## Table of Contents

1. Introduction 2
   1.1 Argentina’s Claim and Initial Protest 2

**The Treaty of Peace**

2. Convention of Peace Treaty 2
   2.1 Treaty Law, the Convention of Peace and the Falklands 2
   2.2 Carlos Pereyra 3
   2.3 Absalon Rojas 3
   2.4 Ernesto Fitte 3
   2.5 Juan José Cresto 4
   2.6 Lord Palmerston 4
   2.7 Convention or Treaty? 4
   2.8 Acquiescence and Estoppel; the 1882 Latzina Map 5
   2.9 Sovereignty Protests 6

**Modes of Acquiring Title to Territory**

3. Proximity 8
   3.1 Prescription (effective control) 8
   3.2 Argentina’s Claims of Sovereignty by Effective Occupation 1820 – 1833 10
   3.3 Immemorial Possession and Historical Consolidation 14
   3.4 Military Occupation leading to Conquest and Subjugation 16
   3.5 Uti Possidetis Juris and Nootka Sound Convention 17

**Self-Determination**

4. Territorial Integrity and Argentinean Stance 20
   4.1 A People 21
   4.2 Indigenous People 22
   4.3 Self-Determination 23
   4.4 Erga Omnes 24
   4.5 Implanted Population 25
   4.6 Population Size 26
   4.7 Free Association With the UK and the UN C24 Decolonization Committee 27
   4.8 ICJ Individual Opinions 28

**Historical Context**

5. Snapshot of Falklands History 1826-1833 29
   5.1 UN Charter & Resolution 2625 (XXV) 30
   5.2 UN Resolution 2065 (XX) Question of the Falkland Islands 30

**Argentina’s Record & Arbitration**

6. Argentina’s Record 31
   6.1 UN Conventions & Argentina’s Declarations 31
   6.2 Falkland Islands’ Territorial Waters 32
   6.3 Extinctive Prescription – Argentina’s Failure to Submit its Claim 33
   6.4 Argentina Has Acquiesced to British Title 34
   6.5 The International Courts of Justice and International Arbitration 36

**Conclusion**

7. Conclusion 37
1. Introduction
If Argentina and the UK both agreed to submit the Falklands issue to the International Courts of Justice for an opinion, what might the ICJ decide? The information provided below will examine Argentina’s claims, the Convention of Peace of 1850, acquiescence and estoppel before dealing with proximity, modes of acquiring territory, Argentina’s claims and territorial integrity arguments; moving on to social and cultural aspects of self-determination, the UN Charter, applicable UNGA resolutions and concluding with Argentina’s history of dealing with treaty obligations. The attached information based on previous ICJ Judgments, Advisory Opinions, UN resolutions and associated matters might provide the answer as to how the ICJ would deal with such a case.

1.1 Argentina’s Claim and Initial Protests
Argentina claims that it inherited the Falklands from Spain, a process known as *uti possidetis juris* and that in 1833 Britain usurped an Argentine settlement in the Falkland Islands, expelled the population (which is Argentina’s best-known falsehood), and then settled the Islands by implanting a population (Argentina’s second-best-known falsehood). ¹

The Argentine government then protested about the British presence on the Falklands in its annual opening statement to Congress every year from 1833 right up to the ratification of the Convention of Peace in 1850. Furthermore, Argentina protested to Britain in 1833, 1834, 1841, and 1849 (when Argentine ambassador Manuel Moreno, unaware that Rosas was preparing to agree the Convention of Peace, queried the comment by Secretary of State for Foreign Affairs Lord Palmerston that Argentina was giving up its claim). ²

2. Convention of Peace Treaty
The Argentineans now deny that the Convention of Peace, which Britain and the Argentine Confederation ratified in 1850, affected the Falklands, but many authors say that it did. The main purpose of the treaty was to put an end to the Anglo-French naval blockade of the Rio de la Plata. Although no mention was made of the Falkland Islands in the treaty, the pre-amble of the treaty clearly states: “Convention for re-establishing the perfect Relations of friendship between Her Britannic Majesty and the Argentine Confederation”. It was signed at Buenos Ayres on November 24, 1849, and ratifications were exchanged on May 15, 1850. ³

2.1 Treaty Law, the Convention of Peace and the Falklands
It is a principle in law that any land/territory not mentioned in any peace treaty remains with the possessor. The law applicable and in force at the time states, *The treaty of peace leaves everything in the state in which it found it unless there is some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing is said about the conquered country or places, they remain with the conqueror and his title cannot afterwards be called into question.* ⁴

International law on treaties is determined by the Vienna Law of Treaties, 1969. Article 31 (3) states: *There shall be taken into account, together with the context, (c) Any relevant rules of international law applicable in the relations between the parties.* ⁵ On the interpretation of subparagraph (c) Professor Lindefalk writes, ‘If it can be shown that the thing interpreted is a generic expression with a referent assumed by the parties to be alterable then the decisive factor for determining the meaning of the “relevant rules of international law” shall be the law applicable at the time of the interpretation. In all other cases, the decisive factor shall be the law applicable at the time when the treaty was concluded.’ ⁶

The principle in law at the time of the signing of the treaty is also relevant. Sir Gerald Fitzmaurice in the Law and Procedure of the International Courts of Justice writes, ‘In a considerable number of cases, the rights of states (and more particularly of parties to an international dispute) depend or derive from rights, or a legal situation existing at some time in the past, or on a treaty concluded at some comparatively remote date...

---

³ Convention of Peace Treaty, British and Foreign State Papers 1848-1849.
⁵ Vienna Convention Law on Treaties, Article 31 (3) C, 1969.
It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today.  

The above principle was adopted by the Institute of International Law in 1975 when they adopted the following resolution: Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of the application.

The above was supported by Vice President Weeramantry in the ICJ Danube Dam Case of 1997 when he stated, ‘It may be observed that we are not here dealing with questions of the validity of the Treaty which fall to be determined by the principles applicable at the time of the Treaty...’

The wording of the Treaty is important –

‘Convention for re-establishing the perfect Relations of friendship between Her Britannic Majesty and the Argentine Confederation’, is written as the pre-amble of the treaty. In the ICJ case between Libya and Chad judgment the ICJ ruled regarding the meaning of the text and stated, ‘a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its obligations and purpose. Interpretation must be based above all on the text of the treaty.’

The Treaty was initially called, ‘the Convention of Peace’ by both Britain and Argentina:- ‘November 24th, the Chamber of Representatives authorizes Governor Rosas to ratify the convention of peace between the Argentine Confederation and the United Kingdom of Britain,’ when Britain’s ratification is presented. The Treaty is recognized as ‘a convention of peace, signed by the Argentine and British plenipotentiaries.’ This fact confirms that it was indeed a peace treaty and both sides interpreted it as settling ALL outstanding differences. Four important Spanish language sources confirm that this convention did in fact end the Falkland’s dispute and put an end to Argentina’s claims.

2.2 Carlos Pereyra
Carlos Pereyra, Mexican diplomat and historian in his book, Rosas Y Thiers – La diplomacia europea en el Rio de la Plata (1838-1850) published in Madrid in 1919, says that he believes that Rosas (Argentine Head of State) was willing to buy Britain’s departure from the River Plate by ceding Argentina’s claims to the Falklands (page 202). He also states that Britain keeping the Falklands was an unwritten 8th article of the convention (page 206).

2.3 Absalon Rojas
On 19th July 1950, Deputy Absalon Rojas, in the Argentine Chamber of Deputies (Lower House of Congress) clearly believes that the convention should have made mention of the Falklands to exclude them, but did not. He then continues in this official record by stating that this might not have harmed Argentina’s claims judicially – but it has.

2.4 Ernesto Fitte
Well known Argentine historian Ernesto Fitte also wrote about the convention of 1849/50 in his book ‘Cronicas del Atlántico Sur,’ published in 1974. On page 250, he suggests that Rosas (Argentine Head of State) “forgot” to mention the Falklands in 1849 when he made peace with Britain. There is ample evidence that Rosas did not forget the Falklands. The dispute of the Falklands was often mentioned at the time. In addition, the “parrafito”

8 The Institute of International Law, The Inter-temporal Problem in Public International Law, Sessions of Wiesbaden, 11 August 1975, p2.
10 ICJ Reports, 1994, Libya/Chad, Judgment, p21-22, para 41.
(little paragraph) that he talked about in the annual government message to the Argentine Congress mentioning the Falklands ceased after the 1849/1850 Convention and wasn’t re-installed until 1941.  

2.5 Juan José Cresto
Cresto was President of the Argentine Academy of History in 2011 and in his book, published that year, ‘Historia de las Islas Malvinas’ he writes, ‘On 27th August 1849 (it was in fact 24th November 1849) Rosas signed the treaty of friendship with Queen Victoria. There it says ‘Under this convention perfect friendship between Her Britannic Majesty’s government and the government of the Confederation is restored.’ In no article or detail is this document is there any proviso for the restitution of the islands iniquitously usurped.’ (Page 433). Cresto clearly believes that Rosas gave the Falklands away by failing to mention them as an exception in the 1849/50 convention with Britain. At the bottom of page 433, Cresto makes reference to the complaint that Moreno, the Argentine Ambassador to Britain, made to Palmerston on 31st July 1849, without any suggestion that it exempted the Falklands from the convention. 

2.6 Lord Palmerston
The Daily News dated 28th July 1849 reports on the House of Commons business of 27th July and a debate between Mr. H Baillie, M.P. for Inverness, and Lord Palmerston, Secretary of State for Foreign Affairs. Mr. H. Baillie, inquired whether it was true that the Government of Buenos Ayres had laid claim to the Falkland Islands, and, if so, what had been done upon the matter?

Viscount Palmerston said, ‘That there was a claim made some time ago, which had been resisted by the British government. Great Britain had always denied the claim of Spain to the Falkland Islands, and the government was certainly not inclined to yield to Buenos Ayres what it had refused Spain. The result was that some ten or twelve years ago the Falkland Islands were taken possession of and occupied by the British and ever since that period there had been a settlement there. He thought, under the circumstances, the hon. gentleman would see that there would be no great use in reviving the correspondence which had ceased with the acquiescence of both parties, the fact being that for the last 10 or 12 years we had occupied the Falkland Islands as a possession of the British crown.’

Palmerston’s identical reply to Baillie was also reported in The Times newspaper of 28th July 1849.

Although Palmerston’s remarks were made in the House of Commons, not all House of Commons business was recorded in the Hansard, as it is today.

From Palmerston’s comments it was evident that he knew that the convention was about to end Argentina’s claim to the Falklands.

2.7 Convention or Treaty?
Another Argentine counter-argument is that the Convention of Settlement, also known as the Arana- Southern Treaty was not a peace treaty just a convention. This argument is easily rebuffed because the term ‘convention’ was regularly employed for bilateral agreements in the past but is now generally used for formal multilateral treaties with a broad number of parties.

Examples of the usage of the term ‘convention’ in peace treaties can be found in the following 19th century conventions: The 1814 Convention of Moss which outlined a ceasefire agreement following the Swedish/Norwegian war; the 1833 Convention of Kütahya also known as the Peace Agreement of Kütahya which ended the Egyptian/Ottoman war and the 1860 Convention of Peace and Friendship between Great Britain and China which ended the Second Opium war.
2.8 Acquiescence and Estoppel

After the signing of the convention of peace two important facts occurred. (i) Argentine officials made statements of acquiescence and (ii) the Argentine government did not question the sovereignty of the Falklands for many years.

Regarding statements of acquiescence, on 1st May 1865 President Mitre says in his opening address to the Argentine Congress, ‘there was nothing to prevent the consolidation of friendly relations between their country and those governments (Britain and France)’. 20 It is quite evident from what President Mitre was saying that Argentina had no issues regarding British possession of the Falklands.

On 1st May 1866, Vice President Paz opened Argentine Congress and refers to an old dispute with some British citizens and states, ‘the British government has accepted the President of Chile as arbitrator in the reclamation pending with the Argentine Republic, for damages suffered by English subjects in 1845. This question, which is the only one between us and the British Nation, has not yet been settled.’ 21 Evidently, Vice President Paz had no concerns regarding British possession of the Falklands.

In addition, on 1st May 1869, in his message to Argentine Congress, Argentina’s President Sarmiento announces, ‘Nothing is claimed from us by other nations; we have nothing to claim from them except they will persevere in manifesting their sympathies with which both governments and peoples have honoured the Republic, both for its progress and its spirit of fairness.’ 22 Likewise, President Sarmiento by his statement supports the view that Argentina was not pursuing any claims to the Falklands. These statements of acquiescence made by Argentine Presidents and a Vice President can also be linked to the estoppel rule highlighted in the Legal Status of Eastern Greenland Case of 1933. Here the PCIJ (Permanent Court of International Justice) determined that it was detrimental that Norway could not object to a Danish claim over sovereignty of Eastern Greenland because a Norwegian official previously had made a statement inconsistent with such a claim. 23

Having complained about the British presence on the Falkland Islands in 1833, 1834, 1841 and 1849, Argentina did not complain again diplomatically by correspondence until 1888. An attempt to reopen the question of sovereignty was made in 1884 with the proposed introduction of a map that showed the Falklands as Argentine territory. After British protests, Argentina dropped the idea. Argentina then did not raise the question of Falkland’s sovereignty in the Argentine Congress until 1941. 24

Argentine Foreign Minister José Luis Murature had specifically stated in 1914 and again in 1915 that there had been no Argentine protests over the Falklands since 1888. Alfredo Becerra’s collection of Argentine protests contains includes no documents between 1888 and 1919 (31 years), and that of 1919 is a purely internal Argentine communication. 25 A silence of 31 years has been held to constitute acquiescence. 26

It is also relevant that the first Argentine Constitution of 1853; adopted in 1862 which distributed seats in Congress on a territorial principle, made no mention of the Falkland Islands. 27

---

20 Falkland Islands, South Georgia, the South Sandwich Islands, the History, Lorton R. quoting Los Mensajes 1810-1910, Heraclio Mabragana, Buenos Aires, 1910, vol III, p227.
21 Falkland Islands, South Georgia, the South Sandwich Islands, the History, Lorton R. quoting British and Foreign State Papers 1866-1867, p1007.
22 Heraclio Mabragana, 1910, volume III, p268, quoted in Falkland Islands, South Georgia, the South Sandwich Islands, the History, R. Lorton.
23 Legal Status of Eastern Greenland, PCU, p70.
24 Falkland Islands, South Georgia, the South Sandwich Islands, the History, R. Lorton.
26 Separate Opinion of Judge Ajibola, ICJ Libya/Chad Territorial Dispute, 3 Feb 1994, P81 & 90, paras 110 & 129.
The Argentine Foreign Ministry financed the 1882 Latzina map of which 120,000 copies were published and distributed to Argentine Consulates all over the world in order to attract emigrants to the country. The Latzina map shows Argentina in a brownish colour and the Falklands differently, in a blank-beige colour - the same as it marked other places outside of Argentina such as Chile and Uruguay.  

