THE LEGAL STATUS OF FALKLAND ISLANDS

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P R E F A C E

PREFACE

Dispute over legal title to a territory has been one of the complicated problems confronting the international law. Such disputes occur mainly due to emergence of newly independent states. The issue of legal title over Falkland Islands also belongs to this category. Argentina and the United Kingdom (U.K.) claim sovereignty over these Islands. The Falkland Islands have been under British possession since 1833. For a brief spell, from early April 1982 to early June 1982, Argentina seized these Islands by use of force, but U.K. in a counter-offensive move, recaptured the Falkland Islands by the middle of June 1982. Despite the exchange of armed hostilities between Argentina and U.K. there has been no change in their respective stands over the legal title to these Islands.

Following the outbreak of the armed hostilities between U.K. and Argentina in April 1982 over the Falkland Islands, since then plethora of literature in the form of news reports, articles -- mainly covering political aspects, has appeared, but no serious academic study covering the legal implications has been undertaken on this subject. The present dissertation has made an earnest endeavour to examine the legality of claims and counter-claims of U.K.

and Argentina respectively in the light of existing norms and practices of international law.

With my scanty knowledge of complicated legal issues involved in this problem, I was faced with an uphill task. I am genuinely grateful to my Supervisor, Professor R.P. Anand, Dean of School of International Studies, whose benign cooperation, encouragement, inspiration and guidance has enabled me to sift grain from the chaff. Despite his busiest schedule, Professor Anand had been kind enough to spare his invaluable time to help me in completing my dissertation.

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Chapter I

HISTORICAL SETTING

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Territorial disputes constitute a predominant factor wielding tremendous influence on the international relations, especially within Latin American countries. The territorial disagreements, majority of which date back to the early nineteenth century, have remained unresolved because of the sensitivity of governments and public opinion to sovereignty issues.[1] There has been a marked reluctance in the attitude of Latin American countries to compromise on territorial disputes. Such a reluctance envisages a remote possibility for resolving the dispute while discouraging the disputants from referring such a dispute to the third party, such as the United Nations.

The dispute between Argentina and the United Kingdom (UK) on the Falkland Islands (also called Islas Malvinas by Argentina) falls in line with this general Latin American pattern although a European power -- U.K. -- is involved in it. The dispute over Falkland Islands between Argentina and UK dates back to 1833 when the British

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1 Peter J. Beck, "Cooperative Confrontation in the Falkland Islands Dispute", Journal of Inter-American Studies and World Affairs (Florida) (hereafter to be cited as JIASWA), Vol. 24, No. 1, February 1982, p. 37.

occupied the Islands and since then has been under their control. Despite various attempts to resolve it, the issue remained difficult to reconcile, led to political confrontation, and during April-June 1982, both countries were engaged in an undeclared war over the Islands.

Argentina launched an armed attack on Falkland Islands on 2 April 1982, and seized the islands with the help of its 4,000 troops outnumbering the 80 British marines resident there. Argentinian invasion took Britain by surprise which had almost no army to defend the Islands and it took about two weeks for the latter to despatch the reinforcements to reach the Falklands by covering a sea route of about 13,000 kms. The Argentine move was assailed by Lord Carrington, the former British Foreign Secretary, as an "unprovoked aggression by the Government of Argentina against British territory".[2]

A couple of days subsequent to Argentine seizure of the Islands, UK despatched its naval task force led by aircraft carriers HMS Invincible and Hermes, equipped with jet fighters, anti-submarine missiles and helicopters, to recapture the Islands. In the meanwhile, the seizure of the

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2 British Information Service (BIS) (New Delhi), B. 87, 5 April 1982.

Islands was hailed by Argentine Government as "the historic decision of definitely integrating the Malvinas, South Georgia and South Sandwich Islands to the national territory. The momentous enterprise put an end to an affront against national sovereignty and to an anachronic expression of colonialism that was offensive to all America".[3]

UK, while denouncing the Argentine seizure of the Falklands, called it as "an act of unprovoked aggression -- a clear violation of international law and five fundamental principles of settlement of disputes by peaceful means and of self-determination of peoples..."[4]

On 3 April 1982, the UN Security Council passed a resolution vide No. SCR 502 by a vote 10 in favour, one against with 4 abstentions, calling for the immediate withdrawal of Argentine forces from the Islands.[5] Security Council's resolution had no immediate effect and Argentine troops consolidated their position in the Falkland Islands.

