par conséquent, succédèrent à l'Espagne dans les droits que cette Nation, de laquelle elle s'étaient séparées, possédait dans cette juridiction. Les Malouines avaient toujours fait partie de cette Contrée, ou de ce District; et, comme telles, elles formaient une portion du Domaine, ou de la Propriété publique du nouvel Etat (patrimonium reipublicae publicum)." Moreno to Palmerston, 22 BRITISH AND FOREIGN STATE PAPERS (1833-1834), at 1366, 1381 (1847). This aspect of the argument was not refuted by Palmerston's response to Moreno of January 8, 1834. On the contrary, Palmerston there argued that *Spain* (emphasis supplied) had acknowledged English rights and 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 herself." (Emphasis supplied). Palmerston to Moreno, 22 BRITISH AND FOREIGN STATE PAPERS (1833-1834), at 1384, 1385-86 (1847). The implication of this was that the concept of succession presumably made the alleged British claim against Argentina stronger than it would have been as against a third party state invoking titles other than as *derived* from Spain. This observation is further ratified by the late correspondence from the Earl of Aberdeen to Moreno which emphasized that England's arrangements with Spain in 1771 should be considered as definitive. See Aberdeen to Moreno, Feb. 15, 1842, transcribed at Note 122 *infra*. On the concept of localized obligations, see 2 M. UDINA, LA SUCCESSION DES ETATS AVANT AUX OBLIGATIONS INTERNATIONALES AUTRES QUE LES DETTES PUBLIQUES, 2 RECUEIL DES COURS 669, 704-42 (1933); 41 F.A. VALLAT, SOME ASPECTS OF THE LAW OF STATE SUCCESSION (Transactions of the Grotius Society) 123 (1956).

77. See §§ II.B & III *supra*.

actual exercise or display of such authority."⁷⁸ Such intention and will, as demonstrated earlier, should become manifest through external acts of possession unequivocally conveying this *animus* to third parties. In this connection, the acts carried out on the Malvinas on November 6, 1820 by Colonel Daniel Jewitt, who was then in the service of the Argentine Navy and had been commissioned by the Buenos Aires government to take possession of the Islands, clearly achieved this effect. There Jewitt performed a solemn ceremony of possession and the flag was hoisted with a salute of twenty-one guns in the presence of many vessels of other nationalities — according to Governor Vernet's report of 1832 more than fifty in number — many of whose masters were even notified in writing of the act of sovereignty and of the prohibition to fish or kill cattle on the Islands under penalty of detention, and the remission of the infringers to Buenos Aires to be tried.⁷⁹ It should be noted that despite the constant visits of sealers and whalers the Malvinas were uninhabited at the time and, in this connection, Jewitt's act of appropriation seems to more than amply satisfy the standards required by precedents.

In the *Clipperton Island* award, for example, the arbitrator held that the document drawn up and signed by Lieutenant de Kerweguen of the French Navy on board a vessel while cruising one-half mile off Clipperton Island — followed by geographical notes and a landing by some members of the crew but without any visible signs of sovereignty being left there — in the absence of any superior title on the part of Mexico, was sufficient to establish French sovereignty. On this assumption that act alone was held sufficient to invalidate occupation of the island by Mexico in 1897.⁸⁰ As in the *Clipperton Island* case, where the arbitrator attached great importance to the publication of the French instrument of possession in the Honolulu journal, "The Polynesian," the taking of possession of the Malvinas was published both in Buenos Aires and Salem, Massachusetts.⁸¹ It should be further noted that the Buenos Aires government

78. Decision of Apr. 5, 1933 on the Legal Status of Eastern Greenland (Den. v. Nor.), 6 I.L.R. 95, 97 (Perm. Ct. of Int'l Justice, 1933).

79. See note 81 *infra*. H. S. Ferns acknowledges that the taking of possession existed and that: "No one challenged this act, and there does not appear to have been much to challenge." FERNs, *supra* note 51, at 225. The author of this article states that nothing much may be added, except the acquisition of sovereignty by the United Provinces over the Islands.

80. *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*, 26 AM. J. INT'L L. 390, 394 (1932); *Clipperton Island Award* (Fr. v. Mex.), 6 I.L.R. 106 (Victor Emmanuel III, King of Italy, Sole Arbitrator, 1931).

81. Salem Gazette, June 8, 1821 reports that Captain Orne who arrived here on Tuesday last from Falkland Islands, has furnished us with the following act of sovereignty (Circular) for publication:

National Frigate Heroína, Port Soledad, 9th Nov. 1820: "Sir, I have the honour to inform you of my arrival at this Port, to take possession of these islands, in the name of the Supreme Government of the United Provinces of South America. This ceremony was publicly performed on the 6th day of this present November, and the National Standard hoisted at the Fort, under a salute from this Frigate, in the presence of several citizens of The United States and Subjects of Great Britain, I am, etc. D. Jewett." Capt. W. B. Orne, Ship *General Knox*, of Salem.

had commissioned Daniel Jewitt to perform such act and subsequently acknowledged it.⁸²

In the *Palmas Island* case the arbitrator expressly admitted that:

The acts of indirect or direct display of Netherlands' sovereignty at Palmas (or Miangas) especially in the eighteenth and early nineteenth centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.⁸³

Now, while it is true that no settlement was left on the Malvinas in 1820, there were both indirect and direct state acts on the part of the United Provinces of the Río de la Plata which followed up on Jewitt's acts. In 1821, the government issued a decree dated October 21, setting forth fishing regulations, establishing taxes and contemplating grants of land by the government on the Patagonian coasts.⁸⁴ In 1823 a commander for the Malvinas was appointed, Pablo Areguatí, and an actual concession of land was made.⁸⁵ In February, 1824 the new commander actually went to the Islands together with Mr. Robert Schofield.⁸⁶ In

As reprinted in 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 422 (1836). See Ruda Report, supra note 22, at 6-7. The event was also reported in El Argos de Buenos Ayres, (No. 31), Nov. 10, 1821, at 211, col. 1, which cited also el "Redactor de Cadiz." See also J. WEDDELL, A VOYAGE TOWARDS THE SOUTH POLE (PERFORMED IN THE YEARS 1822-24, CONTAINING AN EXAMINATION OF THE ANTARCTIC SEA, TO THE SEVENTY-FOURTH DEGREE OF LATITUDE AND A VISIT TO TIERRA DEL FUEGO, WITH A PARTICULAR ACCOUNT OF THE INHABITANTS . . .) 103-04 (1825).

82. See the introductory paragraph of the June 10, 1829 Decree of the Government of Buenos Aires, which speaks about "acts of dominion in the said Islands." See generally note 13.

83. See *Palmas Island Case* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 831, 867 (1931). Max Huber was speaking there about an island inhabited by natives; however, the concept is equally applicable to uninhabited islands. What is important is that the Malvinas like Palmas, were far removed from the centers of population.

84. See text of Decree of Buenos Aires, Oct. 22, 1821, Fishery on the Patagonian Coast, in 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 421 (1836).

85. *Id.* at 420; Ruda Report, *supra* note 22, at 7. The decree nominating Pablo Areguatí is in Archivo General de la Nación, Buenos Aires, Division Colonia, Sección Gobierno, Guerra y Marina, 1817-1826, N° 48, expediente 18.

86. "An expedition was, in effect, fitted out, composed of the Brigs, *Fenwick* and *Antelope*, which carried out, among other things, a quantity of horses, and of the Schooner, *Rafaela* (which was armed) for Seal-fishery." See Vernet Report, *supra* note 54, at 419.

June, 1826 a further expedition arrived headed by Louis Vernet and an actual colony began to be established.⁸⁷ In 1828 Vernet received a concession of land from the government⁸⁸ and, finally, on June 10, 1829 the decrees creating the Military and Political Government of the Malvinas and appointing Louis Vernet as governor were issued.⁸⁹ During those years, *i.e.*, before and after 1828, the colony began to prosper⁹⁰ and in August 30, 1829, *i.e.*, before the British protest, a warship was assigned to the defense of the Islands.⁹¹ It seems quite evident that all these acts were open and public.⁹²

The cumulative effect of these events, it is submitted, clearly meets the standards required by international case law for establishing, in the absence of any competing title, an open, peaceful, actual, sufficient, continuous and, given the circumstances, reasonably effective display of state activities over the Malvinas. If one considers the distances involved, the means of communication available during the first half of the nineteenth century and the fact that the Malvinas were uninhabited, these acts were indeed more than responsive for the purposes of acquiring good title. On this specific point the Permanent Court of International Justice in the *Eastern Greenland* case stated that:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make out a superior claim.⁹³

87. CAILLET-BOIS, *supra* note 21, at 186-99. See LESSON, RELACH AUX ILES MALOUINES, LA REVUE DE DEUX MONDES 174-95 (2d ed. 1831). See also GOEBEL, *supra* note 20, at 434-37.

88. The text of this Decree, dated Jan. 5, 1828 is in 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 420 (1836).

89. See note 55 *supra*; Ruda Report, *supra* note 22, at 7.

90. "By this time the Colonists had become accustomed to the climate, they had commenced various labours, and counted on a certain and decent subsistence; they had become, particularly, very much attached to the Colony; and they considered themselves happy, and I likewise considered them so." Vernet Report, *supra* note 54, at 423.

91. *Id.* It is surprising how superficially some authors cover this point, *i.e.*, Y. Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 109 (1965), states that after 1820 no acts of occupation followed and no effective control was exercised there by the Buenos Aires authorities who confined themselves to the appointment of a Governor, who "never visited the Islands."