The 1882 Latzina map was used in the Beagle Island dispute between Argentina and Chile whereby the court of arbitration, consisting of ICJ judges ruled that, amongst other factors that the Beagle Channel islands were outside Argentina. ‘The Latzina map of 1882 was approved by President Roco and Senior Irigoyen, Minister of the Interior and which seems to the Court the tellingly significant in determining what was then officially regarded as the Treaty boundary line.’  
The Court went on to state that ‘the Latzina map provides an excellent example of the relevance of a map for the circumstances of its production and dissemination making it of highly probative value on the account of evidence afforded by this episode, namely of official Argentine recognition, at the time, of the PNL group’ (Picton, Nueva & Lennox Islands). ‘The force of this, as illustrative of Argentine official opinion in the immediate and post-Treaty period…’ It is noteworthy that the Falkland Islands are also marked in blank beige just like the three Beagle Channel islands that were in dispute. 

The ICJ ruled on the evidential value of maps in the Burkina Faso/Mali judgment stating, amongst other points that, ‘of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits, it is because such maps fall into the category of physical expression of the will of the State or States concerned.’ 

Again, regarding the use of maps, in the Indo-Pakistan Western Boundary Case (Rann of Kutch) 1965, it was determined that maps constitute acts which may be interpreted as acquiescence in, or acceptance of, Kutch’s claim. Gunnar Largergren, the Chairman in that case stated ‘the maps now referred to constitute acts of competent British authorities which if viewed as being in response to claims by Kutch or other Indian States that the Rann was Indian States territory may be interpreted as acquiescence in, or acceptance of, such claims…and ‘may amount to a voluntary relinquishment, whether conscious or inadvertent, of British territorial rights in the Rann.’ 

In the Burkina Faso/Mali case, Judge ad hoc Luchaire described acquiescence of a particular situation as, ‘a State’s acquiescence in or recognition of a situation brought about by another State debars it from calling upon an international tribunal to reopen that situation, in which case there is no need for the tribunal in question to enquire how that situation came into being. Thus in the Legal Status of Greenland Case the Permanent Court of International Justice held that Norway’s attitude could be regarded as recognition of Denmark’s sovereignty, which Norway was consequently not entitled to challenge…’

The ICJ Gulf of Maine Judgment determined that acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. 

The 1882 Latzina map produced by Argentina in the thousands and given presidential approval, clearly shows the Falkland Islands in a different colour to Argentina and in the same colour as the countries neighbouring her. The map is highly relevant in showing that during this period of time Argentina had by its tacit recognition of, or acquiesced to British possession of the Falkland Islands. 

2.9 Sovereignty Protests

Although Argentina maintains that it made a number of sovereignty protests between 1850 and 1941, no evidence other than the 1888 protest is available. For a protest to merit treatment as a factor in the legal relations
of states, it must be made on behalf of that state. Protests which have emanated from unofficial sources and which have not been subsequently ratified by a state have often been rejected. International law does not prescribe rules as to the form and contents of protest. It may be presented verbally or in written form. 35

Protest is a formal communication on the part of a state to another that it objects to an act performed or contemplated by the latter. 36 In international law a protest must clearly and explicitly indicate the act against which it is directed. The protesting state must communicate it to the government of the state concerned. 37

In 2012 the UK’s Permanent Ambassador to the UN wrote to the Secretary-General stating, ‘Following ratification of the 1850 Convention, the Republic of Argentina only submitted one protest, in 1888. In 1863, at the same time that Spain was negotiating a treaty recognizing the Republic of Argentina as a sovereign state, the British Governor of the Falkland Islands officially received a Spanish diplomatic and scientific delegation to the British Falkland Islands and received no protest.’ He continues, ‘The Republic of Argentina only returned to regular sovereignty protests after the outbreak of the Second World War in 1939.’ 38

If Argentina wants to contest the above information regarding sovereignty protests in any court or tribunal then it is required to establish facts to the contrary. ‘It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact.’ 39 As previously stated the fact that Argentine presidents did not raise the issue of Falkland’s sovereignty in their Congress between 1850 and 1941 is also applicable. 40

Argentina’s failure to raise their sovereignty claim for over 50 years is relevant. It is a rule of international law that territorial claims are usually considered defunct if there is a gap of 50 years or more between protests on sovereignty. Silence after lesser periods also constitutes acquiescence. Here the Preah Vihear case judgment of 1962 is relevant. When referring to Thailand, the ICJ stated, ‘She has not, for 50 years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier’ and continued, ‘and it is not now open to Thailand, while continuing to claim and enjoy benefits of the settlement, to deny that she was ever party to it.’ 41 Similarly, in the Nicaragua/Columbia Territorial and Maritime dispute preliminary objection of 13th December 2007, the ICJ stated, ‘At no time in those 50 years even after it joined the organization of American states in 1948, did Nicaragua contest that the Treaty was invalid.’ And the ICJ judgment continues, ‘the Court thus finds that Nicaragua cannot today be heard to assert that the 1928 Treaty was not in force in 1948.’ 42

In his separate opinion in the Libya/ Chad territorial dispute of 3 Feb 1994, judge Ajibola held that Libya’s silence of 31 years after the critical date in regards to a Treaty, constituted acquiescence and clearly militates against its claim. 43

Even the Argentines have used ‘Acquiescence and Estoppel’. In their submission to the ICJ in the Argentina/Uruguay Pulp Mills on the River Uruguay case of 18th December 2006, Ms Ruiz Cerutti, representing Argentina, drew the Court’s attention to the Temple of Preah case by quoting judge and Vice President Alfaro, ‘the party which was by its recognition, its representation, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right.’ 44

38 Extract of Letter From UK Permanent Representative to the UN, Mark Lyall Grant to the Secretary-General of the UN Ban Ki-Moon, dated 27 Jan 2012.
40 Falkland Islands, South Georgia, the South Sandwich Islands, the History, R. Lorton.
43 ibid 26, p5.
44 Argentina/Uruguay Pulp Mills on River Uruguay, Public Sitting at the Peace Palace, President Higgins Presiding, 18
In his Separate Opinion quoted by Argentine Legal Counsel, Ms Ruiz Cerutti above, Vice President Alfaro had stated, ‘The acts or attitude of a state’s previous to and in relation with the rights in the dispute with another state may take the form of an express written agreement, declaration, representation or recognition, or else that of conduct which implies consent to or agreement with a determined factual or juridical situation.’

The conduct and attitude of Argentine officials after the signing of the convention of peace and lack of sovereignty protests over a long period of time is ample evidence of Argentina’s acquiescence and estoppel. Four historians three from Argentina and one from Mexico, who was not a friend of Britain’s, all imply that the Convention of Peace did include the Falklands and thereby ended Argentina’s claims.

3. Proximity
Argentina makes great play out of the argument of ‘proximity’ on the basis that the Falkland Islands are closer to Argentina than the UK. The Islands are in fact 300 miles away from Patagonia and 1,000 miles away from Buenos Aires. In the maritime delimitation and territorial questions Qatar and Bahrain, the ICJ dealt with the ‘proximity argument’ and its relevance. In their joint dissenting opinion, judges Bedjaou, Ranjera and Koroma issued the following statement, ‘There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state, unless there is a fully established case to the contrary (as, for example, in the case of the Channel Islands). But there is no presumption outside the coastal belt.’ They continue, ‘What is more proximity alone does not constitute a title. It supplements or combines with other elements to constitute a title.’

This identical statement was repeated by the PCA in the Eritrea-Yemen award, second stage of 3rd October 1996.

Continuing with this theme, Argentina claims that the Falkland Islands are part of its continental shelf. Here, the ICJ North Sea Continental Shelf cases are relevant inasmuch as Denmark and the Netherlands based their claims inter alia on proximity, i.e. that part of the continental shelf closest to the part of the state in question falls automatically under that state’s jurisdiction. In these cases the ICJ rejected any contiguity type approach and argued that the 1958 Geneva Convention on the Continental Shelf and Contiguous Zone, Article I, now supported in the Law of the Sea Convention, article 76 does not support the view that states have sovereignty over islands above the continental shelf. On the contrary, it laid down the doctrine that islands had their own “continental shelves.” It is therefore evident that proximity alone merely supplements any sovereignty claims. It was only with the occupation of what became Puerto de Santa Cruz by Argentina on the 1st December 1878, followed by the treaty of 1881, that Patagonia opposite the Falklands became Argentinean rather than Chilean. And, of course, Argentina is only a little closer to its mother country, Spain, than the Falklands are to Britain.

3.1 Prescription (Effective Control)
There are gaps in Argentina’s version of history of the Falklands. In Argentina, acclaimed pamphlet from 2007, their information regarding the Falklands jumps from 1849 to 1884 as if there had been no history in between but the opposite would have been true if Argentina had maintained its claim.

In 1866, in the Elements of International Law, Wheaton describes prescription by stating, ‘the writers of international law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable, as between nation and nation; but the constant and approved practice of nations show that, by whatever name it be called, the uninterrupted possession of territory, or the other property, for a certain length of time, by one State, excludes the claim of every other...’
And, ‘It cannot be seriously doubted, that long-continued firm possession, especially if practically undisputed by force, is sufficient to create sovereign title, and give to all attempts to subvert it the character of mere rebellion, if by subjects, or of attempted conquest by other nations.’ The lapse of time is discussed regarding a dispossessed state reclaiming title to conquered territory and states that, ‘as to what is a reasonable time in such cases, it is generally said that the lapse of time allowed for a new generation to be born and educated, and come into possession of the powers and duties of the State, furnishes the negative limit.’ 51 It is reasonable to suggest that by the time this book was published that prescriptive title of the Falklands had already passed to Britain.

In 1886 the Argentine government asked the United States to apply the ‘Monroe Doctrine’ to Britain’s presence on the Falklands and were told by the US Secretary of State that, ‘the resumption of actual occupation of the Falkland Islands by Great Britain in 1833 took place under a claim of title which had been previously asserted and maintained by that government. It is not seen that the Monroe Doctrine which has been invoked on the part of the Argentine Republic, has any application to the case. By the terms in which the principle of international conduct was announced, it was expressly excluded from retroactive operation.’ 52 (the Monroe Doctrine was US Foreign policy applying to Latin American countries that stated that the US would view any attempts by European powers to colonise or interfere with states in South America as aggression requiring US intervention). 53

The rules regarding acquiescence of territory have changed over the centuries. This produces a problem of ‘intertemporal law’, which century’s law is to be applied to determine the validity of title to territory? The general accepted view is that the validity of an acquisition of territory depends on the law in force at the moment of the alleged acquisition; this solution is nothing more than an example of the general principle that laws should not be applied retroactively. 54

From the period 1833 to the present date the UK has maintained effective control over the Falkland Islands. In this respect, the Island of Palmas case USA/Netherlands is relevant inasmuch as ‘effective occupation’ – ‘prescription’. In the case the Court stated, ‘the Netherlands title of sovereignty, acquired by continuous and peaceful display of sovereignty during a long period of time going back beyond the year 1700 therefore holds good.’ The Court rejected the claim of a presumption of Spanish sovereignty stating that ‘no such claim can be based in international law on the titles involving the United States as successor to Spain.’ The Court also found that a claim based on discovery was incomplete until accompanied by the “effective occupation.” The term “effective occupation” incorporates the notion of uninterrupted and permanent possession. 55

Another case that supports this view of effective sovereignty is the Minquiers and Ecrehos Case, France/UK of 17th November 1953. In this case both the UK and France had requested the ICJ to determine which country held sovereignty over the Islets and rocks in the Minquiers and Ecrehos. France had claimed sovereignty because of historic sovereignty going back to the Dutchy of Normandy in the 11th century while the UK claimed that Jersey had historically exercised administrational jurisdiction on them. The Court decided that in the absence of valid treaty provisions, they considered the argument that the British government has exercised effective control to be superior, so that sovereignty control over the Minquiers and Ecrehos belonged to the UK. 56

This interpretation was also supported by judge Torrez Bernárdez in his separate opinion in the ICJ El Salvador/Honduras case where he states ‘Hence, in defining the legal effects to be attached in casu (in this case) to a proven “peaceful and continuous exercise of state authority”, a connection between that conduct and a given norm of international law is of paramount importance. This conclusion is particularly relevant in the instant case because, as indicated, the judgment has rejected the existence of the “historic title” invoked by El Salvador.’ 57

51 Elements of International Law, Wheaton H. 1866, Chp IV, p164-5, footnote 101.
53 Our Documents – Monroe Doctrine (1823).
In the PCIJ Legal Status of Eastern Greenland case of 5 April 1933, the PCA stated that ‘a continued display of authority, involves two elements each of which must be shown to exist: the intention and the will to act as sovereign, and some actual exercise or display of such authority.’

The Grisbadarna case between Norway and Sweden is also relevant inasmuch as the PCA confirmed the law’s preference for stability when it stated, ‘it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.’