During the second week of April 1982, the British task force reached the Falkland Islands and on 12 April 1982,

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3 Government of Argentina, Malvinas Argentinas (Buenos Aires, n.d.), p. 3.

4 Her Majesty's Stationery Office (HMSO), The Falkland Islands: The Facts (London, 1982), p. 1.

5 For details see, United Nations Information Centre, UN Chronicle (New Delhi), Vol. XIX, No. 5, May 1982, p. 5.

a naval blockade was imposed around the Islands. The British move made Argentina to withdraw its naval vessels from the area. Earlier, by the close of first week of April 1982, Argentina had almost occupied the entire archipelago, capturing the 80 British marines and British Governor of the Falklands, Rex Hunt. Later the British marines along with the Governor were flown back to London via Uruguay.

Arrival of the British task force and its retaliatory attacks on Argentine troops escalated the hostilities. A fierce battle ensued between Argentina and UK in the South Georgia Islands. Throughout April-May 1982, fierce fighting continued between the two countries and both sides suffered heavy losses. Britain lost its destroyer HMS Sheffield in early May 1982.

The troops of UK and Argentina were engaged in hostilities in the Falkland Islands and the London and Buenos Aires were also engaged in propaganda war. The British denouncements of Argentine actions were followed by the latter's justification for armed seizure of the Islands. The then Argentine President, Leopoldo Galtieri, while disputing British claims over Falklands, described that they constituted "part of our national patrimony".[6]

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6 Patriot (New Delhi), 4 April 1982.

Argentina also "decided to put an end to the interminable succession of delays by Britain in order to perpetuate the latter's zone of influence".[7]

The escalation of hostilities prompted the Super Powers, United Nations and the countries of the Third World to initiate efforts to deescalate the growing hostilities and persuade both UK and Argentina to resolve the dispute through peaceful means. United States initially used its good offices both with London and Buenos Aires for ending the hostilities but failed. Subsequently, Washington did not show much enthusiasm for a while. Soviet Union urged both the countries to end the hostilities and resolve the issue through peaceful means. Third World countries mostly urged both disputants to abide by the call given by the Security Council on 3 April 1982 for withdrawal of forces. However, the hostilities continued till mid-June 1982 when the British forces finally recaptured the Falkland Islands making Argentine forces to surrender.

Losses:

The Falkland aggression proved a costly affair both for UK and Argentina. According to newspaper reports about 1,000 soldiers, seamen, and civilians were reportedly

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7 Madan Lal, "The Falkland Crisis: A Preliminary Assessment", Foreign Affairs Reports (New Delhi), Vol. XXXI, No. 6, June 1982, p. 100.

killed in the undeclared war between UK and Argentina over the Falkland Islands.

The British losses included about 228 dead or missing including 19 soldiers, 224 wounded. The loss of human lives on Argentine side included at least 82 dead, 342 missing and 106 wounded.[8]

The British loss in terms of money during the Falkland operations cost London exchequer over $1,700 million[9] and after the reoccupation of the Islands UK would have to bear the military cost of about $1,000 million a year.[10] Despite the British reoccupation of the Falkland Islands in mid-June 1982, Argentina did not renounce its claims over the Falklands and still maintains its status quo ante stance. In order to understand the politico-legal implications of the Falkland Islands dispute, it is essential to know its geographical location, past history, strategic importance, economy, etc.

Geo-strategic Location

The Falkland Islands[11] are situated in the South

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8 Statesman (New Delhi), 16 June 1982.

9 Andrew Wilson, "Cost of Keeping the Falklands", Tribune (Chandigarh), 17 June 1982.

10 This estimate is given by Dr. Pane Rogers of the Bradford University, ibid.

11 Argentina calls Falkland Islands as Islas Malvinas. We are using the term Falkland Islands for the purpose of present study.

Atlantic Ocean, lying "between latitudes 51° and 53° south and longitudes 57° and 62° west".[12] The archipelago is separated from the South American mainland by about 300 miles of sea. The archipelago comprises two large islands -- East and West Falkland and some 200 smaller islands,[13] covering an area of 11,961 sq. kms.[14] The Dependencies now comprise South Georgia, South Sandwich Group and a number of smaller groups. Territories which formerly formed part of the Falkland Islands Dependencies -- South Orkney Islands, the South Shetland Islands and Graham Land, together with that "sector of the Antarctic continent lying between longitudes 20° W and 80° W, constituted a separate colony under the name of the British Antarctic Territory".[15]

The Islands comprise almost Palaeozoic and Mesozoic sedementary rocks. The British claim that although the islands lie on the edge of the Patagonious continental shelf, there is no stratigraphical connection between the Falklands and the nearer parts of the South American mainland.[16] However,

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12 HMSO, Falkland Islands and Dependencies: Report for the Years 1966 and 1967 (London, 1969), p. 44.