92. As stated in the *Palmas Island* case, there was no duty to notify other states, as was later provided in the Berlin-Congo Conference of 1885. That the display of sovereignty was *open* and *public* is referred to in the Vernet Report in the following words:

In the mean time, prior and subsequently to the Decree of 5th January, 1828 Merchant Vessels of all Nations frequented the Colony in their voyages to the Pacific, and on their return from thence. They there took in fresh provisions, refitted themselves and recruited their sick. So content were they with the treatment they received, that they viewed the Establishment of the Colony, as a great benefit to commerce in general . . . The Fishing Vessels, on the contrary, which trafficked among the Islands, began to avoid coming in contact with it . . . Whenever they did visit it, they received the best treatment. I have not spoken with any of them, that was not aware of the prior dominion of the Spaniards, of the prohibition imposed by them to frequent those Seas, and of the Act of Sovereignty exercised by this Republic in 1820.

20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 422 (1836).

93. See note 65 *supra*. See also the Clipperton Island Award (Fr. v. Mex.), 6 I.L.R. 97 (Victor Emmanuel III, King of Italy, Sole Arbitrator, 1931).

In connection with this last point — which refers to the issue of a competing claim — if any state in the world could be considered to have had “a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights” that nation was England not only because of its naval development and global interests at the time but also because it had maintained consular relations since 1823 with Argentina and had signed a Treaty of Amity, Commerce and Navigation with Buenos Aires in 1825. This latter agreement further referred in various articles to the *territory* of the Republic for the purposes of defining the rights of British subjects and contains no reservation whatsoever in regard to the Malvinas or Falkland Islands.⁹⁴

The first and only British letter of protest came, as observed earlier, in Mr. Woodbine Parish's letter of November 19, 1829. In this connection, it is difficult to see how this letter — which involved titles dating backwards for more than half a century — could have annulled a title which had been perfected earlier, by Spain first and by Argentina later, or affected in any way the legitimacy of the continuing exercise of Argentine sovereign rights subsequently to that date and even after the depredations committed by the *Lexington*.⁹⁵ As recounted earlier, following the U.S.-Argentine incident, another governor was appointed to continue the colony.⁹⁶

94. See Treaty of Amity, Commerce and Navigation, between His Majesty and the United Provinces of Río de la Plata (Feb. 1825), 22 BRITISH AND FOREIGN STATE PAPERS (1824-1825), at 29 (1846). D. P. O'Connell states that: “In 1774 the English Garrison abandoned the islands, but leaving behind the British flag and a lead plate In 1832 Great Britain again took possession of the islands in spite of protests by Argentina. . . . The lapse in British settlement was thus fifty-eight years. *Had Argentina in this period occupied the islands she might have gained a good title . . .*” (Emphasis supplied). O'CONNELL, *supra* note 50, at 512. J. BATY, in THE CANONS OF INTERNATIONAL LAW 390 (1930), when discussing the Malvinas issue, bluntly states: “The British filched the islands in 1833. . . .”

95. It is important to stress that Argentina's rights did not rest on acquisitive prescription. Such argument would assume that the rightful origin of its occupation could not clearly be established and that, therefore, it required an element of consolidation through lapse of time which was capable of being “disturbed” by a letter of protest. On this latter point, the Permanent Court of International Justice held expressly that, in view of the peaceful origin of Danish exercise of sovereignty, *mere protests from Norway did not alter the peaceful character of such activity*. See Decision of Apr. 5, 1933 on the Legal Status of Eastern Greenland (Den. v. Nor.), 6 I.L.R. 95, cited in 1933 P.C.I.J., ser. A/B, No. 53, at 44, 62. The *Lexington* experience cannot be interpreted as creating a temporal interpretation of state sovereignty over the islands. Even if it had it would still not have changed the situation. In the *Eastern Greenland* case the Court stated that Norwegian sovereignty in Greenland was not lost when the first two Nordic settlements in Greenland were massacred by the aboriginal population around the year 1500. *Clipperton Island Award* (Fr. v. Mex.), 6 I.L.R. 99, 100 (Victor Emmanuel III, King of Italy, Sole Arbiter, 1931). In the *Palmas Island* case Judge Huber stated that: “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 according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestedly displayed or again regions accessible from for instance, the high seas.” *Palmas Island Case* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 831, 840 (1931).

96. Decree of Sept. 10, 1832. *La Gaceta Mercantil* (No., 2577), Sept. 17, 1832, at 2, col. 2; *El Lucero*, *Diario Político, Literario y Mercantil*, Buenos Aires, Sept. 15, 1832, at 2, col. 3.

VI. TITLES CLAIMED BY GREAT BRITAIN

To the extent that Great Britain had consented to the continued presence of the Spanish colony in Puerto de la Soledad in 1771, the claim advanced in 1829, which extended to the entire archipelago, constituted a totally novel claim. However, the English claim, as expressed in Palmerston's correspondence with Moreno after the events of 1833, the Spanish claim, as expressed through its reservation of rights in its 1771 declaration, and the Argentine claim, as advanced after 1833 and ever since that date, had this much in common: that the archipelago constituted then, as it still constitutes today, a single territorial unit. By this token, if the Argentine display of state activity from 1820 until 1833 did not as a matter of fact make itself felt on every nook and cranny of the archipelago, its legal effects certainly did.⁹⁷

Whatever the legal basis Great Britain chose to adduce in justification of its act of 1833, under normal circumstances, *i.e.*, unless otherwise directed by the litigants, an international court would be free to establish the legal interpretation of the military takeover of the Malvinas by Great Britain in light of international law and of its own interpretation of the circumstances of the case. This exercise, which essentially involves ascertaining the rule of decision which governs the case, requires an investigation of how these facts should be subsumed within the existing categories of acts which international law, as conceived in the nineteenth century, had developed in connection with the acquisition of territorial sovereignty by nations. In this connection, this writer considers occupation, conquest and subsequent prescription.

A. *Occupation*

One of the essential features of occupation as a means for establishing state sovereignty over new territory is that such territory should be a *res nullius*, *i.e.*, not subject to the sovereignty of another state. As a general proposition, this rule can be considered as a well-settled principle of international law.⁹⁸ Therefore, it

97. C. H. M. Waldock has argued that: "When uninhabited or very sparsely inhabited territory is taken into sovereignty, the occupying state may not necessarily be required to maintain even a single official permanently on the spot. It is enough if the state displays the function of a state in a manner corresponding to the circumstances of the territory." WALDOCK, *supra* note 7, at 336. The absence of any competing title in the *Eastern Greenland* case allowed the World Court to hold that the acts of colonization by Denmark and Norway over specific points in Greenland established sovereignty over the entire territory: "His (the King of Denmark and Norway) rights over Greenland were therefore not to be regarded as being limited to the colonised area". See the Clipperton Island Award (*Fr. v. Mex.*), 6 I.L.R. 99 (Victor Emmanuel III, King of Italy, Sole Arbiter, 1931).

98. OPPENHEIM, *PEACE*, *supra* note 17, §§ 220-21, at 507-08; HALL, *supra* note 18, at 125; I. J. WESTLAKE, *INTERNATIONAL LAW, PEACE*, 98 (2d ed. 1910) [hereinafter cited as WESTLAKE]; R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 6 (1962); I. L. FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 746 (1925) [hereinafter cited as FAUCHILLE]; 3 C. E. ROUSSEAU, *DROIT*

is submitted that the British *physical* occupation of the Malvinas or Falkland Islands in 1833 could not be considered a *legal* occupation because, as shown elsewhere in this article,⁹⁹ the Islands were definitely subject at the time to Argentine sovereignty based on occupation and settlement both by Spain up until 1811 and by Argentina itself after 1820.

The British claims to title, based purely on constructive possession maintained through symbolic relics, were baseless not only in law but also in fact. In law because: (1) the theory that possession could be maintained on an island without a settlement for such an extended period of time (59 years), as leading British legal writers have acknowledged specifically with reference to the Falklands,¹⁰⁰ was itself contrary to the accepted practices of the time; (2) following the *Palmas Island* rationale, such a title, if it had been so recognized, could not have prevailed over a superior title based on effective possession and the actual and peaceful display of another state's sovereignty; and (3) moreover, England had waived its rights to the Islands in 1790 by treaty. The alleged title was baseless in fact also because the relics and the lead plate had been removed by the Spanish in the eighteenth century, and the English knew about it. In this connection, there is only one period when the Islands could conceivably have been viewed as a *territorium nullius (de facto)* by states which did not recognize the Latin American doctrine of constructive possession based on the *uti possidetis iuris* rule¹⁰¹ and that was between 1811 and 1820. However, during this time, when all Spanish presence on the Islands had been physically withdrawn therefrom, England did not occupy them. And if this circumstance is not yet another proof of a British *animus derelinquendi* one should be able to argue that it is, indeed, the nearest thing to it.

B. Conquest

To the knowledge of this writer, the concept that acquisition of the Islands was effected by conquest has not been advanced by Great Britain. Furthermore, it should be observed that it is difficult to see how this argument could be put forward without actually conceding that the occupation of 1833 was an act of pure force. However, even taken as a second line of defense, the legal category of conquest, as developed by international law after the French Revolution and during the nineteenth century, essentially presupposed situations involving full-scale military hostilities resulting in the complete subjugation of one of the

INTERNATIONAL PUBLIC § 117, at 156 (1977) [hereinafter cited as ROUSSEAU]; CAVARE, *supra* note 53, at 586; I. M. SIBERT, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* § 600, at 860-70 (1951) [hereinafter cited as SIBERT]; L. DELBEZ, *LES PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC* 266 (1964) [hereinafter cited as DELBEZ]; J. L'HUILLER, *ELEMENTS DE DROIT INTERNATIONAL PUBLIC* § 417, at 244 (1950).