3.2 Argentina’s Claims of Sovereignty by Effective Occupation 1820-1833

Argentina claims sovereignty of the Falklands by settlement in 1824 and then undisturbed use until 1833 and that the British had abandoned the islands in 1774, that the islands were in effect terra nullius (territory that nobody owns) and that they inherited the islands as successor to Spain. The British were forced to abandon their settlement, because of rebellion with their North American Colonists. Even after the abandonment of the settlement British ships continued to visit the islands. Similarly, the Spanish abandoned their settlement in 1811 because of armed rebellion in their South American territories. Both the British and Spanish left marks claiming sovereignty behind.

For six months in 1820, Colonel Jewett, an American visited the Falklands for commercial purposes as a privateer of the Buenos Aries regime and claimed the islands for them. Buenos Aries failed to mention Jewett’s action until 1832. Jewett did not occupy the islands, which remained without any effective government or settlement. In February 1821 Jewett prepared a long report about his journey for the authorities in Buenos Aires; he makes no mention of his claim made the previous November. In Buenos Aires the newspaper reports Jewett’s 13-page account. There was no reaction by the authorities in Buenos Aires either about Jewett’s claim.

The law in the early part of the 19th Century is clear in respect of sovereignty. In this respect, Vattel states, ‘the law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use.’ Vattel goes on to describe settlement as ‘a fixed residence in any place with an intention of always staying there. And, a person who stops at a place upon business, even though he stay a long time, has only a simple habitation there, but has no settlement.’ Clearly, Jewett’s visits to the Falklands were for commercial purposes only and he failed to take actual possession of the islands or establish any settlement and therefore his actions were insufficient to gain sovereignty on behalf of the United Provinces. The Buenos Aires government even issued a decree on 10 June 1829 which admitted that, ‘circumstances have hitherto prevented this Republic from paying attention to that part of the Territory which, from its importance, it demands,’ acknowledging that they had neglected the Islands and making no mention of Jewett’s earlier claim.

In 1824, another entrepreneur, Luis Vernet was granted permission to settle in East Falkland by the United Provinces. A year later his settlement was abandoned.

In 1825 the British Consul General, Woodbine Parish had the territory claimed by United Provinces described to him; information that he passed to London. No mention was made of any claim to the Falklands. Parish negotiated a commercial treaty, the Treaty of Amity, Commerce and Navigation giving the United Provinces de facto recognition as an independent entity.

---

58 PCIJ Legal Status of Eastern Greenland, 5 April 1933, p27, para 5.
60 Falklands War: the First 400 Years, Claims, Chronology & Counter-Claims, Lorton R. 2012, p38 & 44.
66 Falklands War: the First 400 Years, Claims, Chronology & Counter-Claims, Lorton R. 2012, Pages 51.
After the treaty was signed, Buenos Aries envoy Nuñez travelled to London. On his arrival he publicised a detailed description of the United Provinces; the work is comprehensive and lays out the geography of the United Provinces, even including longitude and latitude readings for the main towns. He puts the most southerly of the United Provinces' settlements at 37 degrees S latitude. Nuñez's publication makes no mention of the Falklands archipelago.

On 3 Jan 1826, before sailing to re-establish his settlement, Vernet takes the usufruct granted by Buenos Ayres in 1823, to the British mission where he obtains vice-consul Pousett’s affirmation (counter-signature) on the original document. Then, in 1828 Vernet asked permission from the United Provinces regime in Buenos Aries to settle all of East Falkland. On 30th January 1828, Vernet submits a second grant from Buenos Ayres to the British mission. Vernet tells Parish, the British consul, that his settlement will fall under the protection of the British Government. Parish asks him to prepare a full report on the islands for the authorities in London. Clearly Vernet believed that there was ambiguity over the status of the island. Believing that Vernet was acting as a private businessman, the British agreed.

But then on 10th June 1829, the British discovered that the United Provinces planned to create a penal colony and place a military government on the islands, making Vernet a civil and political commander. The British protested stating that this infringed their sovereignty over the islands. The British protest received by the Argentine regime on 19th November 1829 would have stopped the clock in respect of any arbitration purposes. Vernet’s settlement then deteriorated because of lack of adequate provisions and housing. It was then severely damaged by the USS Lexington for illegally holding 3 American ships that had been seal hunting in the area; an act that the American's describe as piracy. At this time, the American's described the islands 'free of government.'

The Islands were then left uninhabited from 14th January 1832 until 10th October 1832 until another Argentine political and military governor, Mestivier arrived with a small detachment of soldiers. Mestivier’s primary aim was to establish a penal colony. Again, Britain protested that this was an infringement of its sovereignty. Mestivier was murdered by his own soldiers shortly after his arrival. On 2nd January 1833 the British rule was restored.

The Argentine claims that that the islands were terra nullius, had no ownership or res nullius had been abandoned, is severely limited as the Spanish still claimed the islands and Britain also had a claim dating back to its settlement at Port Egmont 50 years earlier and whether this claim was still valid or not these rights had been upheld through constant use for over 30 years. This, and acts of sovereignty carried out such as rejecting a French demands for an establishment for a fishery in the Malouine isles (Falklands) in September 1801 and again in January 1802 in peace negotiations between Britain and France to bring the French Revolutionary War to an end, were a clear limitation on any other country’s possible claim of full sovereignty.

Jewett’s visits to the islands and his failure to take actual possession and make any form of settlement, and the lack of time in respect of Vernet’s appointment as civil and military commander: less than 18-months; along with Mestivier’s 2-months period is arguably not enough time to establish title through effective occupation, even if it could be established that the that the islands had no ownership or had been abandoned.

67 Falklands Wars – the History of the Falkland Islands, With Particular Regard to Spanish And Argentine Pretentions, Lorton R., p118, *quoting Nuñez 1825*.
70 Falklands War: the First 400 Years, Claims, Chronology and Counter-Claims, Lorton, R. 2012, p59, 62, 70 & 78.
71 Falklands War: the First 400 Years, Claims, Chronology and Counter-Claims, Lorton, R. 2012, p59, 62, 70 & 78.
72 Getting it Right: the Real History of the Falkland Islands/Malvinas, Pascoe & Pepper, 2008.
Also relevant is that the British never officially gave up their sovereignty and formally protested to the Buenos Aires governments about Vernet and Mestivier’s appointments. In respect of Vernet and his appointment by the United Provinces, the Rosas government that followed publicly declared all actions of the non-elected Lavelle government “null and void” and anyone associated with the Administration, “a criminal.”

Sovereignty in regards to uninhabited islands is governed by the same criteria as to which is applied to land territory and whether title is claimed to derive from occupation of res nullius, the claimant state must demonstrate a continuous and peaceful display of sovereignty over the island territory.

In the boundary case between British Guiana and Brazil of 1904 the tribunal ruled on acquisition of territory that was terra nullius and stated, ‘the discovery of new channels of trade in regions not belonging to any State cannot by itself be held to confer an effective right to the acquisition of the sovereignty of the said region by the State.’ And then went on to clarify, ‘to acquire the sovereignty of regions which are not in the domain of any State, it is indispensable that the occupation be effective in the name of the State.’ In addition, ‘that the occupation cannot be held to be carried out except by effective, uninterrupted and permanent possession and the simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice.’ The tribunal’s ruling stays within Vattel’s Law of Nations mentioned above in regards to settlement and possession. In this respect, Argentine claims of exercising effective sovereignty are limited because of the failure of Vernet’s colony to establish effective control over the Falklands. His colony was not stable, on the verge of collapse and was severely damaged by the American intervention and his occupation was disputed by the British.

Any notion that Vernet’s activities were relevant prior to him being made a political and military commander is questionable, as are the activities of any private individuals. In the Fisheries case, Sir Arnold McNair writes, ‘Another rule of law that appears to me relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their governments or that some other way their governments have asserted jurisdiction through them.’

Even after Vernet had been made a political and military commander, his authority to act and the Buenos Ayres government’s sovereignty of the Falkland Islands was not accepted by the American government. Following the loss of the American ship Harriet and its seal skins, which were seized by Vernet in 1831, the insurance case regarding the loss of the ship reached the U.S. Supreme court in January 1839. It was argued by the insurance company that Vernet was acting legally and therefore they had no duty to compensate the owners. However, the court finds for the owner, stating, ‘...it is the opinion of this Court ..., that, inasmuch as the American government has insisted and still does insist, through its regular executive authority, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, the action of the American government on this subject is binding on the said Circuit Court...’

Professor Burghardt states, that the administration must be continuous and the occupation effective. Identifying the territory should be settled throughout and the natural resources used. Some commentators suggest that the longer the duration of the administration that the more substantial the justification for a territorial claim based on effective control. The term, “effective occupation” incorporates the notion of uninterrupted and permanent possession.

---

75 Falklands War: the First 400 Years, Claims, Chronology & Counter-Claims, Lorton R. 2012, p63 quoting Greenhow 1842.
77 Award of the King of Italy, Boundary Dispute Between the Colony of British Guiana and Brazil, 6 June 1904, p1, para 4.
78 ICJ Fisheries Case UK V Norway 18 Dec 1951, Diss Opin Sir Arnold McNair, p72, para 2.
82 PCIJ Island of Palmas Case, 1928, p35, para 9.
It is difficult to acknowledge settlement as ‘permanent’ if it is on the verge of collapse as was Vernet’s.

Vattel, in the Law of Nations uses the term ‘a few years’ when he describes possession and says, ‘it is however only in cases of long continued, undisputed, and uninterrupted possession that prescription is established on these grounds, because it is necessary that affairs should sometime or other be brought to a conclusion, and settled on a firm and solid foundation. But the case is different with a possession of only a few years’ continuance, during which time the party whose rights are invaded may from prudential reasons find it expedient to keep silence, without at the same time affording room to accuse him of suffering things to become uncertain, and of renewing quarrels without end.’

Vattel’s Law of Nations was considered sufficient to cite to give conclusiveness and force to statements as to the proper conduct of a state in its international relations.

In contrast, the Clipperton Island arbitration between France and Mexico case concerning an uninhabited island, the arbitrator determined that a mere proclamation of sovereignty by a French naval officer published in Honolulu was deemed sufficient to create valid title. The arbitration clarified the normal way of taking valid possession by stating that, ‘the taking possession consists of an act or series of acts by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. In ordinary cases this only takes place when the state establishes in the territory and organisation capable of making its laws respected.’ The tribunal then went on to state, ‘Thus if a territory is completely uninhabited, is from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that State, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.’

Relevant to the decision was the weakness of the Mexican claims to the island as well as the uninhabited and inhospitable nature of the territory.

The question addressed by the Clipperton arbitration was, at what point does occupation become effective? Dickinson, former president of the American Society of International Law, interpreted the Clipperston Island Award ‘as applying to all uninhabited and uninhabitable regions, and as meaning that occupation as is appropriate and possible under the circumstances.’

The earlier settlements had shown that the Falkland Islands were not uninhabitable and as regards to uninhabited at the time of Jewett’s arrival and proclamation in 1820, 6 British and 9 US ships were moored around the islands. Jewett made no attempt to impose any conditions or regulate their sealing activities. And as already stated above, Vernet had gained approval from British Consul to set up ‘his colony’ and commercial enterprise before claiming the Islands for the Buenos Aries regime on 10 June 1829. Effective occupation cannot occur if another state exercises sovereignty over the area. Any claims of British or Spanish abandonment of sovereignty cannot be presumed but must be proved. The Clipperton arbitration explained that although France had not exercised any authority on the island between 1858 and 1897 this did not constitute res nullius when Mexico landed because France had not demonstrated any intention of abandoning her claim. As discussed earlier, Britain carried out acts of sovereignty when it denied France the right to set up an establishment for fisheries on the Falklands in 1801 and again in 1802. The Clipperton arbitration stated, ‘There is no reason to suppose that France had lost her right by derelictio since she never had the animus of abandoning the island and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already perfected.’ The arbitration also clarified, ‘that the occupying State takes steps to exercise exclusive authority there.’

83 The Law of Nations, Vattel, Cpt XI p 337.
84 The Authority of Vattel, C.G. Fenwick, 1913, p395.
85 Judicial Decisions Involving International Law, France-Mexico, 28 Jan 1931, p390-1.
89 Ibid 73 & 74 p 20.
90 Judicial Decisions Involving International Law, France-Mexico, 28 Jan 1931, p393 & 394.
It would be reasonable to argue that the Clipperton Arbitral Award relating to a still uninhabited coral atoll of 3.5 square miles in regards to possession of uninhabited and uninhabitable regions is not applicable to the Falkland Islands and that the arbitration reference to ‘in ordinary cases’ would be more applicable to the Falkland Islands because of previous viable settlements. Any view that United Provinces took steps to exercise exclusive authority there as stated in the arbitral award is doubtful and as stated and any claims of abandonment making the islands res nullius would have to be proved.

The notion that Argentina inherited the islands from Spain through uti possidetis juris is unconvincing because the concept was only accepted as customary law at the Congress of Lima in 1848 and Britain never subscribed to the concept. (see page 17)

Argentina made several attempts to assert sovereignty over the islands but whether any were stable enough to give her clear title is questionable. The islands were not res nullius, but they were not yet clearly recognised by the international community as being under any nation’s sovereignty. The British and Spanish settlements did not end because of commercial failure but because of indirect pressure caused by war; Britain because of rebellion leading to war with its North American colonists and Spain because of revolt in its South American territories. It is reasonable to say that if Argentinean sovereignty survives today through expulsion then British sovereignty survives through temporary abandonment due to war.

### 3.3 Immemorial Possession & Historical Consolidation

Another type of prescription is the existence of immemorial possession in international law. A long and undisturbed possession of a territory militates in favour of the presumption that the state in possession has an originally valid title over this territory. ‘The postulate of this form of prescription is that a state of things exists the origin is uncertain. It is impossible to prove whether the origin of this state of affairs is legal or illegal.’ It does not confer new title; it consecrates a title which had already been in existence. Immemorial Possession: ‘By this term is understood that of which no man living has seen the beginning and the existence of which he has learned from his elders.’