13 Ibid.

14 General Assembly Official Records (hereafter GAOR), 19th session, Annex No. 8 (Part I), Doc. No. A/5800/Rev. 1 (New York), p. 434.

15 Ibid.

16 Falkland Islands, n. 12, p. 44.

Argentine claim that there exists a "virtual continuity of the submarine platform which links the Islands with the Argentine mainland".[17]

Falkland Islands are strategically located. UK has attached great importance to its strategic position, both as a naval base and as a port of call for ships rounding Cape Horn.[18] Argentina is geographically more contiguous to these islands than Britain. UK being an active ally of the NATO treates these islands as of immense strategic significance. Because of its strategic importance, Britain "neglected the development of land ... and no proper system of land tenure was ever devised".[19]

Socio-Economic Conditions

The population of the Falkland Islands is almost entirely of British origin with a small admixture of Scandinavian and Latin American people. The census conducted by Britain in 1980 put the population of the Falkland Islands just over 1,800. Half of the population lives in Stanley, the capital of the Islands. "98 per cent of the

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17 Ministry of Economy, Government of Argentina, "Malvinas", Economic Information on Argentina (Buenos Aires), January-April 1982, No. 122, p. 43.

18 Falkland Islands, n. 12, p. 51.

19 Ibid.

people are of British stock, at least 80 per cent of the 'Kelpers' were born on the islands."[20]

Prior to the British occupation of the Falklands in 1833, the islands were sparsely populated. The British settlers started coming consequent upon the establishment of the British colony and by 1900 the population increased to 2,000. The population of the Islands had fluctuated between 1,800 and 2,300 during the twentieth century. This rare phenomenon of almost static growth of population is mainly due to the fact that owing to the limited economic opportunities, emigration from the Islands had maintained an equilibrium in the natural increases during this period.

Wool industry is the mainstay of the Islands' economy and "practically all revenue is derived indirectly from the sheep farming".[21] The sources of internal revenue are taxation, customs duties and sales of postage stamps. The Falkland Islands Company, which owns about 50 per cent of the total land in the Islands, is engaged in sheep faming. There are nearly 600,000 sheep in the archipelago.

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20 Allen Gerlach, "The Falkland Islands", Contemporary Review (London), Vol. 240, No. 1397, June 1982, p. 287.

21 GAOR, n. 14, p. 435.

Sheep farming having been the main arch of Islands' economy, other resources have remained almost neglected. There is a lot of scope for developing the fishing industry in the region. Even Krill, a crustacean considered to be one of the greatest sources of protein[22] found in abundance there, has not been adequately exploited. There are various other resources available in the Islands which have industrial value.

There is a freehold title to the land in the Falkland Islands. The land on the East Falkland was acquired first and most of it had been sold by 1860. The process of colonization on West Falkland commenced in 1867 and within a period of two years the entire land had been sold.[23]

There is no agriculture in the territory except for a small acreage of oat. The only manufactured product is a meagre quantity of tallow. The major products, besides wool, are whale meat, other whale products and sea oil.

Constitutional and Political Developments

British occupation of the Falkland Islands in 1833 was followed by the introduction of Legislative and Executive

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22 Economic Information, n. 17, p. 44.

23 Falkland Islands, n. 12, p. 51.

Councils in the later part of the nineteenth century to run the administration of the Islands. In 1949, a new constitution was envisaged which provided for a Governor, assisted by an Executive Council and a Legislative Council.[24] The members of these Councils were nominated by the Governor. The constitution was amended in 1951 which led to the reduction of official members in the Legislative Council. The elections were conducted in 1952.

The Constitution was further amended in 1977 to increase the number of elected councillors and elections being based on universal adult suffrage. The 1977 Constitution lowered the voting age from 21 to 18.[25] The Interim Order of June 1982 suppressed the office of the Governor and all powers have been vested in a Civil Commissioner who is the personal representative of the Crown.[26] There is an Executive Council of 6 members -- two elected, two ex-officio and two nominated -- to advise the Civil Commissioner.

The Legislative Council comprising 8 members -- six elected and two ex-officio, is empowered to "make laws for the peace, order and good government"[27] for the archipelago. There are no political parties in the Falkland Islands.

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24 GAOR, n. 14, p. 435.