99. See §§ III, IV & V *supra*.

100. See note 50 *supra*.

101. It is interesting to note that Professor Gross Espeill of Uruguay, in a lecture given in Buenos Aires in November 1982, has argued that the traditional theory that England was not bound by the *uti possidetis iuris* rule is false and not supported by case law.

belligerents by the other. The Permanent Court of International Justice has acknowledged this concept when it stated that: "Conquest only operates as a cause of loss of sovereignty when there is a war between two states and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious state."¹⁰² At that point, according to the conception developed in periods when the threat or use of force in international relations was a lawful instrument of the external policy of states, the victorious power could validly annex the territory of the vanquished state. Territorial acquisitions derived by conquest, however, were basically associated with the extinction of the losing state as an independent political entity. As Professor Charles Rousseau expresses it:

La conquête (*debellatio* dans la doctrine classique ou *subjugation* chez les auteurs anglo-saxons) . . . suppose qu' à la suite d'opérations militaires . . . un Etat a complètement anéanti son adversaire . . . Elle est au fond moins un procédé distinct d'établissement de la compétence territoriale qu' un mode particulier d'extinction de l'Etat.¹⁰³

For this reason, the consent of the extinguished state was not a condition required to perfect the transfer of territorial rights over areas which thereby had become vacant. And precisely because of this circumstance the substitution of the new state's sovereignty occurred immediately, without requiring a subsequent consolidation of title through the lapse of time nor any other formality suggesting acquiescence or consent on the part of the former belligerent, who no longer survived as an independent state.

The characterization of the British seizure of the Islands in 1833 as an acquisition of territorial title by conquest would seem altogether inappropriate. There was no war at the time between England and Argentina, neither declared nor undeclared, and although the larger part of the local population of the Islands was shipped back to Buenos Aires, the Argentine Confederation as such was not "subjugated." Indeed diplomatic relations with Great Britain even continued despite the strong protests made against these acts. When an act of force results in physical occupation of only a part of the territory of a state, as Cohen Jonathan has pointed out specifically in connection with the Malvinas, such occupation could not have the effect of transferring sovereignty to the acting state except by a treaty of peace or of cession, even if such treaty was imposed by

102. Decision of Apr. 5, 1933 on the Legal Status of Eastern Greenland (Den. v. Nor.), 6 I.L.R. 95 (Perm. Ct. of Int'l Justice, 1933); Clipperton Island Award (Fr. v. Mex.), 6 I.L.R. 95, 99-100 (Victor Emmanuel III, King of Italy, Sole Arbitrator, 1931).

103. ROUSSEAU, *supra* note 98, § 141, at 190; VATTEL, *supra* note 18, § 197; I G. SCHWARZENBERGER, INTERNATIONAL LAW 297 (3d ed. 1957). Westlake discusses conquest in the context of the extinction of states. WESTLAKE, *supra* note 98, at 63; cf. SIBERT, *supra* note 98, at 891-92. L. Delbez explains that because the defeated state is extinguished as a subject of international law its territory becomes a *res nullius* and therefore subject to occupation. DELBEZ, *supra* note 98, at 268-69.

force.¹⁰⁴ However, where the state which suffered an alien occupation of a portion of its territory did not sign such a treaty, the indication of its renunciation, acquiescence or consent to the new *status quo* had to be established through other means before the occupying state could acquire title.¹⁰⁵ In this connection, the nearest legal category corresponding to this type of situation would seem to be that of acquisitive prescription.

C. *Acquisitive Prescription*

Acquisitive prescription has been defined 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.”¹⁰⁶ Acquisitive prescription is distinguished from “extinctive prescription” (“prescription liberatoire”) in that the latter refers to the law of “limitation” by which claims generally — including financial claims, damages, etc. — which are not presented or asserted by the affected state for long periods of time might be held by an international court to have lapsed and no longer be enforceable. As Johnson explains it “extinctive

104. Cohen Jonathan, *supra* note 11, at 240-41.

105. FAUCHILLE, *supra* note 98, at 765 states that after 1815 invasion and occupation were not *per se* sufficient titles to acquire title to territory as against another state without this being sanctioned by a peace treaty or accepted by the consent of the population. *Id.* at 765-66. Moore states that: “[a] territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is still entitled to the full benefit of the law of postliminy.” 1 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW § 87, at 291 (1906). Chief Justice Marshall in *American Insurance Co. v. Canter* stated that: “The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace.” 26 U.S. (1 Pet.) 511, 540 (1828). “The annexation by one state of part of the territory of another state which remains an international person cannot produce the legal effects of an annexation unless it was effected with the co-operation or the agreement of the state whose territory has been dismembered.” *Bindels v. Administration des Finances*, Court of Cassation, Belgium, June 16, 1947, 14 I.L.R. 45, 49. *Cf. Deneffe v. Administration des Finances*, Court of Cassation, Belgium, Jan. 26, 1948, 15 I.L.R. 60.

106. OPPENHEIM, PEACE, *supra* note 17, § 242, at 576. A leading article on the subject defines it as the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor, in the case of sea territory neighboring states and other states whose maritime interests are affected) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable period of time to refer the matter to the appropriate international organization or international tribunal or — exceptionally in cases where no such action was possible — have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.

Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L. 332, 353-54 (1950) [hereinafter cited as Johnson].

prescription" is built on the assumption that "the failure to present the claim must be due to negligence or laches of the claimant party and not due to the obstruction of the defendant" and that, "as applied to property law . . . though the original possessor can no longer enforce (his claims) by action, his substantive rights are not abolished."¹⁰⁷ On the other hand, "acquisitive prescription" is invoked as a means by which a state acquires sovereign rights over territory *erga omnes* based on undisturbed possession over relatively long periods of time.¹⁰⁸ Although immemorial possession of territory in instances where the validity of the original title cannot clearly be established is sometimes described as a function of "acquisitive prescription," the type of "acquisitive prescription" which might be relevant to the Anglo-Argentine dispute over the Malvinas is that which is akin to, though naturally not identical with, the concept of *usucapio* as developed in Roman law and which is invoked as a means for curing a defect in title resulting from usurpation of territory of another's sovereignty by the consent and acquiescence of the former sovereign.¹⁰⁹

The concept of *usucapio* is clearly borrowed from municipal law and its operation in international law is usually predicated on the need to preserve peace and stability in international relations. However, whereas in domestic law the sanction of *usucapio* and the conditions of its operations are clearly spelled out by a civil code, special statute or well-settled rule derived from precedents — and, therefore, the owner whose property rights have been obstructed by adverse possession is "on notice" that unless he sues within the established time frame his

107. Johnson, *supra* note 106, at 332. See generally Ralston, *Prescription*, 4 AM. J. INT'L L. 133 (1910). M. Sorensen believes that both "acquisitive" and "extinctive" prescriptions are two elements of a single legal category except that:

Ces formes juridiques se distinguent l'une de l'autre, non seulement par des différences dans les normes positives auxquelles la législation de chaque pays peut subordonner leur application pratique, mais aussi par les divers objets auxquels elles se rapportent; on admet généralement, en effet, que la prescription acquisitive s'applique aux droits sur des espèces et la prescription libératoire aux droits sur des choses de genre.

Sorensen, *La Prescription en Droit International*, 3 ACTA SCANDINAVICA JURIS GENTIUM 145 (1932) [hereinafter cited as Sorensen]. J. Symonides, who strongly disagrees with this approach says that: "In the Polish language there are two terms — *zasiendzenie*, i.e. acquisitive prescription and *przedawnienie*, i.e. extinctive prescription." Symonides, *Acquisitive Prescription in International Law*, 3 POLISH Y.B. INT'L L. 111, 112 (1970) [hereinafter cited as Symonides]. See generally P. A. VERYKIOS, *LA PRESCRIPTION EN DROIT INTERNATIONAL PUBLIC* (1934). See also Johnson, *Consolidation as a Root of Title in International Law*, CAMBRIDGE L. J. 215 (1955).

108. C. C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 116, at 192-96 (1922) [hereinafter cited as HYDE]; I. G. H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, ch. IV, § 63 at 432-42 (1940) [hereinafter cited as HACKWORTH].

109. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 157 (3d ed. 1979). Brownlie seems to believe that Acquisition Prescription has three forms: (1) Immemorial Possession (where the origin of title is uncertain but is presumed to be legal); (2) Prescription under conditions similar to those required for *usucapio*: uninterrupted possession, *Justus titulus*, even if it were defective, good faith, and the continuance of possession for a period defined by the law; and (3) *Usucapio*, modified and applying under conditions of bad faith. Thus Hall, Oppenheim and Fauchille — he states — do not require good faith in the context of international law.

rights will be lost — in international law there is: (1) an element of frustration in that there is no compulsory jurisdiction where the adverse possessor can be compelled to appear; (2) an element of uncertainty both with respect to the time frame and other conditions of its operation and, indeed with respect of the very existence of *usucapio* as a general legal category sanctioned for all types of cases;¹¹⁰ and perhaps (3) an element of scandal in that even writers who tend to admit *usucapio*, such as Hall for example, have cautioned that:

[W]hile under conditions of civil life it is possible so to regulate its operation as to render it the handmaid of justice, it must be frankly recognized that internationally it is allowed, for the sake of interests which have hitherto been looked upon as supreme, to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment, but to establish itself permanently and solidly.¹¹¹

Writers who admit *usucapio* as a category of international law are not all in agreement as to what exactly causes the displacement of sovereign title in favor of the usurper. Whereas some writers have spoken of tacit renunciation of the

110. Grotius admitted immemorial possession but rejected *usucapio* of the Roman Law. DE IURE BELLI AC PACIS LIBRI TRES § 1, at 7, 9 as reprinted in CLASSICS OF INTERNATIONAL LAW (J. B. Scott ed. 1925); cf. OPPENHEIM, PEACE, *supra* note 17, § 242, at 575. Among the authorities who reject acquisitive prescription of the type akin to *usucapio* are HEFTER, LE DROIT INTERNATIONAL DE L'EUROPE § 12 (4th ed. 1883); G. F. MARTENS, PRECIS DU DROIT DE GENS MODERNE DE L'EUROPE § 71 (Vergé ed.); 1 RIVIER, PRINCIPES DU DROIT DES GENS 182-83 (1896); 2 HOLD FERNECK, LEHRBUCH DES VOLKERRECHTS 107; LISZT, DAS VOLKERRECHT § 30 (iii)(1) (12th ed. 1925). See also the dissenting opinion of Judge Moreno Quintana to the Judgment of April 12, 1960 of the International Court of Justice in the *Case Concerning the Right of Passage over Indian Territory* (Port. v. India) which stated that the reasoning in the majority opinion "implies, by definition, a recognition that territorial sovereignty can be acquired by prescription, a private law institution which I consider finds no place in international law." 1960 I.C.J. 6, 88 (1966).