In relation to immemorial possession ICJ Judge Ad Hoc Rao, stated, ‘Where original title to a given territory is sought to be established, what is crucial are not indirect inferences or presumptions deduced from “history” or Middle Ages” but evidence directly relating to effective display of State authority. Referring to claims of original title based on immemorial possession, in the Minquiers and Ecrehos case, the Court observed that “what is of decisive importance…is not indirect presumptions deduced from the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.” He went on, ‘Similarly, in its Advisory Opinion in the Western Sahara Case, in response to Morocco’s claims to ties of sovereignty on the ground of an alleged immemorial possession of the territory, the Court noted that, “what must be of decisive importance…is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonisation by Spain and in the period immediately preceding that time.”’

Immemorial Possession is deemed lawful in the light of general acquiescence by the international community or particular acquiescence by a relevant other state. Accordingly, acquiescence may constitute evidence reinforcing title based upon effective possession, rendering it definitive. In such cases, failure to protest would be particularly significant.

---

91 Geography.about.com/library/cia/bic clipperton.
92 Boundaries, Possession & Conflicts in S. America, Ireland G. 1938, P327.
95 Civil Code of Louisiana, Art 762.
The Falkland Islands are recognised by the European Union as ‘an overseas country or territory of the UK, subjected to EU law in some areas.’ The Commonwealth of Nations also lists the Islands as a British Overseas Territory. As already stated, Argentina failed to protest about British possession of the Falklands for over fifty years. 98

The fact that the British have exercised effective control over the Falkland Islands since 1833 is also highly relevant.

**Historical Consolidation**

The notion of historic consolidation is different from prescription as it does not require acquiescence. Historical consolidation assumes that: there comes a time when realities, however illegal or inequitable they may have been initially, appear to have become irreversible and the world community’s interest in orderliness and stability might justify cloaking it with the mantle of legality. 99

The PCA Eritrea-Yemen arbitration of 1996 spoke of the traditional fishing regime as having been established by ‘historical consolidation’ rights for both parties as a form of international servitude falling short of territorial sovereignty. 100 The award also expanded the concept of effectivités, to show what Charles de Visscher called ‘a gradual consolidation of title’ and relies on the relatively recent history of presence and display of government authority and other ways of showing possession. 101

In the ICJ Maritime Delimitation and Territorial Questions between Qatar and Bahrain of 2001, Judge Torres Bernárdez in his dissenting Opinion acknowledged ‘historical consolidation’ when he stated, ‘In effect, this finding fails, according to the opinion, to acknowledge (i) the original title and corresponding sovereignty of the State of Qatar over the Hawar Islands, a title established through a process of historical consolidation and general recognition; and (ii) the absence of any superior derivative title of the State of Bahrain over the Hawar Islands...’ 102

In the Cameroon Nigeria Judgment of 10 Oct 2002, Nigeria claimed that it required areas located in the Lake Chad area by virtue of historical consolidation – by prolonged occupation of the territory belonging to another state as the basis to title. In response, although the Court had recognised the relevance of such consolidation to maritime delimitation in the UK-Norway Fisheries case, stating that there was nothing in the fisheries judgment suggests that the ‘historical consolidation’ referred to, in connection with external boundary of the territorial sea, allowing land occupation to prevail over established treaty title. The Court rejected Nigeria’s argument of using historic consolidation as a mode of acquiring title because it could not prevail where there was a treaty title and with respect to the Lake Chad villages, the period of 20 years was too short a period to uphold the theory. The Court went on to say that the theory of historic consolidation cannot replace the establish modes of acquiring territory. 103

However, judge Korma in his dissenting opinion stated that ‘historical consolidation, if supported by the requisite evidence, can be a sound and valid means of establishing territorial title in international law.’ He went further and criticized the Court for being preoccupied with labelling the evidence rather than assessing and interpreting it. 104

Judge Ajibola in his dissenting opinion also supported Korma’s view when he stated, ‘the principle has evolved over the years, side by side with effectivités (effective principles), that a territory that is not terra nullius, occupied by inhabitants, over many years with open claim of territorial sovereignty over the territory, undisturbed, uninterrupted and without any hindrance whatsoever, becomes a matter of recognition under

---

98 Ibid, 38 p7
99 The East Timor Case Before the International Court of Justice, Chinkin C.M. 1993, *quoting* Fonteyne, Supra note 24, at 178.
100 PCA Eritrea/Yemen Second Stage Maritime Delimitation Award, 3 Oct 1996, para 38.
international law in the name of historical consolidation.’ Ajibola went on to state that, ‘a long list of
distinguished jurists and writers in international law including Charles de Visscher, Sir Robert Jennings and
Professor George Schwarzenberger have lent their support to this principle.’

It is interesting that the two major inferences for the Court rejecting Nigeria’s claim of historic consolidation
referred to (i) an already established treaty title and (ii) too short a period of occupation (20 years). Neither of
which would apply to the Falkland Islands.

3.4 Military Occupation Leading to Conquest and Subjugation

Halleck’s book on the laws of war turns to both Heffter and US case law in respect of military occupation. His
theory incorporates the British and Heffter’s into one and comes up with the following: ‘once the occupant has
successfully secured control over the enemy territory and the ousted government is incapable of regaining
control over the territory through military efforts, the occupant may opt to treat the area as subject to military
occupation, during which it can, at his pleasure, either change the existing laws or make new ones. However,
the occupant can also gain sovereign title over the territory by executing an authoritative and unequivocal
sovereign act, such as annexation or incorporation, thereby manifesting its intention to retain the occupied
territory as its own.’

In the award between Eritrea and Yemen of 1996, the PCA determined that, ‘it was further agreed in these
proceedings that Ottoman title had been secured by military occupation, which was lawful by reference to the
international law of the day.’

The right of making war belonged to every nation and a formal declaration of war to the enemy was not
considered necessary.

Through military occupation the territory conquered does not automatically become the victor’s land until
subjugation takes place. The terms cession, annexation and subjugation are used to describe a formal and
permanent acquisition of territory by one belligerent power to another.

While military occupation alone does not give the conqueror automatic title to territory, conquest and
subjugation does. Conquest was a legitimate way of acquiring territory and in the process subjugating the
population remained in force from the 16th century right up to the 20th century and was only outlawed by the
League of Nations.

Here, the comments from the work of Professor Oppenheim and Sir Hersch Lauterpacht are relevant and explain
the legal process: Conquest is the taking of possession of enemy territory through military force in time of war.
Conquest alone does not ipso facto make the conquering state the sovereign of the conquered territory...
Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally
annexes the territory. Such annexation makes the enemy state cease to exist and thereby brings the war to an
end. And as such ending of war is named subjugation. It is conquest followed by subjugation and not conquest
alone which gives a title and is a mode of acquiring territory...Annexation turns the conquest into subjugation.
It is the very annexation which by a unilateral act makes the vanquished state cease to exist and brings the
territory under the conquerors sovereignty. Thus the subjugated territory has not for one moment been no
state’s land, but passes from the enemy to the conqueror, not through cession, but through annexation.

In simple terms, in order to obtain a territory by conquest and subjugation (i) the conquering power must
establish the conquest, (ii) the state of war must have ended and (iii) the conquering nation must annex the
territory.

105 Diss Opinion Judge Ajibola, ICJ Land & Maritime Boundary Judgment, 10 Oct 2002, p582, paras 135-6
106 The International Law of Occupation, Second Addition, Benvenisti, E, 2012, p34, quoting Laws of War,
Halleck, H.W. 1866.
107 PCA Arbitral Award, First Stage of Proceedings, Territorial Sovereignty and the Scope of the Dispute, Eritrea & Yemen
109 International Law Reports, Volume 72, Lauterpacht, H., 1932, Case No. 56.
110 The Legal Foundation and Borders of Israel Under International Law, Grief H. 2008, P285-286 quoting Treaties of
On the subject of conquest as providing title to the Falklands, Shaw writes, ‘it would appear that conquest formed the original title, irrespective of the British employment of other principles. This, coupled with the widespread recognition by the international community, including the United Nations, of the status of the territory as a British Colony would appear to resolve the legal issues, although the matter is not uncontroversial.’

The modern definition of war has been defined as: ‘a state of forcible contention; an armed contest between nations; a state of hostility between two or more nations or states.’ In the Law of Nations, and more relevant to the era, Vattel provides the following definition – ‘War is the state in which we prosecute our right by force.’

The Argentine government describe the British activities of 3 January 1833 as, ‘on 3 January 1833 a British Royal Navy corvette with the support of another warship in the vicinity, threatened to use greater force and demanded the surrender and handover of the settlement.’ And ‘The act of force of 1833, carried out in peacetime without prior communication or declaration by a government friendly to the Argentine Republic...’

The Argentine Foreign Minister described the events of 1833 as, ‘the UK had occupied the Malvinas Islands since 1833, when its fleet had driven away the population and Argentine authorities, a shameful, imperialist act consolidated with the expansionist intent of the British crown.’

The international community has accepted the results of conquest in many cases by virtue of recognition. The Falkland Islands have been recognised by the United Nations as a non-self governing territory. The Falkland Islands have been annexed by the UK and were given a British colonial administrator on 2 January 1842 and were a classified as British Crown Colony on 2nd March 1892 and are now classified as a British Overseas Territory. Therefore it is reasonable to argue that in 1833 the British, by re-establishing control over the Falkland Islands did this by an act of war by conquest and formally annexed the territory completing the legal requirements of the day to obtain legal title of the Falkland Islands by conquest and subjugation.

3.5 Uti Possidetis Juris

Argentina claims the right of uti possidetis juris – a principle according to which, upon independence, news states’ inherit territories and boundaries of former colonial provinces. In this respect, Argentina claims that it inherited the Falkland Islands from Spain. This principle is in no way universally applicable in international law.

The doctrine that boundaries of the American republic ordinary coincide with the boundaries of the preceding Spanish administrative divisions and sub-divisions was not embodied in any of the early treaties among new nations, and of course not in any between them and Spain; but rather it came gradually to be accepted as a general principle in South America known as the doctrine of uti possidetis juris of 1810 and proclaimed in the Congress of Lima in 1848. Therefore uti possidetis juris was simply a proposal which did not acquire regional agreement from the former Spanish Colonies until 1848.

The ICJ Burkina Faso/Mali Judgment described uti possidetis juris as ‘its purpose, was to scotch any design which non-American colonial powers might have on regions which had been assigned by the former metropolitan state to one division or another but which were still uninhabited or unexplored. The essence of the principle lies in its primary aim of securing respect for the territorial boundary at the moment which independence was achieved.’

113 The Law of Nations, Of War, Definition of War, Vattel, 1797.
115 Extract from statement of Argentine Foreign Minister Timerman to UN Special Committee On Decolonization 21 June 2011.
116 UN C24 List of Non-Self-Governing Territories.
118 Boundaries, Possessions and Conflicts in S. America, Ireland G. 1938, p327.
119 ICJ Burkina Faso/Mali judgment, 22 Dec 1986, p566, para 23.
It was applied in this case because the African states had previously reached agreement amongst themselves to apply uti possidetis juris when delimiting their borders.  

It must be taken into consideration that Argentina was not recognised by Spain until 1859, twenty-six years after the Falklands had come under British rule (1833). Therefore it would be reasonable to argue that Spain could not transfer sovereignty to a state that it did not recognise.

In the Nicaragua/Columbia maritime dispute of 19th November 2012, the ICJ stated, ‘the Court finds that neither Nicaragua nor Columbia has established that it had title to the disputed maritime features by virtue of uti possidetis juris because nothing clearly indicates these feature were attributed to the colonial provinces of Nicaragua or of Columbia.’

Similarly in the Islands of Meanguera and Meanguerita, part of the Land, Island and Maritime dispute between El Salvador and Honduras of 11th September 1992, the Court stated, ‘the uti possidetis juris position in 1821 cannot be satisfactorily ascertained on the basis of colonial titles and effectives.’ The court decided on El Salvador’s sovereignty due to its effective possession and control over the Islands.

The Clipperton Island case of 28th January 1931, France/Mexico was another important case where Mexico claimed that Clipperton Island had been discovered by Spain and by virtue of the law then in force, fixed by the Papal Bull of Alexander VII, had belonged to Spain and afterwards, from 1836 to Mexico as successor state of the Spanish state. The Court determined ‘the proof of an historic right of Mexico’s is not supported by any manifestation of her sovereignty over the Island, a mere conviction that it was territory belonging to Mexico, although general of long standing, cannot be retained.’

The Latin American States have together initially adopted the principle of uti possidetis with a view to simply protest against the occupation of the Falkland Islands by stating that there were no longer any terra nullius (land belonging to no one) in Latin America.

The same states have never adopted together the uti possidetis juris as a way of settling their boundary disputes. In the Treaty of Limits of 15 July 1852 Argentina and Paraguay undertook to fix their boundary by direct negotiation. No mention is made of the uti possidetis. A comparison between maps of Latin America under Spanish rule and at the turn of the twentieth century reveals that colonial lines accounted for only 10% of the new international boundaries. It can be argued that as a principle of Latin American Law, uti possidetis juris was applied strictly on the basis of a contracting-in by the parties involved.

It is on the basis of a mutual agreement between the two parties and not on its own that the ICJ will declare that uti possidetis juris will be applied to a particular case. This was confirmed in the Opinion of 16th March 2001, when Judge Torres Bernárdez stated that, ‘Moreover, in the present case, Qatar rejects the application of uti possidetis juris in its relations with Bahrain. Therefore there is no agreement between the Parties as to retroactive application of uti possidetis juris by the Court to the present case.’