25 Falklands: Facts, n. 4, p. 10.

26 Ibid.

27 Ibid.

Historical Background

The dispute over Falkland Islands with regard to the legal title over it is also accompanied by a controversy over the name of the Islands. UK calls them the Falkland Islands, named during the late seventeenth century after Lord Falkland, then treasurer of British navy. The French named it as "the Isles Malouines", after St. Malo, a town in the English Channel. Spaniards called them the Isles Malvinas,[28] the name which was adopted by Argentina later.

The dispute over the Falkland Islands between London and Buenos Aires dates back to 1833 though these Islands were discovered during the sixteenth century. There are conflicting opinions about the discovery of the Islands as well. Amerigo Vespucci is considered to be the first having sighted these Islands without giving them a name in 1502. Schoner's map of 1515 "seems to be the first tentative cosmographic work to represent the lands south of 52° latitude."[29]

According to Argentina, these Islands were discovered by the Spaniards, "perhaps by Amerigo Vespucio, at the service of Spain or, more probably, by navigators of

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28 Gerlach, n. 20, p. 288.

29 Argentina Embassy in India, "History of the Malvinas Islands", News From Argentina (New Delhi, n.d.), No. 18, p. 1. (This is an unofficial version compiled from Spanish sources).

Magellan's expedition, in 1520, and what is more certain by that of the bishop of Plasencia in 1540."[30] In 1540 Santa Cruz, a royal cosmographer at the court of King Charles V of Spain, prepared a "Islario" or a map of islands that formed a part of Spain in 1515 wherein he incorporated some islands to the east of San Julian Gulf (present day Argentina). Santa Cruz called them the Islands of Patos or Sanson or San Anton. It is not "quite clear whether he was referring to the Malvinas or to other islands".[31] Reference to the Falkland Islands appears, without any name, in the maps of Sabiatz and Weimar (Spain, 1527), Wolfen-buettel (Spanish, 1525-1530), Stevenson (Initial Spanish Catrography), Rio Branco, 1529, Weiman-Ribero, 1529; Peter Martyr's Historia de l'India Occidentali, 1534; Mordenskald's Facsimile Atlas and Ptolomeus, Basel, 1540.[32]

Most of the historical background will be dealt with in Chapters III and IV while discussing the claims of Argentina and UK. In order to avoid factual repetition, this part of the chapter would deal with the sketchy historical details.

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30 Economic Information, n. 17, p. 44.

31 News From Argentina, n. 29, p. 2.

32 Ibid.

Despite the conflicting claims about discovery, there seems to be no dispute about the fact that the Islands were discovered during the early part of the last decade of the sixteenth century.

Sebald de Weert, a Dutch navigator sighted the north-western part of the Falklands in January 1600 and called them Sebald Islands which are now known as Jason Islands. Subsequent to Davis having sighted the Islands, there is no information available as to what happened for about a century in this region. British Captain John Strong of the Welfare "made the first recorded landing on 27 January 1690"[33] on these Islands and named them after Lord Falkland, then Treasurer of the British Navy. Since then these Islands are called Falkland Islands.

The subsequent years prompted various countries to embark on sea-expeditions with the result that visitors to the Falklands became more frequent, with French being on the forefront. As the years went by, France evinced increased interest in these islands and called them "Isles Malouines" after their seaport of St. Malo.[34] The Spanish interest in the Islands was also discernible who named them "Islas Mulvinas" -- the name which was later adopted by Argentina.

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33 Falkland Islands, n. 12, p. 53.

34 Ibid.

Jacques Guinde Beauchene, a French navigator, discovered a small island, now known as Beauchene Island, lying south of the East Falkland.

The second half of the eighteenth century witnessed sole French interest in the Falklands. Louis Antoine de Bougainville reached the Falklands on 31 January 1764, established a French colony and a fort on the East Falkland naming it Saint Louis.[35] He named the entire archipelago as "Isles Malouines". "There were 150 French settlers who named various isles as Beauchene, Amicant and Etang."[36] The French occupation of the Falklands irritated the Spanish Government and the latter warned France that "according to the Treaty known as Pacto de Familia (1743), and the Treaties of Utrecht (1713 and 1714), among France, England, Holland, Portugal and Prussia, and that of Spain with England, the occupation of Spanish lands in America (mining part) was not possible".[37] Subsequently, there followed a series of negotiations between France and Spain which led to the signing of a treaty between France and Spain on 4 October 1766. Accordingly France returned the Islands to Spain.