111. HALL, *supra* note 18, at 143. In domestic law the clear enactment of *usucapio* in a civil code, statute or well-settled rule derived from precedent provides a firm legal basis for its operation. In this connection, the enactment or legal norm that concedes a status of legitimacy to a situation which by its very definition is illegal should possess a rank, status or hierarchy which is at least equal to the rank, status of hierarchy of the enactment or legal norm which was violated in the first place because otherwise the contradiction between law and reality remains unresolved. Whereas in international law the rules pertaining to territorial sovereignty are in effect very firmly established, there is no general treaty or well-settled rule of general customary law which in all sincerity can be stated to have promulgated acquisitive prescription of the type akin to *usucapio* with equal vigor for all cases. In this connection J. Barberis mentions that Acquisitive Prescription is first designated by that name in the Anglo-Venezuelan boundary arbitration Agreement of Feb. 2, 1897 (*La Prescripción Adquisitiva y la Costumbre*, 4 JURISPRUDENCIA ARGENTINA 378, 381 (1967) [hereinafter cited as Barberis]). The writer also points out that acquisitive prescription has been applied namely in frontier disputes. In this connection C. C. Hyde remarks:

Thus the doctrine of prescription may be expected to be limited in its application and use to territorial differences involving comparatively narrow areas such as boundary disputes, and where the possessor invoking the principle relies upon a title which, although legally deficient in origin, is based on something more respectable than conquest.

HYDE, *supra* note 108, § 116, at 195.

affected state, others tend to emphasize, on the one hand, the mere acquiescence, express or implied, of the one state in the adverse possession of the other¹¹² in combination with, on the other hand, the general conviction of other states that the present conditions of things is in conformity with international order.¹¹³ This latter element — the role of the international community — is also recognized even by hard-liners who describe prescription as a function of the general principle of effectivity.¹¹⁴

In the specific case of the Malvinas dispute, title by acquisitive prescription was invoked by representatives of Great Britain in the discussions of 1964 held by Subcommission III of the Decolonization Committee at the United Nations and in the General Assembly.¹¹⁵ However, its applicability to the situation in the Malvinas was difficult to sustain because of the colonial nature of the dispute. In this latter connection, the mere invocation of prescription as a title to territory — with the exception of immemorial possession, which is not the case here — amounts to an admission that the initial title was originally defective. This in itself constitutes — even if the United Nations had not recognized it, which subsequently to those discussions it in fact did — a strong indication of which

112. "It must be clear that it is uninterrupted and undisturbed possession implying full acquiescence on the part of the foreign and dispossessed claimant, which in theory serves to rob it of its rights and to lodge them in the actual occupant." HYDE, *supra* note 108, § 116, at 194. The principle that possession appears as undisputed ("incontestatio possessio") on the part of the former sovereign before the international community is supported by the following cases: The Cravairola Boundary Case (Switz v. Italy), award issued by Mr. George P. Marsh on Sept. 23, 1874. 2 J. B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2027 (1898); the award of the President of the French Republic, July 24, 1875 (Gr. Brit. v. Port.) with respect to the islands of Inyack and Elephant in the Delagoa Bay. *Id.* at Vol. 5, 4984-58; France and the Netherlands: Award of the Emperor of Russia as to the boundary between France and Dutch Guiana. *Id.* at Vol. 5, 4869-70. See the U.S. boundary cases in HACKWORTH, *supra* note 108, § 63, at 432-42. See also *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden* (Oct. 23, 1909), 4 AM. J. INT'L L. 226-33 (1910); *The Chamizal Arbitration between the United States and Mexico* (June 10, 1911), 5 AM. J. INT'L L. 782 (1911); the Palmas Island Case (Neth. v. U.S.), 2 R. INT'L Arb. Awards 831 (1931); and in the Fisheries Case (U.K. vs. Nor.), 1951 I.C.J. 116.

113. OPPENHEIM, PEACE, *supra* note 17, at § 243. J. Barberis believes that acquisitive prescription is a manifestation of international customary law and therefore requires an *opinio iuris* that the occupation is legitimate and peaceful. Barberis, *supra* note 111, at 384. Sorensen, who believes that prescription is a general principle of law ("et . . . truve son fondement dans la conscience juridique des peuples") recognizes, however, the role of the international community. Sorensen, *supra* note 107, at 151.

114. Effectiveness of possession in the case of prescription is determined in a larger measure by the attitude adopted by the international community as compared to the case of occupation.

The appearance of prescription is made doubtful by the opposition on the part of the international community, not only in the form of non-recognition but in a concrete action expressed in a determined support rendered to the claims of the state which had sustained a loss of part of its territory.

Symonides, *supra* note 107, at 118. C. DE VISSCHER, THEORIES ET REALITÉS EN DROIT INTERNATIONAL PUBLIC 255-56 (2d ed. 1960).

115. Cf. Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/5800/Add. 7, p. 53 (1965).

party suffered the colonial action, whose territory was dismembered and, hence, whose self-determination is at issue for the purpose of decolonization. Concerning the merits of the argument of prescription *per se*, the evolution of the dispute shows, not only that Argentina cannot be held to have acquiesced to the British occupation because of its continuous attitude of protest, but also that there are clear indications that there is no general conviction on the part of the international community that Britain's continuing occupation of the Islands is in conformity with the international order.

Indeed the attitude of Argentina in the face of the British military occupation of January 2, 1833 was of immediate protest. This is evidenced by Foreign Minister Maza's request for explanations to the British Chargé d'Affaires (January 16, 1833),¹¹⁶ the subsequent protest of the same minister (January 22, 1833),¹¹⁷ and the letter of protest addressed by the Minister Plenipotentiary of the United Provinces of the Río de la Plata to the Court of St. James, Don Manuel Moreno, to Viscount Palmerston (June 17, 1833).¹¹⁸ Palmerston's response dated January 8, 1834, as explained earlier,¹¹⁹ invoked the arguments of prior discovery and settlement, the reciprocal declarations with Spain of 1771 — which were attached to the letter but with the curious yet significant substitution of the word "counter-declaration" for "acceptance" in the heading of the declaration signed by Great Britain — and the theory based on the visible signs of sovereignty which had been left at Port Egmont on Saunders Island in 1774. However, despite the initial rebuff, Moreno's protests were renewed on December 29, 1834,¹²⁰ December 18, 1841,¹²¹ February 19, 1842¹²² and March 10, 1842.¹²³

116. MUÑOZ AZPIRI, *supra* note 7, at 107; 20 BRITISH AND FOREIGN STATE PAPERS (1832-33), at 1197 (1836).

117. MUÑOZ AZPIRI, *supra* note 7, at 108; 20 BRITISH AND FOREIGN STATE PAPERS (1832-1833), at 1198 (1836).

118. MUÑOZ AZPIRI, *supra* note 7, at 125; 22 BRITISH AND FOREIGN STATE PAPERS (1833-1834), at 1366 (1847). Palmerston's response of Jan. 8, 1834 is in *id.* at 1384.

119. See text accompanying notes 49-51 *supra*.

120. Moreno to Wellington, MUÑOZ AZPIRI, *supra* note 7, at 158.

121. Moreno to the Earl of Aberdeen, 31 BRITISH AND FOREIGN STATE PAPERS (1842-1843), at 1003-04 (1858). MUÑOZ AZPIRI, *supra* note 7, at 177. The tone of this letter, as well as that of the earlier letters, leaves little room for doubt about the intensity with which the Argentine government advanced the matter and the seriousness of its attitude.

122. Aberdeen had rejected the claim of Moreno in a letter dated February 15, 1841. MUÑOZ AZPIRI, *supra* note 7, at 183. It is worth transcribing a paragraph of the Earl of Aberdeen's response to establish the nature of the British posture. It read as follows:

The British Government cannot recognize to the United Provinces the right to alter an agreement concluded forty years before their emancipation, between Great Britain and Spain. As to their rights on the Islas Malvinas of Falkland Islands, Great Britain considers this arrangement as definitive. The Government of Her British Majesty communicates this measure to Mr. Moreno and at the same time the determination that the infringement of the unquestionable rights of Great Britain on the Falkland Islands shall not be allowed.

The Feb. 19, 1842 letter pursued the matter yet again. Moreno to Aberdeen II, MUÑOZ AZPIRI, *supra* note 7, at 185.

123. Following an interview between Moreno and Aberdeen held on February 21, 1842 Moreno's letter of March 10, 1842 said that from then onward, so that the silence of the United Provinces of the

The negative reactions which met these protests, together with the mechanical repetition on the part of Great Britain of the same legal posture — or lack thereof — revealed each time with greater clarity the reality which lay behind that mask of words, *i.e.*, that the occupation of 1833 had been an act based on pure force and that no amount of reasoning based on international law was going to alter the British intention of retaining the Islands at the expense of Argentina. It can be stated that the acquiescence of the dispossessed claimant, which is a condition *sine qua non* of acquisitive prescription,¹²⁴ should be appreciated by a court in light of the circumstances of the particular case. In this connection, the disparity of strength between the British empire in the nineteenth century and Argentina and, indeed, the very tone of the British responses each time the matter was raised go far towards explaining why comparatively long periods of time transpired during the nineteenth century without Argentina having corresponded with Great Britain on the Malvinas question. However, it seems pertinent to question if in a situation where a succession of protests is met by negative responses in which the respondent does not even condescend to give serious consideration to the arguments supporting such protests, in the absence of any alternative course of action or international organization where the case could be taken, as indeed was the case at that time, international law can really be construed to require the claimant-state to persist in the humiliating exercise of knocking its head against the brick wall.¹²⁵ That Britain herself clearly understood this aspect of the case is evidenced by an episode of decisive importance.