121 The Falkland Islands/Malvinas Case, Breaking the Deadlock, Laver, 19 Nov 2012, p2, para 6.
124 Judicial Decisions Involving Questions of International Law, France-Mexico, 1931, p393, para 2.
127 Costa Rica/Panama Arbitration, Memorandum on Uti Possidetis, Moore, J.B., 12 Sept 1914, p27, quoting The Treaty of Limits of 15 July 1852, Argentina and Paraguay.
129 ICJ Maritime Delimitation & Territorial Questions Qatar/Bahrain, 16 March 2001, Diss Opinion Judge Torres Bernádez, p372, para 430.
The Argentine and Chile Beagle Island arbitration described uti possidetis juris as, ‘This doctrine – possibly, at least at first, a political tenet rather than a true rule of law – is peculiar to the field of the Spanish-American States whose territories were formerly under the rule of the Spanish crown – and even if both the scope and applicability of the doctrine were somewhat uncertain, particularly in such far-distant regions of the continent as are those of the present case, it undoubtedly constituted an important element in the inter-relationships of the continent.’

Not a single arbitration tribunal has ever proprio motu, (on one’s own initiative) in the silence of the compromis, (formal agreement) taken a decision to apply the uti possidetis.

The reliance on the uti possidetis juris principle in Latin America must be seen as a separate and distinct process, as a means not of delimiting title but rather of determining the precise location of boundary lines that revolutionary activities had set up as the new international borders. Thereby in the South American context uti possidetis juris was considered a principle applying to only among the former Spanish possessions on the one hand and Brazil and the other European possessors on the other, was consistently denied by the latter parties. In such boundary/territorial disputes effective possession and acquiescence were the governing principles.

At the time uti possidetis juris imposed an obligation only on those who subscribed to it, which did not include Brazil, Britain or Spain. For the Falkland Islands to have been inherited from Spain then uti possidetis juris would have had to impose an obligation on Spain and the South American countries and as already stated, the legal concept did not achieve regional agreement until 1848, too late to be considered relevant to the Falkland Islands.

Nootka Sound Convention of 1790
The Argentinians claim that the Nootka Sound Convention of 1790 recognises Spanish sovereignty over the Falklands and that this reinforces their argument that they inherited the Falklands. The Nootka Sound controversy was a dispute over the seizure of vessels at Nootka Sound, an inlet on the western coast of Vancouver Island that nearly caused a war between Britain and Spain. The British threatened war over Nootka Sound incident, but because of Spain’s military weakness and because of Prussian diplomatic support on behalf of Britain, Spain yielded to the British demands in the Nootka Sound Convention, signed on 28 October 1790. The Convention acknowledged that each nation was free to navigate and fish in the Pacific and to trade and establish settlements on unoccupied land.

Article VI of the agreement, ‘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 coast situated to the south of the parts of the same coast and the islands adjacent already occupied by Spain; it being understood that the said respective subjects shall retain liberty of landing on the coasts and islands so stipulated for objects connected with their fishery and of erecting thereon huts and other temporary structures serving only those objects.’

Contrary to what is usually asserted, article VI of the Nootka Sound Convention, as has been shown, did not apply to the Falkland Islands. It was restricted to territories lying farther south.
In 1790 the land that was to become Argentina was not adjacent to the Falkland Islands. The islands are 300 miles off the coast of Patagonia, unconquered by Argentina until 1878. Even so, the Continental Shelf Judgment of 1969 described terms as “adjacent to” it is evident that by no stretch of the imagination can a point on the continental shelf situated say a hundred miles, or even much less from a given coast, be regarded as “adjacent” to it, or to any coast at all, in the normal sense of adjacency. 137

Even if Article VI did incorporate the Falklands the secret article would have put paid to Argentina’s claims as it states, ‘Since by Article 6 of the present convention it has been stipulated, respecting the eastern and western coasts of South America, that the respective subjects shall not in the future form any establishment on the parts of these coasts situated to the south of the parts of the said coasts actually occupied by Spain, it is agreed and declared by the present article that this stipulation shall remain in force only as long as no establishment shall have been formed by the subjects of any other power on the coasts in question. This secret article shall have the same force as if it were inserted in the convention.’ 138

The Nootka Sound Convention was signed at the Palace of San Lorenzo, Spain and the secret article was added on 22nd November 1790. Both the agreement and secret article were ratified by The Count of Floridablanca, Chief Minister of King Charles of Spain and Alleyne Fitzherbert British Ambassador to Spain.

New states like Argentina cannot inherit the Nootka Sound Convention – ‘As is evident that a treaty binds none but the contracting parties, the conventional law of nations is not a universal but a particular law.’ 139

The British have always insisted that the Nootka Sound Convention of 1790 did not affect existing sovereignty claims. Even if it did apply to the Falklands, Argentina by establishing a settlement on the islands in 1829 (as long as no other establishment shall have been formed by the subject of any other power) would have made the Treaty null and void by as per the secret article.

4. Territorial Integrity and Argentinean Stance
While UN Resolution 1514, Declaration on the Granting of Independence of Colonial Countries and Peoples of 1960, upholds the commitment to an ‘inalienable’ right to freedom and decolonization and states in paragraph 2 ‘All people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’, it also prompts the Argentine viewpoint that paragraph 6 of UN Resolution 1514 states, ‘any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Charter of the United Nations.’ 140

The above argument is particularly weak as the Falkland Islands were not accepted as part of Argentinean territory in 1833, either by Britain or other countries including the United States, so paragraph 6 of 1514 does not apply. The claim that Britain ejected a civilian population from the Islands is false. The British did eject a small Argentine garrison (26 soldiers, with their 11 women and 8 children) that had been on the Falklands just less than three months, and Britain had protested diplomatically against the appointment of their commander, and by implication, the garrison that went with him, less than a week after they had sailed from Buenos Aires. In fact, Britain wanted the tiny civilian population to remain, and the majority of settlers decided to do so. Only four settlers ‘chose’ to leave with the garrison, Brazilian gaucho Joaquín Acuña and his woman Juana and the Uruguayan gaucho Mateo González and his woman Marica. 141 Also, UN Resolution 1514 although legally relevant is not legally binding and didn’t come into force in 1960 and is therefore subject to the general principle that UN resolutions are not be applied retroactively so any events occurring in the 19th century are not covered by this resolution. In this respect of non-retroactively the ICJ has made a number of judgments. 142

137 ICJ North Sea Continental Shelf Cases, Germany/Denmark, Germany Netherlands, 20 Feb 1969, p31, para 41.
138 Nootka Sound Convention, Secret Article, British Columbia from the Earliest Times to the Present, Clarke, S.J., 1914, P666.
140 UNGA 1514 (XV) Declaration on Granting of Independence to Colonial Countries and Peoples, 14 December 1960.
142 ICJ Ambatielos Case, Greece & UK Judgment 1 July 1952, p40

20
The ICJ has judged that both Security Council and General Assembly resolutions cannot be applied retroactively. In the Lockerbie case the Court denied the objection because 'the date, 3 March 1992, on which Libya filed its Application, is the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at a later date.' 143 And in the Genocide case, 'the Court stated that resolution 55/12 of 1 November 2000 (by which the General Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations) cannot have changed retroactively the sui generis (something is unique) position which FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention.' 144

The non-retroactive effect is the rule as it is in all legal systems. (See Ambatielos Case 177 page 26). Even if it were acknowledged for the sake of argument, that the Falklands were part of Argentinean territory it was explained that, the principle of territorial integrity was enshrined in the Covenant of the League of Nations and again in the Charter of the United Nations. Article 2 of the UN Charter provides that: “Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Threat or use of force impinges the territorial integrity of a state but general diplomatic and political declarations do not violate the principle. But this international legal rule applies only between states because “members” under the UN Charter are only states. This leads to the conclusion that the principle of territorial integrity is the principle applied in relating between states and not inside a single state. Respecting the territorial unity/integrity of a state by its own population is a domestic affair and does not fall within the international law jurisdiction. 145

The above view was confirmed by the 2010 Kosovo ICJ Advisory Opinion where the judgment explained that, ‘the Helsinki Conference on Security and Cooperation in Europe of 1st August 1975 stipulated that, “participating states will respect the territorial integrity of the participating states.” Thus the scope of the principle of territorial integrity is confined to the sphere of relations between States.’ 146 Thereby indicating, that the principle of territorial integrity does not impinge on the international law of self-determination and independence.

The ICJ rejected Serbia’s claim that the move had violated its territorial integrity. Therefore, theoretically, even if the Falkland Islands were acknowledged as part of Argentinean territory it would not stop them from breaking away and claiming independence through the exercise of self-determination. In February 2008, Argentine Foreign Minister Jorge Taiana, when speaking of the ICJ Kosovo case in the Clarin Newspaper said, ‘If we were to recognise Kosovo, which has declared independence unilaterally, without an agreement from Serbia, we would set a dangerous precedent that would seriously threaten our chances of a political settlement in the case of the Falkland Islands.’ He continued, ‘Argentina will not recognise also because it supports the principle of territorial integrity.’ 147

In 2010, the ICJ determined that Kosovo’s declaration of independence from Serbia was not unlawful. To date, one hundred and ten UN member States, the majority, now recognise Kosovo as an independent State. 148

4.1 A People

Argentine politicians attempt to circumnavigate UN resolutions by declaring that the Falkland Islanders are not ‘a people.’ The UNESCO international meeting of experts for the elucidation of the concepts of rights of people met in 1989 and discussed titleholders of the right to self-determination. They referred to Webster’s definition of ‘peoples’ as described as, ‘the entire body of persons who constitute a community or other group by virtue of common culture, religion or the like.’ They continued, ‘A more detailed description was developed in 1989 specifically for the purpose of identifying the holders of the right to self-determination by UNESCO’ and referred to the Kirby definition.’

146 ICJ Kosovo Advisory Opinion, 22 July 2010, p38, para 80.
147 Jorge Taiana, quoted in Clarin.com, 20 Feb 2008.
148 Who recognized Kosovo as an independent State/Kosovo thanks you.com.
The Kirby definition identifies ‘a people’ as: a group of individual human beings who enjoy some or all of the following features:

a) common historical tradition Racial or ethnic identity
b) Cultural homogeneity
c) Linguistic units
d) Religious or ideological affinity
e) Territorial connection
f) Common economic life.

The UNESCO expert also said, ‘the group must have the will to be identified as a people or the consciousness of being a people. They must be a certain number which need not be large.’

Another definition of what constitutes ‘a people’ was provided by Gudeleviciûtê. After interpreting the principle of self-determination, Gudeleviciûtê identified that the only way to prevent discrimination between different groups of people is to define ‘a people’ as the whole population of a particular territorial unit and came up with the following definition, that under the present international law ‘a people’ means: a) entire population of an independent state, governed in a way representing the whole population; b) entire population of a non-self-governing territory; c) entire population of a particular occupied territorial unit living under foreign military occupation; d) entire unrepresented/oppressed part of population of a particular territorial unit.

The UNESCO international conference of experts met again in Barcelona in 1998 and determined ‘that the plain meaning of the term “all peoples” includes peoples under colonial or alien subjugation or domination, those under occupation, indigenous peoples and other communities who satisfy the criteria generally accepted for determining the existence of “a people.” Accordingly, the Falkland Islanders would qualify as a people under their present colonial status.

The above view was supported by Judge Trindade in his separate opinion of 22 July 2010 as part of the Kosovo ICJ Advisory Opinion. In his opinion, Judge Trindade dealt specifically with the people-centred outlook in context of international law and commented on ‘people or populations.’ He stated, ‘In fact, the law of nations has never lost sight of this constitutive element – the most precious one – of statehood: the “populations” or the “people”, irrespective of the difficulties of international legal thinking to arrive at a universally accepted definition of what a “people” means. The respective “territorial” arrangements were the means devised in order to achieve that end, of protection of “populations” or “peoples.” And, “By the same token, self-determination is an entitlement of “peoples” or “populations” subjected in distinct contexts, not only that of decolonization...” This leads to the assumption that Judge Trindade believes that in international law, ‘a people’ and ‘population’ have the same basic meaning. This is supported by numerous UN resolutions on decolonisation where the words ‘people’ and ‘population’ are used interchangeably. For example, UNGA resolution 1514 (XV) from 1960 uses the word ‘people’ and UN 2065 (XX) from 16 December 1965 uses ‘population.’

4.2 Indigenous People

Another Argentine argument espoused by some politicians is that the Falkland Islanders do not qualify for the right to self-determination as they are not an indigenous people by stating, ‘the UN is very clear. Self-determination applies to native people, not to people that have been implanted.’

153 UNGA Resolution 1514 (XV) Declaration on Decolonization and UN 2065 (XX) Falkland Islands It is pretty evident that despite Argentina’s protests, the Falkland Islanders are ‘a people.’
154 Oil Fuels British-Argentine Stand-off Over Falklands, Abbas, M. Reuters, 6 Feb 2013, quoting Argentine Foreign Minister Hector Timerman.
And, ‘Self-determination is a fundamental principle contemplated by international law that’s not granted to any settlers of a certain territory, but only to the original natives that were currently being subjugated to a certain colonial power...’ 155

The UNESCO international conference of experts held in Barcelona in 1998 clarified the right to self-determination and stated, 'from the indigenous perspective the term “indigenous peoples” has no intrinsic meaning. It is just a technical term which allows a number of people to participate, albeit in a limited way, in internal discussions affecting their situation.’ Professor Erica-Irene A. Danes, the Chairperson-Rapporteur of the United Nations working Group on Indigenous Populations is not persuaded that “there is any distinction between “indigenous” peoples and “peoples” generally, other than the fact that the group typically identified as “indigenous” have been unable to exercise the right to self-determination.” 156

Many Falkland Islanders stem from an immigrant community as do so many people from North and South America. It would not be realistic to limit the principle of self-determination to the small number of people who can truly claim to be the descendants of indigenous inhabitants.