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35 News from Argentina, n. 29, p. 3.

36 Ibid. A map pertaining to this period is available at the National Archives of India, New Delhi.

37 Ibid., pp. 3-4.

Bougainville, in his book A Voyage Round the World (Paris, 1772), wrote that he "handed over ... colony to the Spaniards, who took possession of the same..."[38]

While the French were still in occupation of the Islands, a British expedition under John Byron was making preparations "to locate and claim Pepy's and Falkland's Islands".[39] Captain Byron's expedition arrived in Falklands in January 1765 and he founded the Port Egmont. Encouraged by Byron's success, the British sent another expedition headed by John MacBride who reached the Islands in January 1766. He served the French with formal notices to quit the Islands.[40] But prior to MacBride's initiative, the French had already relinquished their claim over the Falklands in favour of Spain. The British however maintained a settlement at the Port Egmont.

In the wake of France's resignation of its claim to Spain over the Falklands, the Spaniards were irritated at the British settlement at the Port Egmont. In January 1771, Spain despatched a force which "expelled the British settlers from the Port Egmont, and brought the two countries

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38 Cited in ibid., p. 4.

39 Letter from Captain Byron to the Earl of Egmont, 24 February 1765, quoted in Falkland Islands, n. 12, p. 54.

40 Ibid.

to the brink of war."[41] However, peaceful negotiations between Britain and Spain were resumed which yielded a peaceful settlement of the issue and in February 1771 "Port Egmont was restored to Britain".[42]

In September 1771, Britain resumed the possession of the Islands and until 1774, the settlement underwent a substantial development. In May 1774, the British closed their establishment at Port Egmont considering it to be "neither more or less than a small part of an uneconomical regulation".[43] Before making a departure from the Port Egmont, S.W. Clayton, British Commander at Egmont, fixed the following description engraved in lead to the door of the black-house:

> Be it known to all nations that Falkland Islands with this Port, the Stonehouse, Wharfs and Harbours, Bays and Creeks, there unto belonging are of the Sole Right and Property of His Most Sacred Majesty, George the Third, King of Great Britain, France and Ireland, Defender of the Faith, etc. In witness whereof this plate is set up, and His Britannic Majesty's colours left flying as a mark of possession.
>
> by S.W. Clayton,
> Commanding Officer at Falkland Islands,
> A.D. 1774 [44]

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41 Peter Calvert, "The Causes of the Falklands Conflict", Contemporary Review (London), Vol. 241, No. 1398, July 1982, p. 7.

42 Falkland Islands, n. 12, p. 55.

43 Letter from Rochford to the Duke of Grafton, 11 February 1774, cited in ibid.

44. Ibid.

In the wake of British departure from the Falkland Islands in 1774, Spain was left in sole possession of the Islands with its settlement at Solebad. From 1774 till the early part of the nineteenth century, the Islands remained under the possession of Spain uninterruptedly. During this period Port Egmont remained almost deserted except for occasional visitations by sealing and whaling vessels from UK and North America.

Till the beginning of the nineteenth century, no significant developments occurred on the Falkland Islands. It was in 1806, that Britain "convinced of the strategic importance of Buenos Aires and its zone, invaded Buenos Aires"[45] and occupied it. The British invasion of the Argentine capital, Buenos Aires, and its occupation in April-May 1806 made Spanish Governor Martinez abandon Solebad in June 1806.[46] "At this point Spanish jurisdiction over the Falkland Islands ended".[47] The British invasion of the Buenos Aires was vacated in 1807.

In Argentina, the struggle against Spanish colonialism had reached its zenith by 1810 which resulted in the declaration of Argentine independence leading to the establishment of the United Provinces of the Dio de la Plata.

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45 News from Argentina, n. 29, p. 9.

46 See Falkland Islands, n. 12, p. 55.

47 Ibid.

By July 1816, Argentina had become a sovereign independent state. The new government in Argentina evinced interest in the Falkland Islands and claimed to succeed Spain in sovereignty over the Islands. Argentina despatched a force to the Islands under the command of Col. David Jewit, which finally took possession of the Islands on 9 November 1820. Pablo Aregusti was appointed by Argentina as the Governor of the Islands in 1823 "who developed the establishment at Solebad ... and more than 500 Argentine inhabitants"[48] settled on the Falkland Islands. In June 1828, Louis Vernet was appointed as the Governor of the Islands. During this period various vessels of different countries had started visiting the Islands for fishing. In August 1831, Vernet ordered the seizure of three US schooners which had been fishing in the territorial waters of the Islands. Vernet was recalled by Buenos Aires. Seizure of the schooners had irritated the United States which despatched its warship Lexington under the command of Captain Duncan who "sought reprisals for the seizure of the United States vessels and destroyed the small fort at Solebad before retaking the seized ships".[49]

In the wake of these developments, British interests were revived in the Islands. In 1832, UK despatched its

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48 News from Argentina, n. 29, p. 10.