Río de La Plata should not be taken as implicit acquiescence ("implicita acquiescencia"), that he must expressly state that these "no pueden ni podrán jamás conformarse con la resolución del gobierno de S.M. . . . que consideran injustas y opuestas a sus manifestos derechos." Moreno to Aberdeen III, MUÑOZ AZPIRI, *supra* note 7, at 189.

124. Johnson, *supra* note 106, at 344.

125. In the *Chamizal* arbitration (Mex. v. U.S.) the Commissioners held that a failure on the part of Mexico to take action which might lead to violence in its relations with the United States could not be held to jeopardize Mexican rights. There the United States had invoked actual occupation of the Chamizal tract but it was held that Mexico's attitude had prevented title from arising by prescription. *The Chamizal Arbitration between the United States and Mexico (June 10, 1911)*, 5 AM. J. INT'L L. 782 (1911). If a nation has a right to its dignity and reputation, as Sir Thomas Holland acknowledges then it is submitted that international law cannot compel a state to put itself in the humiliating position of having to formulate new protests when the other state has clearly indicated that it does not wish to discuss the matter any further. HOLLAND, *supra* note 50, at 110. Cohen Jonathan has acknowledged that:

[l]e gouvernement argentin avait, à plusieurs reprises, exposé en détail pourquoi il jugeait l'occupation britannique illicite, et il avait chaque fois proposé au gouvernement britannique de régler pacifiquement ce litige, en recourant à l'arbitrage par exemple. Le Royaume-Uni y a toujours opposé un refus laconique, ne daignant même pas répondre aux objections présentées par le gouvernement de Buenos Aires;

Cohen Jonathan, *supra* note 11, at 243. On the significance of the Argentine attitude, he remarks: "Néanmoins est-il possible d'ignorer le sens exact donné à ce silence ainsi que tout le comportement ultérieur de l'Argentine qui marquait une volonté réelle de s'opposer à cette occupation de fait". *Id.* at 244.

On July 27, 1849 Palmerston was interrogated in the House of Commons by one Mr. Baille as to whether Buenos Aires still claimed the Falkland Islands. According to the newspaper reports of the following day, *i.e.*, the "Times" and the "Daily News," Palmerston responded that correspondence with Buenos Aires had been discontinued some years back and, according to the newspapers, took the position that it would not be advisable to revive a correspondence that had ceased by the acquiescence of one of the parties (Argentina) and the perseverance of the other (Great Britain).¹²⁶ On July 31, Moreno's instant reaction was expressed in an official letter to Palmerston referring to the episode in the House of Commons and expressly stating that the discontinuation of correspondence on the subject on the part of his legation in London should not be taken as acquiescence and that the Argentine Confederation had never consented to the usurpation of the islands.¹²⁷ Palmerston's response to this letter stated that:

. . . the reply which I was reported by some of the London Newspapers to have made by a question put to me by Mr. Baille in the House of Commons on the 27th of July, did not correctly describe the State of the question between the British Government (and) Buenos Aires respecting the Falkland Islands; and I have the honour to acquaint you that whatever the Newspapers may have represented me as having said on that occasion above referred to, I have always understood the matter in question to stand exactly in the way described by you in your letter.¹²⁸

This exchange shows that the British government not only did not want to receive any more protests but was even prepared to acknowledge in writing an understanding between the parties to the effect that the absence of additional protests would not imply acquiescence.

Correspondence between Britain and Argentina regarding the Malvinas was renewed, this time by Great Britain's minister in Buenos Aires, Mr. Edmund

126. Moreno to Felipe Arana, Aug. 2, 1849, MUÑOZ AZPIRI, *supra* note 7, at 193.

127. En consecuencia de esto, Porque el silencio de esta legación no se tome alguna vez por confirmación de la errónea asersión que el Gobierno de Buenos Aires y Confederación Argentina nunca ha consentido en el despojo de su soberanía en las islas Malvinas que le hizo el Gobierno inglés en 1833; y que lejos de retirar su protesta del 17 de junio de aquel año, reiterada en la del 29 de diciembre de 1834 ha mantenido sus indisputables derechos a aquella posesión, por todos los medios que han estado en su poder, y constantemente ha declarado su justa queja por falta de satisfacción.

The final paragraph stated:

En este sentido, han sido las órdenes que ha recibido y continúa recibiendo esta legación, para vigilar este asunto, y si de algún tiempo a esta parte, la correspondencia no ha sido tan active, esto es debido a estar la discusión casi agotada, y al estado de las relaciones desde la intervención; pero S.E. el vizconde Palmerston, en su alto saber, no ha podido sin duda equivocar la intermisión de la correspondencia con un consentimiento y aquiescencia tácita o expresa, que de ningún modo se ha dado por el gobierno argentino, a los actos a este respecto del gobierno de S.M.

Moreno to Palmerston, July 31, 1849, *id.* at 195-96.

128. Palmerston to Moreno, Aug. 8, 1849, *id.* at 197.

Monson, in 1884¹²⁹ in connection with the preparation of a government-sponsored map showing the Malvinas as part of Argentina. In the context of that dialogue, the Argentine Foreign Minister officially proposed that the issue be resolved through amicable and *legal methods adopted by civilized nations for the resolution of disputes of this kind*.¹³⁰ However, Britain did not give a response to this proposal and in February, 1886 the Argentine representative in London, Manuel Garcia, raised the proposal again with the British Foreign Secretary Lord Rosebery.¹³¹ On November 3, 1887 the Argentine minister in London, Luis L. Dominguez, acting on instructions,¹³² again requested a response to the above proposal in a letter addressed to the Marquis of Salisbury, who then held the position of British Foreign Secretary.¹³³ The belated response was eventually delivered on behalf of the Foreign Secretary by a Sir Thomas Villiers Lister on November 14, 1887 and it stated that from the point of view of the British government *the discussion was closed and could not be reopened*.¹³⁴ Yet another overture was made by the Argentine Foreign Minister Quirno Costa in a letter addressed to the British minister in Buenos Aires, Mr. F. Pakenham,¹³⁵ but it evoked a similar response.¹³⁶ On June 12, 1888 the British Chargé d'Affairs was told by the Argentine Foreign Minister, in a formal letter, that the Argentine claim would not be withdrawn neither as a result of the British position nor by "*the silence maintained by the British Government with respect to the Argentine proposals for arbitration*."¹³⁷

After these dialogues, the persistent attitude of Argentina was expressed not only in internal acts, which confirmed that there was no acquiescence on its part,¹³⁸ but also in diplomatic correspondence. Thus, reservations of sovereignty

129. Monson to Foreign Minister Francisco J. Ortiz, Dec. 15, 1884, *id.* at 204.

130. After requesting that the Minister submit a memorandum, which was attached to his letter to the British government, the letter stated the Argentine government's hopes: "[q]ue la discusión aplazada será nuevamente abierta por la contestación que el abajo firmado espera a sus observaciones, y resuelta por los medios amistosos y de derecho que hoy adoptan las naciones civilizadas para arreglar cuestiones de este género". Ortiz to Monson, Jan. 2, 1885, *id.* at 213-16.

131. C. A. SILVA, LA POLÍTICA INTERNACIONAL DE LA NACIÓN ARGENTINA, IMPRENTA DE LA CÁMARA DE DIPUTADOS 640 (official ed. 1946) [hereinafter cited as SILVA].

132. Foreign Minister Norberto Quirno Costa to Dominguez, May 11, 1887, MUÑOZ AZPIRI, *supra* note 7, at 349.

133. Dominguez to Quirno Costa, Nov. 18, 1887, *id.* at 350-51. See Dominguez to Salisbury, Nov. 3, 1887, *id.* at 351.

134. Lister to Dominguez, *id.* at 352.

135. Quirno Costa to Pakenham, Jan. 20, 1888, *id.* at 354.

136. Jenner to Quirno Costa, Apr. 13, 1888, *id.* at 360.

137. Quirno Costa to Jenner, June 12, 1888, *id.* at 360-61. It is interesting to note that a recent book by the Sunday Times of London states that a memorandum prepared in 1910 by a member of the Foreign Office research department, Mr. Gaston de Bernhart, showed that the British claim was indefensible, and therefore the book concludes: "Britain's reluctance to put the dispute before an international court was therefore understandable!" WAR IN THE FALKLANDS, *supra* note 3, at 40-41.