4.3 Self-Determination

The Argentineans claim that the right to self-determination does not apply to the Falkland Islanders is not supported by international law. The ICJ has made several Advisory Opinions and Judgments from Namibia through to Kosovo that have either confirmed or stated, ‘that the subsequent development of international law in regard to non-self-governing territories, as enshrined by the Charter of the United Nations, made the principle of self-determination applicable to all of them.’ Four Advisory Opinions and one ICJ Judgment all verify this. 157 In regards to jus cogens (Compelling law) ICJ Judge Skubiszewski, in his East Timor opinion mentioned the opinion of Judge Bedjaoui, President of the Court, ‘self-determination has in the course of time, become a primary principle from which other principles governing international society follow. It is part of jus cogens; consequently, the international community could not remain indifferent to its respect.’ 158 The international Law Commission and the UN Commission on Human Rights, take the view that in the light of the East Timor Judgment, that obligations in respect of self-determination are jus cogens. 159

Two International Covenants on human rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights both state in Part 1 Article 1 (i) ‘All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. And continue, Part 1 Article 1 (ii) All people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. In addition, Part 1 Article 1 (iii) The states parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provision of the Charter of the United Nations.’ 160

Argentina signed both Covenant s on the 19th Feb 1968 and ratified them on 8 August 1986.

Upon ratifying the International Covenant on Economic, Social and Cultural Rights Argentina made declarations which contained amongst other wording ‘rejected the extension of the Covenant to the Malvinas...and In ratifying the protocol of the covenant the Argentine Republic does so on the understanding that the system of communication provided under the instrument does not apply to the rights of peoples to self-determination in any context relating to sovereignty disputes.’

Although Argentina is not precluded from making declarations upon signing or ratifying the Covenant, the International Law Commission has stated, ‘one of the major differences between a ‘reservation’ and an ‘interpretative declaration’ lies in the author’s purpose in making that declaration.’ (Argentina clearly wants to exclude the Falkland Islanders from the human rights principles set out in the Covenant). The International Law Commission continued, ‘Thus, if a statement purports to exclude or modify the legal effect of a treaty in its application to the state, it constitutes a reservation.’

In regards to ‘reservations’, ‘A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a ‘reservation’ unless: c) the reservation is incompatible with the object and purpose of the treaty.’

In the above respect, Article 60 of the Vienna Convention Law of Treaties 1974 outlines how states can terminate or suspend operation of a treaty. In paragraph 5 it clearly says, ‘the above does not apply to the provisions relating to the protection of the human person contained in treaties of a humanitarian character (human rights treaties).’ Therefore, Article 60, paragraph 5 of the VCLoT does not allow termination or suspension of a human rights treaty.

4.4 Erga Omnes

The ICJ Barcelona Traction Judgment of 5 February 1970 set down the basis of erga omnes obligations. The ICJ stated, ‘In particular, an essential distraction should be drawn between the obligations of the state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes.’ The ICJ then gave examples of such obligations quoting, outlawing acts of aggression, genocide, basic rights of the human person, slavery and racial discrimination as being examples erga omnes obligations.

In the 1995 East Timor judgment, the ICJ added the right to self-determination to the list. The ICJ stated in para 29, ‘In the Courts view, Portugal’s assertion that the right of people’s to self-determination, as it evolved from the Charter and the United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court; it is one of the essential principles in contemporary international law.’

In regard to states breaching erga omnes obligations, the Institute of International Law, Krakow Session of 2005, adopted the following resolution and defined an obligation erga omnes as: Article (I)

a) An obligation under general international law that a state owes in any given case to the international community, in view of its common valued and its common values and its concern for compliance, so that a breach of that obligation enables all states to take action; or

b) An obligation under a multilateral treaty that a state party owes in any given case to all the other states parties

1976, in Accordance With Article 27.


162 Alteration of Human Rights Treaty Obligations, Icelandic Human Rights Centre quoting Guide to Practice on Reservations to Treaties Adopted by the International Law Commission 2011, paras 1.3 & 1.3.3.


164 Vienna Convention on the Law of Treaties, Article 60, para 5.

165 ICJ Barcelona Traction Judgment, 5 Feb 1970, paras 33 & 34.

to the same treaty, in view of the common values and concern for compliance so that a breach of that obligation enables all these states to take action. 167

The placing of restrictions on the right to self-determination was also debated by the UN General Assembly Fourth Committee (Senior UN decolonization committee) on 20th October 2008 and a motion sponsored by Spain and Argentina to have conditions applied to the right to self-determination where there was a sovereignty dispute was defeated by 61 votes to 40. The right to self-determination was thereby confirmed as a universal right. 168

4.5 Implied Population

Another Argentinean view is that the Falkland Islanders are an implanted population and as such have no right to self-determination.

Although colonisation, including settler colonisation, is absolutely prohibited under international law it was not expressly prohibited until the 1960s with the UN Declaration on Granting Independence to Colonial Countries and Peoples. 169 In this respect, population transfer was accepted in international law until it was prohibited by the Fourth Geneva Convention of 1949. 170

The ICJ Construction of a Wall in Occupied Palestinian territory Advisory Opinion is often referred to and gives reference to the Fourth Geneva Convention. In the judgment the ICJ stated, 'Article 49, paragraph 6 of the Fourth Geneva Convention is relevant which provides: 'The occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies.' And 'that provision prohibits not only deportations or forced transfers of populations such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.' Then continues 'The Security Council has taken the view that such policy and practices have no legal validity.' 171 In respect of the Falkland Islands, in 1833, only the garrison was asked to leave while the majority of settlers were encouraged to and did stay. Only 4 settlers decided to leave the settlement which was on the verge of collapse. 172

Article 2 regarding the application of the Fourth Geneva Convention is highly relevant inasmuch as it clearly states, 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict' and article 153 ‘coming into force’ – the present Convention shall come into force six months after ratification (21 October 1950). 173

In regards to Article 49, paragraph 6 on population transfer to occupied territories, the Special Rapporteur UN Commissioner of Human Rights clarified, ‘The view has been advanced that a transfer is prohibited under paragraph 6 only to the extent that it involves displacement of the local population’ and ‘Another view of paragraph 6 is that it is directed against mass population transfers such as occurred in WWII for political, racial or colonization ends; but there is no apparent reason for limiting its application to such cases.’ In the conclusion the Special Rapporteur states, ‘International Law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved.’ 174

169 UN Resolution 1514 XV, 14 Dec 1960.
170 Fourth Geneva Convention, Article 49, para 6, 12 Aug 1949.
171 ICJ Construction of a Wall in Palestinian Territory Advisory Opinion, 9 July 2004, p183, para 120.
172 Getting it Right, the Real History of the Falklands/Malvinas, Pascoe & Pepper, 2008, p19.
However, the general rule is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or it is clearly to be implied from its terms. 175

There is no language in the Fourth Geneva Convention regarding its retroactive application. The Vienna Convention Law on Treaties, article 28 also states, ‘unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.’ 176

In reference to the treaty application, the ICJ Ambatielos judgment dealt with retroactive effects of treaties and stated, ‘all provisions of the Treaty shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.’ 177

The only conclusion that can be logically drawn is that the Fourth Geneva Convention is irrelevant in respect of any assertions that the Falkland Islanders are an implanted population.

Article 12 of the International Covenant on Civil and Political Rights is also relevant and clearly states: i) Everyone lawfully within the territory of a state shall, within that territory, have the right of liberty of movement and freedom to choose his place of residence. And at three, iii) The above mentioned right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with other rights recognised in the present covenant. 178

Clearly, the Falkland Islanders are lawfully within their territory.

The problem in the Argentinean view – that “aliens” who have settled have no right to self-determination because of a territorial integrity claim would set a dangerous precedent. If applied universally it would be the basis for driving the people of a country, particularly most of Latin America, out of the places that they now occupy (in Argentina’s case, a native population was actually exterminated to make way for the current population). It is also worth noting that in 1833, when the British returned to the Islands to eject an Argentine garrison, Argentina was 1,000 miles from the Falkland Islands; now because of ‘territorial conquests’ namely the seizure of Patagonia in 1878, it is 300 miles away. 179

4.6 Population Size

Another Argentine view is that the population of the Falklands is too small for self-government. Just as international law does not require a state’s territory to be a minimum size, nor is there a minimum population requirement. Infinitesimal smallness has never been a reason to deny self-determination to a population. 176 In this respect, the UN general assembly issued a resolution in 1970 where it stated that the Charter was unconditionally valid and applied to states irrespective of their size, geographical location and level of development. 180

The Vatican with a population of 800 182 is the smallest state followed by Tuvalu which has 10,000 residents. 183 Tokelau with a population of 1,400, under half that of the Falkland Islands, held a UN sponsored referendum on self-determination on 13th February 2006 and narrowly rejected self-government electing to remain freely

177 ICJ Ambatielos Case, Greece v UK Judgment, 1 July 1952, p40.
178 International Covenant on Civil & Political Rights, Article 12 (i) and (iii), 16 Dec 1966.
182 Vatican City, Official Estimate, State Website.
183 Tuvalu 2011 Census, Government Website.
associated with New Zealand. Similarly, in March 2013 the Falklands Islanders voted with 92% turning out and 99.8% voted to remain British. The head of international observation mission present issued a statement after the election declaring, ‘It is our findings that the Falkland Island referendum process was free and fair, representing the democratic will of the vote of the Falkland Islands’.

The demographics of the Falkland Islands population are listed as 57% Falkland Islanders, 24.6% British, 9.8% St Helenian, 5.3 % Chilean and 3.4% other. Although the population is small, it is permanent and not a transitional population. The majority of islanders were born on the Falklands and many are from families that have been established on the islands for well over a century.

The Argentinean claim that the right to self-determination does not apply to the Falkland Islands can only be described as unfounded.

4.7 Free Association with the UK and the UN C24 Decolonization Committee
UN Resolution 2625 (XXV) of 24 October 1970, Categorically states beneath the Principle of Equal Rights and Self-Determination of Peoples, ‘the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by the people constitute modes of implementing the right of self-determination by that people.’ It is abundantly clear that the Falkland Islanders have elected to remain freely associated with the UK.

Argentina uses the UN C24 Decolonization Committee as a forum for pursuing its Falkland sovereignty claims. The Committee is currently chaired by a member from Ecuador, a country closely aligned to Argentina with diplomats from Cuba and Syria at the head of its office. A host of other countries from South America and Africa as well as China, Russia and Iran are included in the Committee.

Many of the countries of the committee have questionable track records on human rights and 21 of the 29 countries in the committee have been ranked as being ‘not free’ or ‘partly free’ by the 2014 ‘Freedom in the World’ Survey.

Howard S. Levie, one of America’s foremost legal experts and key draftsman of the Korean Armistice agreement summed up the Special Committee when he said, ‘the Special Committee has completely disregarded this right of self-determination and has been seeking to award territory against the wishes of the people who reside on that territory.’ And ‘ that it was Arab and Latin American states who led the General Assembly in these decisions, and that they were more concerned with their own territorial integrity than with the right to self-determination of small colonies that wished to remain loyal to their colonial rulers.’

From the beginning, non-administering governments have dominated the Committee of 24. The administering powers smarting under constant criticism gradually left the Committee. The first to leave were Italy and Australia, followed by the United Kingdom and the United States which complained of the "militant attitude" of the majority. As the number of dependent territories declined, the behaviours of the Committee and the tone of its debates sharpened increasingly. It also demanded full independence for dozens of dependent island archipelagos no matter how small their populations or how benign their governors.

Argentinean politicians often make great mileage out of the UK being in breach of numerous UN resolutions by stating such as, 'the UK and Argentina have a historic opportunity to set an example to the world by resolving...'

184 Tokelau and Self-Determination, Government of Tokelau.
189 United Nations and Decolonisation, UN C24 Decolonisation Committee, Members.
this dispute by peaceful and diplomatic means, as called for by as many as 40 UN resolutions since 1965."

This statement seems impressive but the fact is the vast number of these resolutions has come from the UN Decolonisation Committee. The Decolonisation Committee is a subsidiary body of the United Nations General Assembly, it has NO decision-making powers. Any resolutions that it passes have no legal significance and are irrelevant unless they are endorsed by the United Nations General Assembly. The last UN resolution that was specific to the Falkland Islands was UN Resolution 43/25 from 17th November 1988. That resolution, 'Reiterated its request to the governments of Argentina and the UK to initiate negotiations with a view to finding the means to resolve peacefully and definitively the pending problems between both countries, including all aspects of the Falkland Islands, in accordance with the Charter of the United Nations.' No mention was made to ANY sovereignty negotiations. In this respect, the UK/Falklands made agreements with the Argentine government in respect of hydrocarbons exploration and fisheries control. Both agreements were terminated by Argentina.

Any credibility that the UN C24 Decolonisation Committee had was lost when it blatantly ignored the outcome of the Falklands 2013 referendum when the islanders elected to remain freely associated with the UK in accordance with UN resolution 2625 (XXV). There are no UNGA resolutions that state or infer that the UN must accept a referendum before it is given validity.

4.8 ICJ Individual and Other Opinions

Although the ICJ has not judged the merits of Falkland’s sovereignty, in his Separate Opinion of 16th October 1975, Judge Dillard stated, "It seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient 'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people."

ICJ judge Higgins, commented Dillard’s comments of ‘it is for the people to determine the destiny of the territory and not the territory of the people’ by adding that this would apply to the Falklands, even if Argentina had a legitimate claim: ‘if there has emerged the sort of political, social and cultural identity of a people that gives rise to a right of self-determination, then that right must be the guiding principle.’ She also went on to argue, ‘that the wish of the population not to reintegrate with the original sovereign is a reason for not turning back the clock.’

The above view is also supported by Judge Franck, in his Separate Opinion of 23rd October 2001, when he stated, ‘The point of law is quite simple, but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot – except in the most extraordinary circumstances – prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination.

In 2012, the New York City Bar Associations Committee of the United Nations has taken a detailed look at the Western Sahara dispute regarding the principle of self-determination and their legal team came up with the following observations, stating: ‘To summarize, according to the ICJ, a state must demonstrate ties between itself and the population of a colony as a whole over a continuous period and in a significant and formal fashion immediately preceding its colonization in order to overcome the right of self-determination of the

193 Alicia Castro, Argentinean Ambassador to the UK, the Guardian Newspaper, 11 March 2013
198 Separate Opinion, Judge Franck, ICJ Pulau Ligtan & Pulau Sipadan, Philippine Historic Title, North Borneo, 2001, p81, para 2.
inhabitants of a colony.'

The Association continues, 'Further a state’s right under international law to acquire the territory of another sovereign state or a non-self-governing territory against the will of the people under the theory of ‘historical ties’ is severely circumscribed, the theory cannot support the annexation of the territory of another state. When applied to the territory of a non-self-governing territory the requirements are strict; it requires proof of continuous, important and formal ties of a political and economic nature in the few instances where it has successfully defeated the right of the inhabitants to self-determination.

Needless to say, Argentina has not maintained continuous, important and formal ties of a political and economic nature with the Falklands. If anything, the opposite is true.

The New York City Bar Association comments on public policy and legislation. The Chairperson and principal signatory to this document, Katlyn Thomas, testified before the UN Decolonization Committee in October 2012 regarding Western Sahara. The committee drafting this document consisted of ten lawyers, most of whom, are experienced at dealing with cases concerning international law.

5. Snapshot of Falklands History 1826 - 1833

To understand why the Argentina has not maintained continuous, important and formal ties of a political and economic nature with the Falklands and why any 'historic title' argument or 'old legal ties' are not relevant it is necessary to understand a brief history of the Falklands. During various periods in the 18th and 19th centuries the French, British and Spanish all had settlements on the Falklands. All were abandoned. For long periods the Islands were uninhabited as they were prior to 1826. This is a brief snapshot of the period 1826 – 1833 to give a better understanding of the Argentina’s claims.

1826 – Louis Vernet started a private venture on the Falklands and established a settlement at Puerto de la Soledad.

1829 – The illegal* Lavalle government in Buenos Aries made Vernet a commander in the Falklands on the grounds that they claimed all rights in the region that were previously exercised by Spain. Britain makes a formal protest asserting her sovereignty over the Falklands. * When Rosas was elected governor of Buenos Aries in 1829 his legal federal government declared all acts of the ‘illegal unelected’ government of Lavelle between 1 Dec 1828 and 5 Dec 1829 null and void. Vernet makes the first of several approaches to Britain for it to re-assert its sovereignty over the Falklands.

1831 – Vernet seized 3 American ships that were involved in the seal business on the Falklands. In retaliation, the US ship Lexington destroyed Puerto de la Soledad and proclaimed the Islands ‘Free of government.’ Most of the settlers leave on board the Lexington.

1832 – Diplomatic relations between the US and Argentina broke down and were not re-established until 1844. The US questions the claim that all Spanish possessions had been transferred to the government in Buenos Aries and confirmed its use of the Falklands as a fishing base for over 50 years.

1832 (10 October) – Buenos Aries installs an interim commander, Mestivier and a tiny garrison in the Islands. Mestivier is murdered by his own soldiers in a mutiny on the 30 November that year. Captain Onslow arrives in HMS Clio at Port Egmont two weeks later, on 12 December, and re-asserts British sovereignty over the Islands.

1833 (2 January) – Captain Onslow arrives in HMS Clio at Port Luis and re-asserts British sovereignty there. The captain of the Sarandi, the Argentine ship which had brought Mestivier and his tiny garrison, represents Argentina’s claim to sovereignty. He and the Argentine garrison are expelled and leave on the 4th January 1833. Only 4 settlers ‘chose’ to leave with the garrison. The rest of the settlers, about 25 people, decide to stay. The last of them, Gregoria Madrid, dies in Stanley in 1871.

199 New York City Bar Association, Committee on the UN, Legal Issues Involved in the Western Sahara Dispute – the Principle of Self-Determination, 2012, p51.
200 New York City Bar Association, Committee on the UN, Legal Issues Involved in the Western Sahara Dispute – the Principle of Self-Determination, 2012, p58.
The government in Buenos Aires protests and was told. ‘The British Government upon this occasion has only exercised its full and undoubted right...The British Government at one time thought it inexpedient to maintain any Garrison in those Islands: It has now altered its views, and has deemed it proper to establish a post there.’ 201

5.1 UN Charter and UNGA Resolution 2625 (XXV)
The UN Charter also supports the right to self-determination; Article 73 – Declaration regards nonself-governing territories states, ‘that the interests of the inhabitants are paramount.’ Argentina signed the UN Charter on 24th October 1945. The UN Charter is a constitutional treaty and all members are bound by its articles. Article 103 of the Charter states that, ‘obligations to the United Nations prevail over all other treaty obligations. 202

UN General Assembly resolution 2625 (XXV) of 24th October 1970, entitled, Declaration on the Principle of International Law Concerning Friendly Relations and Cooperation Among States declares, ‘No territorial acquisitions resulting in the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting: a) provisions of the charter or any international agreement prior to the charter regime and valid under international law.’ 203 The resolution thereby clarifies that the modern prohibition against the acquisition of territory by conquest should not be construed as affecting titles to territory ‘prior’ to the Charter regime and valid under international law. 204 Therefore any British actions in respect of the Falklands that occurred in 1833 would not fall under the provisions of the Charter. And, in any case, Britain’s claim dates from 1765, and was sustained against the claim of Spain by treaty in January 1771.

5.2 UNGA Resolution 2065 (XX) Question of the Falkland Islands – 16 Dec 1965
Argentina frequently cites the UK as being in breach of the above non-binding UN resolution. The resolution states, ‘Noting the existence of a dispute between the government of Argentina and the United Kingdom concerning the sovereignty over the said Islands. Invites the government of Argentina and the UK to proceed without delay with 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 provisional objective of the United Nations and of General Assembly Resolution 1514 XV and the interests of the population of the Falkland Islands.’ 205 The resolution carries two important words ‘peaceful’ and ‘interests’ both are highly relevant. Peaceful was broken by the Argentina in 1982 with their invasion of the Falklands and the subsequent development of international law that has occurred between 1971 and 2010 in regards to self-determination has replaced interests of the population from the old Charter regime on decolonization with ‘inalienable rights.’

In respect of the above, UNGA Resolution 2734 (XXV) from 16 December 1970 is relevant as it states, in part 17, ‘Urges member states to reaffirm their will to respect fully their obligations under international law in accordance with the relevant provisions of the Charter and to continue to intensify the efforts towards the progressive development and codification of international law.’ 206 This confirms that new principles of international law, such as the right to self-determination are incorporated into the UN Charter; therefore self-determination supersedes all other international obligations. 207

The ICJ has now issued Four Advisory Opinions and one Judgment that all state or confirm that the right to self-determination is applicable to all non-self-governing territories. 208 In their East Timor Judgment of 1995 the ICJ stated, ‘it is the Court’s view that the right to self-determination as it evolved from the Charter of the UN, has now an erga omnes character, is irreproachable. The principle of self-development has been recognized by the

201 Falkland Islands Government, Our History & False Falklands History at the UN, Pascoe & Pepper.
203 UNGA Resolution 2625 (XXV) 24 October 1970.
204 Akehurst’s Modern Introduction to International Law, Acquisition of Territory, p156.
205 UNGA 2065 (XX) Question of the Falkland Islands, 16 Dec 1965.
208 Ibid, 157, p23
UN Charter and the jurisprudence of this Court.’ 209 Advisory Opinions carry great legal weight and contribute to the development of international law. A compulsory judgment gives its order on the law as laid down and is taken as precedent for other subsequent cases and serves for developing international law. 210 The International Law Commission has taken the view that in the light of the East Timor judgment, that the obligations in respect of self-determination are jus cogens (compelling law). The UN Commission on Human Rights supports this view. 211

When being interviewed by Argentine newspaper Tiempo Argentino regarding the Falkland Islands on 12th November 2012, the Secretary-General of the UN Ban Ki-Moon stated ‘I don’t think Security Council Members (UK) are violating relevant UN resolutions. The impression is that people who are living under certain conditions should have access to certain level of capacities so that they can decide on their own future. And that is the main criteria of the main UN bodies. Having independence or having some kind of government in the territories. I don’t think it’s an abuse of relevant UN resolutions.’ 212

Clearly, UNGA 2065 (XX) is no longer relevant.

6. Argentina’s Record

Argentina has a record of signing treaties and not living up to its obligations from the Convention of Peace of 1850, ‘Convention for the re-establishing the perfect Relations of Friendship between Her Britannic Majesty and the Argentine Confederation,’ 213 to the UN Charter it signed in 1945, a constitutional treaty that all members are bound by which states in Article 73 – Declaration regards non-self-governing territories – that states, ‘the interests of the inhabitants are paramount.’

In 1995 the governments of Argentina and the UK signed a joint declaration on hydrocarbons entitled, ‘Cooperation in Offshore Activities in Southwest Atlantic.’ The two governments agreed to stimulate offshore activities in the southwest Atlantic in order to encourage and develop investment from oil companies in a special area between the Falkland Islands and Argentina. In 2007, the government of Nestor Kirchner voided this agreement. 214

6.1 UN Conventions and Argentina’s Declarations

Upon ratifying six UN Conventions on discrimination against women; climate change; transnational organized crime; inhumane and degrading treatment; civil and political rights; and economic, social and cultural rights, Argentina made declarations on each in respect that it ‘objected to the extension of the territorial application of the convention with respect of the Falkland Islands, South Georgia and South Sandwich Islands.’

In this respect Article 29 of the Vienna Convention on the Law of Treaties is relevant because it clearly states, ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’ 215

In respect of Article 29, the International Law Commission also determined that, ‘a state cannot claim an exemption from compliance with a treaty in respect of conduct occurring, for example within a component colony or province.’ And ‘A more recent formulation is that of ICJ in the Namibia case, when it said that, ‘Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states.’ 217

210 Advisory Jurisdiction, ICJ and SW Africa/Namibia Dispute: Documents and Scholarly Writings, Duggard J. 1973, p163
211 Ibid, 159, p23
212 Ban Ki-Moon Interview in Tiempo Argentino Newspaper, quoted by MercoPress, Montevideo, Uruguay, 12 Nov 2012.
214 Cooperation in Offshore Activities in Southwest Atlantic, quoted in ‘Argentina and the Falkland Islands, Library, House of Commons, Vaughne Miller,’ p42.
It is evident that Argentina’s declarations, statements, or objections have no legal impact on the above conventions.

6.2 Falkland Islands’ Territorial Waters

Argentina has continued along this path when ratifying UNCLOS, the United Nations Convention Law of the Seas, on 1 December 1995, she made declarations and statements when signing regarding not accepting the territorial waters around the Falklands, South Georgia and the South Sandwich Islands.

The ICJ, in their maritime delimitation judgment between Romania and Ukraine of 3rd February 2009, is relevant here. In this case, the ICJ stated, ‘Finally regarding Romania’s declaration, quoted in para 35 above, the Court observes that under 310 of UNCLOS, a state is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided that these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration of UNCLOS. Romania’s declaration as such has no bearing on the Court’s interpretation.’ 218 (Romania made declarations on signing and ratifying UNCLOS in respect of fishing, security and uninhabited islands).

Similarly, in the Gulf of Maine case, the ICJ has also stated that, ‘The thrust of this principle is to establish by implication that any delimitation of the continental shelf effected unilaterally by one state regardless of the views of the other state or states concerned is in international law not opposable to those states,’ and ‘No delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states.’ And ‘The delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be affected by agreement on the basis of international law...’ 219 The UK has ratified UNCLOS in respect of the Falkland Islands.

Argentina has also claimed 200 nautical miles of sea from its shores and around the Falkland Islands, South Georgia and the South Sandwich Islands under Article 56 & 57 of UNCLOS whereby coastal States can claim Exclusive Economic Zones with regard to exploring and exploiting natural resources. The UK has made a similar claim in respect of the Falkland Islands and Dependencies. 220

Argentina’s claim can only be described as fanciful because ’it is a well-established practice, accepted as law that title over natural resources is to follow that over territory: accordingly, the sovereign subject enjoys the exclusive right to dispose of the natural wealth of the area which it exercises sovereignty.’ 221

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea issued an Advisory Opinion on 1 Feb 2011, regarding ‘Sponsorship of activities’ in Exclusive Economic Zones. They advised that in order to be eligible to carry out such activities, national and juridical persons must satisfy two requirements. ’First, they must be either nationals of a state party or effectively controlled by it or its nationals’. Second, they must be "sponsored by such states." 222 It is extremely doubtful whether Argentina can ever be regarded as the state sponsor of any activities carried out within Falkland Islands or Dependencies EEZs. In this respect, all fishing and hydrocarbons licences are issued exclusively by the Falkland Islands Government.

In the delimitation of maritime areas arbitration between Canada and France, Canada invoked the primacy of non-encroachment and proportionality to try to delimit the EEZ around the islands of St.Pierre and Miquelon, two French territories close to the Canadian coast. The court found that France was fully entitled to a seaward projection towards the south of 200 nautical miles along a corridor 10.5 miles wide. 223

218 ICJ Delimitation, Judgment, Romania/Ukraine, 3 Feb 2009, p78, para 42.
219 ICJ Case Concerning Delimitation of Maritime Boundary, Gulf of Maine area, Canada/USA, 12 Oct 1984, P50, para 87 p52, para 95 & p57, para 112(i).
220 UK UNCLOS Declaration 25 July 1997, Article 57.
222 Seabed Disputes Chamber ITLOS, Advisory Opinion 1 Feb 2011, Sponsorship of Activities paras 74-81.
223 Delimitation of Maritime Areas Arbitration, Canada/France 10 June 1992.
Regarding natural wealth and resources Judge Koroma, gave the following advice in the Congo/Uganda ICJ Case of 19 December 2005 when he stated in paragraph 11 of his declaration that, 'It should be recalled, confirmed the right of people and nations to permanent sovereignty over their natural wealth and resources. It makes clear that such resources should be exploited in the interests of...the well-being of the people of the state concerned.'