138. See SILVA, *supra* note 131, at 642; MUÑOZ AZPIRI, *supra* note 7, at 362-64. A further protest was lodged in 1908. See La Reivindicación Argentina de las Islas Malvinas, Comisión Internacional de Juristas, No. 28, June 1982, at 26, 33. In 1919 the Argentine Ministry of Marine ("Ministerio de

over the Malvinas were reaffirmed, whenever the occasion arose, in the context of discussions concerning radio-telegraph stations in the area,¹³⁹ venereal disease conventions,¹⁴⁰ postal communications and other subjects which had a bearing on the dispute.¹⁴¹

The treatment of the Malvinas question in the United Nations is discussed later in this article.¹⁴² However, the reference contained in General Assembly Resolution 2065 (XX) of December 16, 1965 to the effect that official notice was taken of "the existence of a dispute between the Governments of Argentina and the United Kingdoms of Great Britain and Northern Ireland concerning sovereignty over the said Islands" is directly relevant to the question of acquisitive prescription. This pronouncement of the General Assembly had the effect not only of overruling British arguments based on "acquisitive prescription" advanced before Subcommittee III of the Committee of 24 (Decolonization) during the debates on the sovereignty question¹⁴³ but also had the value of ascertaining, beyond any possible doubt, that the international community as a whole did not regard the British possession of the Malvinas as having been uncontested, undisturbed or consolidated as of that time. Whatever one can say about the substantive legal value of General Assembly resolutions, it would seem difficult to dispute the value of those resolutions as "evidence" of what the attitude of the international community was, and still is, with respect to this question. This resolution, together with those which followed it, evidences not only what the world, in general, thought about the substantive status of the matter, *i.e.*, that there was a dispute with regard to "sovereignty," but also

Marina") instructed all radiotelegraph stations in the Argentine maritime zone not to accept messages dispatched from the Malvinas. C. DIAZ CISNEROS, *LA SOBERANÍA DE LA REPÚBLICA ARGENTINA EN LAS MALVINAS ANTE EL DERECHO INTERNACIONAL*, ANALES DE LA FAC. DE CIENCIAS JURÍDICAS Y SOCIALES, LA PLATA 7, 121 (1951). See *In re Carlos Gleadell Watson* where the federal court of Río Gallegos in a judgment dated February 11, 1935 denied a petition for naturalization by a person born in Port Stanley on the grounds that

the lands in question continue to form *de jure* part of the territory of our State, and that accordingly the petitioner, born there, needs no naturalization, since he has acquired the natural-born citizenship where Article 1 of Law 346 recognizes in all who have been born on the national territory or its legal extensions.

In re Carlos Gleadell Watson (Feb. 11, 1935), 8 I.L.R. 180 (Argentina, Fed. Ct. of Rio Gallegos, 1941). On later incidents, see *Cronique des Faits Internationaux, Argentine et Grand-Bretagne*, 69 REVUE GEN. DROIT INT'L P. 111 (1965).

139. See the Protest lodged by Foreign Minister Angel Gallardo with the British Minister in Buenos Aires, Sir Malcolm Arnold Robertson, Nov. 30, 1925, in MUÑOZ AZPIRI, *supra* note 7, at 365.

140. See correspondence between Gallardo and the Belgian Minister in Buenos Aires Count Robert van der Straten Ponthoz in respect of the extension of the Bruxelles Convention of Dec. 1, 1924 to the Islands. In his letter of Dec. 28, 1926 the Belgian diplomat confirms to have communicated Gallardo's protest to his Government. *Id.* at 368-69.

141. See the note of Foreign Minister Carlos Saavedra Lamas of March 10, 1933, 395 and the later correspondence between Mr. R. A. Leeper and Foreign Minister Atilio Bramuglia, in *id.* at 375.

142. See § VII *infra*.

143. See note 115 *supra*.

whether or not Argentina, in view of its action taken on the matter in the United Nations, could be stated to have acquiesced to the British occupation.

In summary, on the issue of prescription, the following observations can be made: (1) The very notion of prescription is controversial and, except for the very special case of immemorial possession, its indiscriminate application to all cases could give rise to serious injustices; (2) Cases in which prescription has actually played a role in international adjudication have involved, by and large, territorial differences involving comparatively narrow areas such as boundary disputes where the parties had directed the court to apply prescription and articulated the conditions of its operation; in other cases, the tendency of the courts has been not to designate prescription by its name, *e.g.*, the *Palmas Island* case; (3) There are no clear precedents in case law which can be stated to have sanctioned on the international plane the category of prescription of the type akin to *usucapio* operating under conditions of bad faith where the territory in question was taken by force in circumstances not involving subjugation, or a treaty signed by the affected state; (4) Even admitting (though only *ad arguendum*) that this type of prescription actually exists as such, the evolution of the dispute shows that Argentina did *not* acquiesce in the British occupation of the Malvinas and Great Britain was aware of this circumstance; and (5) The discussion of the dispute at the United Nations in 1964 and 1965, Resolutions 2065 (XX) of 1965 and those that followed, which took notice of the existence of a dispute "concerning sovereignty," clearly show, on the one hand, that the international community did not — and does not — regard the British occupation to have been consolidated, and, on the other, that the underlying policies of prescription could be viewed as being in conflict with the general doctrine of decolonization as developed by the United Nations on the basis of Resolution 1514 (XV) of 1960. A discussion of this Resolution follows.

VII. DECOLONIZATION OF THE ISLANDS

With the establishment of the United Nations after World War II, the Anglo-Argentine conflict over the Malvinas became something more than a conventional territorial dispute involving the purely bilateral interests of two nation-states with respect to a piece of territory. By the action of Argentina, the conflict became a matter of regional concern within the Organization of American States.¹⁴⁴ By the action of Great Britain, it became a matter of universal concern

144. The Malvinas issue was raised by Argentina at the Interamerican Conferences of Panama (1938), Havana (1940) and was debated during the IX Interamerican Conference of Bogotá of 1948. The latter Conference voted Resolution XXXIII which stated the need to end colonialism and the occupation of territories in the Americas on the part of extracontinental powers. In 1949 a Special Committee created by that resolution classified Malvinas, not as a "colony," but as an "occupied territory." See J. J. CAICEDO CASTILLA, *EL PANAMERICANISMO* 84-85 (1961). See I C. DIAZ CISNEROS, *DERECHO INTERNACIONAL PÚBLICO* 620-24 (1955).

in the United Nations when in 1946, in the face of Argentina's opposition based on its territorial claim,¹⁴⁵ Great Britain included the Islands within the list of non-self-governing territories — in terms of Chapter XI of the Charter — which were subject to its administration. Great Britain thereafter regularly furnished reports to the Secretary General on the economic, social and educational conditions of the Islands as required by Article 73(c) of the Charter. This development in the United Nations is significant inasmuch as it established British acceptance of, and its voluntary compliance with, the general proposition that its relationship with the territory of the Islands could no longer be viewed as a purely domestic issue of Great Britain or even only a bilateral question with Argentina and that it had become a matter of international concern which would thereafter be subject to the supervision and control of the international community exercised through the instrumentality of the United Nations and in accordance with the purposes and principles of the Charter.

On December 14, 1960 the General Assembly issued its historic Declaration (the "General Declaration") on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV). This famous Resolution declared, among other things, "that the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace" and solemnly proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." This declaration, together with other General Assembly resolutions of a general character which supplemented it, gave sanction to the proposition that colonialism was contrary to the purposes and principles of the Charter, endangered world peace and security, constituted an international crime¹⁴⁶ and even rendered legitimate the struggle of peoples subject to alien domination to sever their colonial yoke.¹⁴⁷

145. General Assembly Resolution 66 (I) of Dec. 14, 1946 included a list of non-self-governing territories which reflected information presented by U.N. members for the purpose of Article 73 (e) of the Charter which included the Falklands. Argentine reservations were formulated from 1946 onward. *See inter alia*, 1 U.N. GAOR C.4 (25th mtg.) at 156, U.N. Doc. A/C.4/SR. 25 (1946); 2 U.N. GAOR C.4 (36th mtg.) at 34, U.N. Doc. A/C.4/SR. 36 (1947); 2 U.N. GAOR C.4 (47th mtg.) at 107, U.N. Doc. A/C.4/SR.47 (1947); 3 U.S. GAOR C.4 (52nd mtg.) at 7, U.N. Doc. A/C.4.SR. 52 (1948); 4 U.N. GAOR C.4 (110th mtg.) at 107, U.N. Doc. A/C.4/SR. 110 (1949); 5 U.N. GAOR C.4 (211th mtg.) at 62, U.N. Doc. A/C.4/SR. 211 (1951); 7 U.N. GAOR C.4 (256th mtg.) at 48, U.N. Doc. A/C.4/SR. 256 (1952); 8 U.N. GAOR C.4 (324th mtg.) at 52, U.N. Doc. A/C.4/SR. 324 (1953); 9 U.N. GAOR C.4 (411th mtg.) at 91, U.N. Doc. A/C.4/SR. 411 (1954); 10 U.N. GAOR C.4 (472d mtg.) at 14, U.N. Doc. A/C.4/SR. 472 (1955); 10 U.N. GAOR C.4 (479th mtg.) at 67, U.N. Doc. A/C.4/SR. 479 (1955).

146. 1970 Program of Action for the Full Implementation of the Declaration, G.A. Res. 2621, 25 U.N. GAOR Supp. (No. 28) at 1, U.N. Doc. A/8028 (1970); 1970 Declaration of Principles of International Law, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

147. *See* G.A. Res. 2105, 20 U.N. GAOR Supp. (No. 14) at 3, U.N. Doc. A/6014 (1965); G.A. Res. 2189, 21 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/6316 (1966); G.A. Res. 2326, 22 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/6716 (1967); G.A. Res. 2465, 23 U.N. GAOR Supp. (No. 18) at 4, U.N.

Although Resolution 1541 (XV) of December 14, 1960 had equated non-self-governing territories governed by Chapter XI of the Charter with "colonies" within the meaning of the General Declaration,¹⁴⁸ the colonial character of the British presence on the Malvinas Islands was expressly established by a succession of General Assembly resolutions starting with Resolution 2065 (XX) of December 16, 1965.¹⁴⁹ These resolutions constituted specific applications of the General Declaration to the particular situation of the Islands and their value as an authentic interpretation thereof was evident by the fact that they were issued by the same body which had sanctioned the General Declaration. Therefore, appreciation of their proper legal significance calls for an examination of how the basic principles of decolonization set forth in the General Declaration were applied by the General Assembly in light of the special nature of the British colonial presence on the Malvinas or Falkland Islands.

The General Declaration of 1960, which proclaimed the need to end colonialism, *in all its forms and manifestations*, had established two basic principles by which decolonization was to be achieved. One was the principle of self-determination and the other, the principle of territorial integrity. The principle of self-determination was contained in paragraphs (1), which stated that "All peoples have the right to self-determination," and (5)¹⁵⁰ of the General Declaration. The principle of territorial integrity was expressed in paragraphs (4)¹⁵¹ and (6) thereof.¹⁵² A similar emphasis on these two principles is given by the U.N.