In addition, 'Accordingly, no rule is clearer than the precept that no state may lawfully attempt to exercise its sovereignty within the territory of another.' By including the Falkland Islands, South Georgia and the South Sandwich Islands in its EEZ Argentina has blatantly attempted to achieve this. The above is supported by Judge Alvarez in his Individual Opinion of 9 April 1949 in the ICJ Corfu Channel Case where he stated, 'By sovereignty, we understand the whole body of rights and attributes which states possess in its territory, to the exclusion of all other states, and also in its relations with other states.' Furthermore, as previously mentioned Article 29 of the Vienna Convention on the Law of Treaties clearly states that 'a treaty is binding upon each party in respect of its entire territory.' Therefore the United Nations Convention on the Law of the Seas cannot be interpreted in Argentina’s favour. It is clear that Argentina does not have any sovereign rights over the territorial waters of the Falkland Islands or any other British Overseas Territories.

Hans Corell, the Under Secretary-General for Legal Affairs, the legal counsel for the UN in his letter of 12 February 2002 addressed questions raised by the Security Council on the legality of actions taken by Moroccan authorities exploring mineral resources in Western Sahara. Corell confirmed that mineral resource activities in a Non-Self-Governing territory carried out by an administering power are illegal if conducted in disregard of the needs and interests of the people of that territory. In this respect, the natural resources of the Falkland Islands and surrounding maritime areas belong exclusively to the Falkland Islanders.

Argentina’s declarations and statements regarding the territorial waters and Exclusive Economic Zones surrounding the Falkland Islands and other British Overseas Territories can have no legal effect on how UNCLOS is applied to them. Any delimitation can only be achieved by agreement or through the ICJ or appropriate tribunal.

### 6.3 Extinctive Prescription - Failure of Argentina to Submit Its Claim to the International Courts

Extinctive prescription means that a state loses competence due to a failure to present its case within a reasonable amount of time. Although the ICJ has not specified what ‘a reasonable amount of time’ is and indicated that this is entirely up to the court to determine, the following reasoning and opinions are relevant.

International courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits and no time limit has been laid down. However, Umpire Ralston in the Guastini case, part of the American/Venezuela Claims Commission declared, 'that while disallowing the claim, expresses no opinion as to the number of years constituting sufficient prescription to defeat claims against governments in an international court. Each must be decided according to its special conditions. He calls attention to the fact that under varying circumstances the civil-law period is ten, twenty and thirty years.' The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim. ‘To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged.’ It would be a reasonable assumption to make that the events occurring nearly 200 years ago could not be clearly established by either party.

---

225 The Acquisition of Territory in International Law, Jennings, R.Y. 1963.
In the American and Venezuela Claims Commission the claim of William V. Spader case, the claim was rejected. The commissioner in the case stated, ‘A right unasserted for over forty-three years can hardly, in justice, be called a “claim.”’

In the case of Driggs v- Venezuela, the Commission stated, 'Twenty-eight years since the alleged wrong by the Colombian government and not a complaint had been made by Driggs. There is not a case on our list that better illustrates the wisdom of the prescriptive rule.’ Municipal statutes of limitation cannot operate to bar an international claim. But the reason which lies at the foundation of the such statutes, that of “great principles of peace” is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.” Article 38 of the Statute of the ICJ also states: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply, para c) the general principles of law recognised by civilized nations.’

In the Certain Phosphate Lands in Nauru case, Nauru/Australia, of 26th June 1992, the ICJ confirmed that a state may lose its right to make a claim when they stated, ‘The Court recognises that even in the absence of applicable treaty provision, delay on the part of the claimant state may render an application inadmissible. The Court notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.’ In the same case, Judge Oda states, ‘The fact that Nauru kept silent for more than 15 years on the subject of the alleged claim makes it inappropriate for the Court to entertain it and, if only on the grounds of judicial propriety, the Court should therefore find that the Application is inadmissible.’

### 6.4 Argentina Has Acquiesced to British Title

It is clear that protests must be sustained and made in the appropriate form; it will not be sufficient to ‘go through the motions.’ It would seem that the protests must be made at the level of the appropriate regional or international tribunal. In the Minquiers and Ecrehos Islands case, the UK argued that French protests against English legislation were ineffective to displace acquiescence because they did not demand arbitration.

In the same case, Judge Levi Carneiro stated, ‘Yet while the latter (UK) acted and continued to exercise sovereignty, the French government was satisfied to make a “paper” protest. Could it not have, and it ought to have, unless I am mistaken, proposed arbitration.’ And, ‘Why did France not at least propose that the dispute should be referred to this tribunal. As England has done, after more than half a century of intermittent and fruitless discussion? The failure to make such a proposal deprives the claim of much of its force; it may even render it obsolete.’

Diplomatic protests were the only avenue open to Argentina to protest about British sovereignty up until the 1920s. The establishment of the Permanent Court of International Justice in 1922 which was succeeded by the International Courts of Justice in 1946 changed the situation so that diplomatic protests were no longer sufficient to keep alive Argentina’s claims to sovereignty. In order to avoid extinguishing its claim, Argentina should have resorted to the ICJ rather than continuing with its protests. Argentina’s failure to take advantage of requirements prescribed under international law has ceded sovereignty to Britain by ‘extinctive prescription.’ Others support this view. ‘In serious disputes further steps should be taken such as severing diplomatic relations or proposing arbitration or judicial settlement.’

---


235 Article 38 of the Statute of the International Courts of Justice.

236 ICJ Phosphate Lands in Nauru Case, 26 June 1992, p17, para 32.


239 ICJ Minquiers & Ecrehos Case, 1953, Individual Opinion of Judge Levi Carneiro, pages 64 & 65

240 The Falklands War: Britain versus the past in the South Atlantic, Gilbran D. K. 1998, p42.

Former jurist and President of the ICJ Charles de Visscher asserted, ‘A State which has ceased to exercise any authority over a territory cannot, by purely verbal protestations, indefinitely maintain its title against another which for a sufficiently long time has effectively exercised the powers and fulfilled the duties of sovereignty in it.’

A commentator noted in 1934 that diplomatic protests by itself was not effective indefinitely, and that a protest not followed up by other action becomes in time ‘academic’ and ‘useless’ and that the protesting country must try and take the dispute to the League of Nations (now the United Nations) and/or seek third-party adjudication. Because of this requirement: the position now is that, if the matter is a proper one for determination by the Security Council or the International Court of Justice, failure to bring the matter before the Council or to attempt to bring it before the Court must be presumed to amount to acquiescence, even if, for propaganda purposes or other reasons, ‘paper protests’ are still made from time to time.

In the 1911 Chamizal Arbitration between Mexico and the USA, it was held that upon the evidence produced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted and unchallenged once there was a competent tribunal created to determine such cases. International Boundary Commission stated, ‘In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose.’ They continued, ‘In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it had commenced to exercise its functions.’

In 2001, The International Law Commission drew attention to the fact that states may by acquiescence lose their rights to bring a case to Court by referring to the Certain Phosphate Lands in Nauru case mentioned above. The ILC stated that international courts have not engaged in measuring the lapse in time and applying clear-cut time limits and no generally accepted time limit had been agreed or expressed in terms of years but mentioned, as already stated above that the Swiss Federal Department decision in 1970 which suggested a period of 20-30 years since coming into existence. The ILC summarized that, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured state should be considered as having acquiesced in the lapse of time of the claim or the respondent state has been seriously disadvantaged.

It would stretch a reasonable person’s imagination to the extreme to suggest that after 93 years since the formation of the world court system in 1922, by not pursuing a sovereignty claim to arbitration that Argentina had not acquiesced to British possession of the Falkland Islands by failing to present its case. Arguably, any UK response to any Argentinean claim would be put at a serious disadvantage because of the lapse of time of and the clarity of the events that occurred nearly two hundred years ago. The fact that Argentina has sought ICJ jurisdiction and arbitration in other instances only adds to the weight of evidence stacked against her in this respect.

Jurist Rosalyn Higgins, former president of the ICJ wrote, ‘No tribunal could tell her (Argentina) that she has to accept British title because she has acquiesced in it. But what the protests do not do is to defeat the British title, which was built up in other ways than through Argentina’s acquiescence.’

---

244 International Boundary Commission, Chamizal Case, Mexico/USA, 15 June 1911, p328, 329.
246 (i) Dispute Between Argentina & Chile Concerning the Beagle Channel, 18 Feb 1977 (ii) ICJ Pulp Mills on River Uruguay, Argentina/Uruguay 20 April 2010. (iii) Dispute Regarding Sovereign Debt Against US, Received by ICJ, 7 Aug 2014. (see 257)
6.5 The International Courts of Justice and International Arbitration

Argentina also claims sovereignty over South Georgia, South Sandwich Islands and British Antarctica, with which it has no historical connection whatsoever. Although the UK has never sought a judicial ruling regarding the Falkland Islands it has raised the question of the Falkland Dependencies on three separate occasions, in 1947, 1949 and 1951. On each occasion Argentina refused to go to the Court. 248

The UK government also applied unilaterally to the ICJ in 1955 after encroachment on British sovereignty in the dependencies by Argentina. The ICJ advised that it could only act if there was agreement from both parties to recognise the Court’s jurisdiction – something Argentina did not recognise. Argentina had not protested about British sovereignty over South Georgia until 1927 and the South Sandwich Islands until 1948. 249 In the Temple of Preah Vihear case Judge Alfaro, Vice-President of the Court stated, ‘Failure of a state to assert its right when that right is openly challenged by another state can only mean abandonment of that right.’ 250 It would be a reasonable assumption that in not taking up the UK’s offer to go to the International Court of Justice over South Georgia and the South Sandwich Islands (former Falkland Island Dependencies) that Argentina has forfeited the right to take the matter to arbitration and has no legal claim over those territories.

Argentina is not listed amongst the states that have made declarations recognizing the jurisdiction of the International Courts of Justice as compulsory, 251 although in 1977 Argentina and Chile signed an arbitration agreement to deal with the Beagle Island Dispute. The Court subsequently ruled that the Islands concerned belonged to Chile. On 25th January 1978 Argentina repudiated the arbitration decision declaring it null and void. 252 In addition, on 13th July 2006 Argentina presented a complaint to the ICJ against Uruguay regarding the environmental impact of pulp mills on the river Uruguay. On 20th April 2010 the ICJ ruled that the pulp mills in Uruguay can keep operating. 253

Regarding Falklands oil exploration, Argentine Foreign Minister Jorge Taiana stated in February 2010, that his Government would take ‘all measures necessary to preserve our rights’ and also reiterated that Argentina had a ‘permanent claim’ on the islands, saying ‘Buenos Aires would complain to the UN over the oil project and might take the case to the International Courts of Justice in the Hague.’ 254

In October 2013 Uruguay announced plans to increase production at one of the pulp mills and as a result, on 3 October 2013, Argentine Foreign Minister Hector Timmerman denounced the ‘unilateral’ decision by Uruguay and said, ‘Argentina would take its case to the ICJ in the Hague.’ 255

And on 7th August 2014, Argentina asked the ICJ to take action against the United States over Argentina’s sovereign debt after losing a lengthy battle with hedge funds rejecting debt restructuring. Argentina said in its application to the Court that the United States had, ‘committed violations of Argentina’s sovereignty and immunities and other related violations as a result of judicial decisions adopted by U.S. tribunals.’ 256 The ICJ confirmed that Argentina’s request had been submitted to the U.S. government but no action would be taken until Washington accepts the Court’s jurisdiction. 257

The UK signed up to accept the jurisdiction of the ICJ on 5 July 2004 but stipulated that it withdraws its consent to jurisdiction over any dispute arising before 1st January 1974. The UK’s 1969 declaration was effectively to preclude the ICJ from having jurisdiction in most disputes between former British territories concerning the

249 Antarctic Case, United Kingdom/Argentina Order 16 March 1956.
251 Declarations Recognition of Jurisdiction of the Court as Compulsory Filed With Secretary General of the United Nations.
252 Ibid, 246,(i) p35
253 Ibid, 246,(ii) p35
colonial period. It is common practice for states to restrict declarations by date. Regarding this, 68% of nations using the common law system have made reservations to the ICJ in respect of exclusion dates. The UK also stated that it also had the right to add or amend this or any other reservation.

7. Conclusion
The above information has dealt with historic arguments proving the validity of the Convention of Peace of 1850, the statements made by Argentinean politicians in the period of signing and the long periods without protestations all contributing to proving sufficient evidence of acquiescence and estoppel that nullify the effect of any sovereignty claims. The laws applicable of the day and modes of acquiring title to territory along with the effective control argument, relevant UNGA resolutions and rights of the Islanders to exercise self-determination, discussed above, is also convincing evidence that Argentina does not have an effective sovereignty claim to the Falkland Islands. Argentina's claim has no basis in international law. The only relevant factor in Argentina's claim is her proximity argument – 300 miles. Any sovereignty claim that is based solely on proximity alone does not constitute a title to the Islands and is no stronger a case than Canada claiming Alaska because it's closer. A sovereignty case submitted to an international tribunal can only realistically have one outcome.

Argentina has shown a willingness to resort to the International Courts of Justice in pursuance of other claims when it suits her purpose but is reluctant to take this course of action regarding its Falkland Islands aspirations thereby exposing the weakness of her case. Instead of seeking a legal judgment, Argentina chooses to pursue its Falklands sovereignty aspirations by conducting what only can be described as a process of diplomatic warfare against the Islanders and the UK government. And, as we all know, it had tried to seize the Falklands by actual warfare in 1982.

The dispute has been a convenient tool for various Argentine governments to use in order to divert attention away from domestic problems. Argentina maintains the pretence of a sovereignty claim over the Falkland Islands but a claim without any legal basis can only be described as illegitimate.

---

260 UK Declaration on Recording the Jurisdiction of the Court as Compulsory, New York, 5 July 2004.
261 Ibid 246, p35