Doc. A/7218 (1968); G.A. Res. 2548, 24 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/7630 (1969); G.A. Res. 2708, 25 U.N. GAOR Supp. (No. 28) at 7, U.N. Doc. A/8028 (1970); G.A. Res. 2878, 26 U.N. GAOR Supp. (No. 29) at 16, U.N. Doc. A/8429 (1971); G.A. Res. 2908, 27 U.N. GAOR Supp. (No. 30) at 2, U.N. Doc. A/8730 (1972); G.A. Res. 3163, 28 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/9030 (1973); G.A. Res. 3328, 29 U.N. GAOR Supp. (No. 31) at 7, U.N. Doc. A/9631 (1974). *See generally* A. CRITESCU, *THE RIGHT OF SELF-DETERMINATION* (1981) [hereinafter cited as CRITESCU].

148. G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960) contained an annexed list of "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 (e) of the Charter." This list set forth the express statement that "the authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type." *See* Claude, Jr., *Domestic Jurisdiction and Colonialism*, in *NEW STATES IN THE MODERN WORLD* 121, 126 (1975).

149. G.A. Res. 3160, 28 U.N. GAOR Supp. (No. 30) at 108, U.N. Doc. A/9030 (1973); G.A. Res. 31/49, 31 U.N. GAOR Supp. (No. 39) at 122, U.N. Doc. A/31/39 (1976); G.A. Res. 37/9, U.N. Doc. A/RES/37/9 (1982).

150. "Immediate steps shall be taken, in Trust and Non-Self Governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom."

151. "All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected."

152. "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter, approved by Resolution 2625 (XXV) of October 24, 1970.

The applicability of these general rules to the specific case of the Malvinas, in particular, the rule of self-determination of paragraph (5) of the General Declaration necessarily had to take account of the very special features of the British Colonial venture on the Islands. These special characteristics proceeded from the fact that when Great Britain forcefully occupied the Malvinas in 1833, the population which then inhabited the Islands, rather than being allowed to remain under the "subjugation," "domination" or "exploitation" of the European power as had been the case with most other colonial experiences, was simply displaced, shipped back to Buenos Aires and no longer allowed to return there. After this step had been accomplished, Britain undertook to transfer and implant its own population on the Island to carry out the colonial project, which from then onwards was developed without any Argentine participation whatsoever. In this connection, it should be noted that the exclusion of Argentines from the Falkland Islands is in sharp contrast with the climate of complete civic freedom under which a substantial British community has prospered in Argentina.

In the course of the debates in the United Nations on the Malvinas (Falkland) question held in 1964 before Subcommittee III of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence ("Special Committee"), Great Britain invoked the principle of self-determination and argued that it should be applied for the benefit of the British subjects which inhabited the Islands and claimed that decolonization should be brought about in accordance with the "wishes" of those inhabitants as freely expressed by them.¹⁵³ However, in view of the claim to sovereignty to the Islands on the part of Argentina, a literal reading of paragraph (5) of the General Declaration appeared to be in conflict with paragraph (6) of the same Document. If the sovereignty claim was valid, the exercise of a right of self-determination on the part of the local inhabitants could result in a "*disruption of the national unity and the territorial integrity*" of Argentina.

Quite apart from this dimension of the question, it is submitted that recognition of a right of "external" self-determination, *i.e.*, a right of self-determination which is exercised against other states and affects international status of territory,¹⁵⁴ would have been a sharp contradiction of the basic policies of the

153. See generally Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/5800/Add. 7, Annex, paras. 4-12 (statement by representative of the United Kingdom) (1964).

154. "Self-determination is concerned with a change of sovereign status, and not with how sovereignty is exercised thereafter." H. S. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS 49-50 (1967). Although the 1966 International Covenants on Human Rights have promoted self-determination on a wider front, this concerns primarily "internal" self-determination. This distinc-

General Declaration inasmuch as it had been sanctioned for the general benefit of peoples who had been subjected to the workings of an “*alien* subjugation, domination or exploitation.”¹⁵⁵ In this connection, it is difficult to envisage how the General Declaration could have been construed to benefit the same subjects of the colonial power who — whether they in fact knew it or not — had been the very instrument of the colonial venture through which British occupation and continuing presence on the Islands had been maintained in the face of Argentina’s protests. The wording of paragraph (1) of the General Declaration, as well as its entire philosophy, indeed suggests that a population subject to colonialism eligible for the exercise of a right of self-determination of the type which is here at issue should possess an identity and interests which can be separated or distinguished from the identity and interests of the colonizing power. The essence of colonialism was, and still is, the existence of a conflict of interests between a group which “exploits,” “dominates” and “subjugates” and another group (or groups) which have suffered such “exploitation,” “domination” or “subjugation.”¹⁵⁶

In this connection, the general belief and the very assertions of Great Britain that the Islanders wished, and still wish, to remain British is the best possible evidence that in this case there is a complete coincidence, if not an identity, of interests between them. Under this rationale there is little wonder that the so-called “Kelpers” wish to remain British. They “are” British and for this very reason the recognition of a right of self-determination for their benefit based upon a literal application of paragraph (5) to this very special form of colonialism — in which the candidates for exercising this right do not have a legitimacy

tion between “internal” and “external” self-determination is also acknowledged by Emerson, *Self-Determination*, 65 AM. J. INT’L L. 459, 465-66 (1971) and M. POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* [hereinafter cited as POMERANCE].

155. “The subjection of peoples to *alien* subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.” See generally A. MIAJA DE LA MUELA, *LA EMANCIPACIÓN DE LOS PUEBLOS COLONIALES Y EL DERECHO INTERNACIONAL* 104 (1968).

156. “The beneficiary of the right of self-determination is a self-conscious politically coherent community that is under the political subjugation of another community.” W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 156 (1977). This author further states that the element of *subjugation* is probably the most important characteristic required to validate a claim to the right of self-determination.” *Id.* at 157. A. Cristescu, Special Rapporteur of the U.N., states that the term “peoples” designates (a) a social entity having a clear identity and special characteristics (“*identidad evidente*” and “*características propias*”) which has (b) a (legitimate) relationship with the territory, “even if the people in question has been wrongfully expelled from it and artificially replaced by another population” (“*incluso si el pueblo de que se trata ha sido injustamente expulsado de él y reemplazado artificialmente por otra población*”). CRISTESCU, *supra* note 147, at 41. M. Pomerance comments that: “the ‘indigenous’ credentials of the population of Gibraltar and the Falklands are apparently eyed with some suspicion, a factor which (along with considerations of territorial extent and size of population) goes far towards explaining the Assembly’s preference for the territorial claims of Spain and Argentina.” POMERANCE, *supra* note 154, at 21.

relationship with the territory — would have done violence to the spirit of the General Declaration and defeated the very purposes of its enactment. Furthermore, from the viewpoint of the sovereignty issue, the British assertion contained the curious proposition that *British subjects* should be vested by the United Nations with supreme authority to decide, as umpires of final resort and in accordance with their own “wishes,” the ultimate outcome of the territorial dispute between England and Argentina, and with the added peculiarity that the umpires potentially could decide, if they so “wished,” that the territory really did not belong to either of these states because it belonged to themselves only.

It is against this general background of issues that the General Assembly, on its 1398th plenary meeting held on December 16, 1965, issued Resolution 2065 (XX) which is transcribed below:

The General Assembly,

Having examined the question of the Falkland Islands (Malvinas),

Taking into account the chapters of the reports of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples relating to the Falkland Islands (Malvinas), and in particular the conclusions and recommendations adopted by the Committee with reference to that Territory,

Considering that its resolution 1514 (XV) of 14 December 1960 was promoted by the cherished aim of bringing to an end everywhere colonialism in all its forms, one of which covers the case of the Falkland Islands (Malvinas),

Noting the existence of a dispute between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the said Islands,

1. *Invites* the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to proceed without delay with the negotiations recommended by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United Nations and of General Assembly resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas);

2. *Requests* the two Governments to report to the Special Committee and the General Assembly at its twenty-first session on the results of the negotiations.¹⁵⁷

The repercussions of this resolution on the question of prescription have been

157. G.A. Res. 2070, 20 U.N. GAOR Supp. (No. 14) at 58, U.N. Doc. A/6014 (1966).

noted elsewhere in this article. Therefore the author here only points out important legal implications which flow from it in the context of decolonization: (1) The Resolution, by calling for negotiations between Great Britain, on the one part, and "Argentina," on the other, seems to have identified Argentina — and no other party — as the state affected by the colonial action of Great Britain; (2) By stating that there is a need for negotiations with a view to settling a dispute "concerning sovereignty" the Resolution would seem to imply that if Argentina in fact had possessed sovereign rights over the Malvinas as of 1833, which elsewhere in this article has been indicated as a possible *critical date* of the dispute, this suggested that the exercise of Argentina's sovereign rights could have been obstructed thereafter by Britain's colonization. In this connection, the notion of acquisitive prescription in relation to the Malvinas would give support to the view that the sovereignty dispute, as defined by Resolution 2065 (XX), could be appreciated as a conflict between Argentina, on the one part, who is claiming the "full" exercise of its territorial rights, and Great Britain, on the other, whose adverse possession of the Islands acts as an obstruction thereof; and (3) By stating that the negotiations should take into account the "interests" and not the "wishes" of the local population and the Resolution confirmed that the "international" right of self-determination, in the sense expressed earlier in this section, was not recognized in favor of the local inhabitants of the Islands. Thus, it is clear that the British arguments were overruled by the General Assembly.

The principle that "external" self-determination must not apply for the benefit of an "imported" population is well-illustrated within the practice of the United Nations by the case involving *Gibraltar*, between Great Britain and Spain. As occurred with the Malvinas the issue of decolonization of Gibraltar was raised in 1964 before the Special Committee. Here also the Special Committee recommended a "negotiated solution" which should take account of the "interests," and not the "wishes," of the local inhabitants.¹⁵⁸ However, notwithstanding the General Assembly resolution which had confirmed this recommendation, Great Britain held a referendum in Gibraltar in 1967 which showed clearly that the overwhelming majority of the local inhabitants wanted Gibraltar to remain in association with Great Britain. This referendum was expressly rejected by the United Nations and both the Special Committee and the General Assembly took the view that because the colonial population had been transferred from Great Britain in the early eighteenth century in replacement of the earlier Spanish inhabitants, the wishes of such inhabitants were not controlling.¹⁵⁹

158. See Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/5800/Add. 5 paras. 204-208 (recommendations of the Committee as to Gibraltar) (1964).

159. "The Committee and the General Assembly have taken the view that the wishes of the current population should not be paramount in the case of Gibraltar because it is an imported, colonial population, replacing the earlier, largely Spanish population which left the territory at the time of its capture." D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 110 (2d ed. 1979).

The operation of the principle of territorial integrity is further illustrated by the more recent decolonization case involving *Western Sahara*. There Spain, who had colonized Western Sahara in 1884, had agreed to hold a referendum under United Nations auspices which would enable the “*indigenous*” population of Western Sahara in 1975 to exercise freely its rights of self-determination in accordance with the General Declaration and a specific recommendation by an earlier General Assembly resolution.¹⁶⁰ At that point Morocco and Mauritania advanced separate, but mutually overlapping, territorial claims based upon alleged titles predating Spanish colonization. On the initiative of these two states the General Assembly requested an advisory opinion from the International Court of Justice on the following two points: (1) Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?; And if the answer to the first question is in the negative, (2) What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

In its advisory opinion dated October 16, 1975, the Court interpreted question two as referring to such “legal ties” as may affect the policies and procedures to be followed in the decolonization of Western Sahara.¹⁶¹ Although the Court found that certain legal ties of a religious, cultural and military nature had existed between some of the nomadic tribes of the region and the Sultan of Morocco, it concluded that:

The materials and information presented to the Court . . . (do) not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. *Thus*, the Court has not found legal ties of such nature as might affect the application of Resolution 1514 (XV) in the decolonization of the Western Sahara and in particular, of the principle of self-determination through the free and genuine expression of the will of the people in the territory.¹⁶²

The legal implications of this opinion clearly suggest that had legal ties between Morocco and Western Sahara in effect amounted to ties of *territorial sovereignty* on the part of the Sultan of Morocco at the time of the Spanish colonization the applicability of self-determination, as expressed in paragraph (5) of the General Declaration, could have thus been affected. In fact, the separate Declaration of Judge M. Nagendra Singh, while discussing instances where the General Assembly had dispensed with the requirement of consulting with the inhabitants of a

160. G.A. Res. 2229, 21 U.N. GAOR Supp. (No. 16) at 72, U.N. Doc. A/6316 (1966).

161. *Western Sahara Case*, 1975 I.C.J. 12 (advisory opinion). “The General Assembly, as appears from paragraph 3 of resolution 3292 (XXIX) has asked the Court for an opinion so as to be in a position to decide on the policy to be followed in order to accelerate the decolonization process in the territory. . . .” *Id.* at 27.

162. *Id.* at 68.

given territory, clearly stated as follows: "Again cases falling under paragraph (6) of resolution 1514 would remain outside this rule."¹⁶³ Furthermore, Judge S. Petren stated in his separate opinion that:

There is no need to recall the place of decolonization, under the aegis of the United Nations, in the present evolution of international law. Inspired by a series of resolutions of the General Assembly, in particular resolution 1514 (XV), a veritable law of decolonization is in the course of taking shape. It derives essentially from the principle of self-determination of peoples proclaimed in the Charter of the United Nations and confirmed by a large number of resolutions of the General Assembly. But, in certain specific cases, one must equally take into account the principle of the national unity and integrity of States, a principle which has also been the subject of resolutions of the General Assembly. It is thus by a combination of different elements of international law evolving under the inspiration of the United Nations that the process of decolonization is being pursued. The decolonization of a territory may raise the question of the balance which has to be struck between the right of its population to self-determination and the territorial integrity of one or even of several States. The question may be raised, for example, whether the fact that the territory belonged, at the time of its colonization, to a State which still exists today justifies that State in claiming it on the basis of its territorial integrity.¹⁶⁴

Perhaps what is most important about the *Western Sahara* opinion in relation to the issues discussed in this article is that if the principle of territorial integrity in paragraph (6) of the General Declaration could in some cases be held to prevail over the rule of self-determination by the genuine expression of the "wishes" of the local population, as in paragraph (5) of the General Declaration, in instances where such population was truly "indigenous," *i.e.*, with regard to a population which had supposedly suffered the colonialistic action of Spain, the case for territorial integrity should become *a fortiori* even stronger in cases where the population inhabiting the territory proposed to be decolonized is imported, implanted and non-indigenous as is the case with Gibraltar and the Malvinas.

Perhaps it is appropriate to close this final section by pointing out that the opposition between the principles of territorial integrity and self-determination, in the specific case of the Malvinas, may be more apparent than real. When the General Assembly singles out Argentina, *i.e.*, the sovereign state, as the affected

163. 1975 I.C.J. 81. It should be noted that Judge Dillard, in his separate opinion, pointed out that, because the Court had denied the existence of any tie of territorial sovereignty there was no "automatic retrocession" and that, therefore, "it was unnecessary for the Court to pronounce upon the principle of territorial integrity imbedded in paragraph 6 of resolution 1514 (XV)." *Id.* at 120.

164. *Id.* at 110.

party with whom Great Britain must negotiate decolonization, one should be entitled to interpret this to mean that it is the "people" of Argentina whose interests are thus affected. It was indeed the "people" of Argentina, who had happened to organize themselves into a sovereign state as in 1833, that suffered the colonial action of Great Britain. It was again the "people" of Argentina who were expelled from the Islands by military force and who were deprived by the British continued presence and occupation of the Islands for one-and-one-half centuries from freely establishing on the Islands their "political, economic, social and cultural systems, without interference in any form by another state."¹⁶⁵ Under this perspective, Resolution 2065 (XX) and those that came after it would seem to support the argument that the principle of self-determination, as viewed from the perspective of the Argentine "peoples,"¹⁶⁶ could be seen as operating in conjunction, rather than in conflict, with the principle of territorial integrity, thus constituting a separate, but closely related building block, of a single claim to restitution of the Islands.

VIII. CONCLUSION

It seems quite clear that the South Atlantic War between Great Britain and Argentina has not altered the basic legal status of this ancient, but ever continuing, dispute as defined by Resolutions 2065 (XX) of 1965; 3160 (XXVIII) of 1973; and 31/49 of 1976 of the General Assembly of the United Nations. This proposition is confirmed by the recent General Assembly Resolution 37/9 of November 9, 1982¹⁶⁷ which, carrying the favorable vote of the United States, has

165. G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1966), *reprinted in Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, 60 AM. J. INT'L L. 662 (1966).

166. That the right of self-determination can also be exercised by "peoples" organized as nation-states is recognized by CRISTESCU, *supra* note 147, at 41-43; Gross Espiell, *En torno a la Libre Determinación de los Pueblos*, 3 ANUARIO DE DERECHO INTERNACIONAL 49, 56, 57 (1976); CÁRDENAS, *El Conflicto de las Malvinas y el Principio de Autodeterminación*, 56 CRITERIO No. 1887, at 439 (1982).

167. Here is the full text of the resolution:

The General Assembly,

Having considered the question of the Falkland Islands (Malvinas),

Aware that the maintenance of colonial situations is incompatible with the United Nations ideal of universal peace,

Recalling also Security Council resolutions 502 (1982) of 3 April 1982 and 505 (1982) of 26 May 1982,

Taking into account the existence of a *de facto* cessation of hostilities in the South Atlantic and the expressed intention of the parties not to renew them,

Reaffirming the need for the parties to take due account of the interests of the population of the Falkland Islands (Malvinas) in accordance with the provisions of General Assembly resolutions 2065 (XX) and 3160 (XXVIII),

Reaffirming also the principles of the Charter of the United Nations on the non-use of force or the threat of force in international relations and the peaceful settlement of international disputes,

1. *Requests* the Governments of Argentina and the United Kingdom of Great Britain and

(1) ratified all its earlier resolutions on this question; (2) restated the incompatibility of the colonial situation on the Islands "with the United Nations ideal for peace;" (3) reaffirmed the need to take account of the "interests," as opposed to the "wishes," of the population of the Islands; and (4) requested new negotiations between both countries on the "sovereignty dispute," this time with the assistance of the Secretary General of the United Nations. It is indeed hoped that this time the recommendation of the General Assembly, which is the expression of world opinion acting through the authoritative institutional framework of the United Nations, will no longer be rendered dead letter by the procrastinating attitudes of the past, whose fair share of responsibility for the South Atlantic War appears, at least to this author, not to have been properly assessed.

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- Northern Ireland 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);
2. *Requests* the Secretary-General, on the basis of the present resolution, to undertake a renewed mission of good offices in order to assist the parties in complying with the request made in paragraph 1 above and to take the necessary measures to that end;
 3. *Requests* the Secretary-General to submit a report to the General Assembly at its thirty-eighth session on the progress made in the implementation of the present resolution;
 4. *Decides* to include in the provisional agenda of its thirty-eighth session the item entitled "Question of the Falkland Islands (Malvinas)".

Among the 90 countries voting in favor of the resolution were the United States, the Soviet Union, China, Israel and Japan. The 12 votes against it were from the United Kingdom, Antigua-Barbuda, Belize, Dominica, Fiji, Gambia, Malawi, New Zealand, Oman, Papua New Guinea, Solomon Islands and Sri Lanka. The remaining countries abstained.