49 Falkland Islands, n. 12, p. 56.

detachment on a ship Clio under the command of Captain Onslow. On reaching Solebad, Onslow "found a detachment of 50 Argentine soldiers and their schooner Sarandi".[50] Onslow told the Argentine force that "I have received directions to exercise the rights of sovereignty over these islands".[51] The Argentine detachment was sent back to Buenos Aires and in January 1833, the British occupied the Falkland Islands. Since then till date the Falkland Islands have been under British occupation, but for a brief spell between April-May 1982, when Argentina captured the Islands. In June 1982, Britain reasserted its sovereignty over the Falkland Islands by defeating Argentina.

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50 Ibid.

51 Letter from Captain Onslow to Pinedo, 3 January 1833, cited in ibid.

Chapter II

STATUS OF FALKLANDS IN INTERNATIONAL LAW

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STATUS OF FAIKLANDS IN INTERNATIONAL LAW

We shall see in the following pages, legal title to an Island under international law is acquired by a state in a number of ways: (a) accretion, whereby the forces of nature act to facilitate the alteration in the geography of an area; (b) cession, whereby title is transferred by provision of a treaty; (c) prescription, whereby title flows from one state to another over a period of time; and (d) occupation of previously unsettled land.[1]

The legal title to Falkland Islands is contested by Argentina and UK since 1833. We have dealt with the historical background[2] and grounds of claims both by Argentina[3] and UK.[4] Since the conclusion of the Second World War, two additional factors have arisen that also have a bearing on the legal title to the Islands. These are self-determination and decolonisation. In this chapter we will

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1 R.Y. Jennings, The Acquisition of Territorial Sovereignty in International Law (Manchester, 1963), pp. 6-7.

2 For details, see Chapter I.

3 For details, see Chapter III.

4 For British claims, see Chapter I

deal with these two principles keeping in view the contentions of both Argentina and UK.

Principle of Self-determination

One of the major developments in international law during the post-Second World War period has been the emergence of the right of self-determination which is still at the developing stage. The modern concept of self-determination encompasses legal, political, economic, social and cultural aspects. The principle of self-determination which commands a considerable influence on economic, social, cultural, political and legal planes[5] is also gaining wider acceptance in international law.[6] It is not an absolute right and there are limits to the right of self-determination.

The implementation of the right to self-determination entails not only the completion of the process of attaining independence or other appropriate legal status by the peoples subject to colonial and alien domination, but also "the recognition of their right to maintain as sure and perfect

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5 This has been acknowledged by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. See UN Document No. E/CN.4/1128, paras 27-28.

6 UN, The Right to Self-Determination: Historical and Current Development on the basis of United Nations Instrument (hereafter Self-Determination) (New York, 1981), p. 17.

their full legal, political, economic, social and cultural sovereignty".[7] The right of self-determination has lasting force,[8] and does not lapse on first having been used to secure political self-determination and must be presumed to entail all fields -- economic, social, cultural and political affairs.

The right of self-determination has more or less gained wider acceptance. It has been incorporated in the Charter of the United Nations, the International Covenants on Human Rights, numerous resolutions of the UN General Assembly, the historic Declaration on the Granting of Independence to colonial countries and peoples, which was adopted by the General Assembly on 14 December 1960 vide its Resolution 1514 (XV); the Declaration on the inadmissibility of Intervention in the Domestic Affairs of States and the protection of their independence and sovereignty; the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; the definition of

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7 UN, The Right of Self-Determination: Implementation of United Nations Resolutions (hereafter Right to Self-Determination) (New York, 1980), para 47.

8 For details, see the statement of the Observers for the Federal Republic of Germany, in the UN Commission on Human Rights on 9 February 1978, UN Document E/CN.4/SR.1433, paras 20-21.

Aggression, the Charter of Economic Rights and Duties of States and many other UN instruments. Though the above-mentioned covenants and resolutions passed by the General Assembly neither make law nor are of binding nature, however, the incorporation of the principle of right to self-determination in these covenants has been instrumental in gaining wider support for it. "But this principle of the Charter is an extension of the principle of nationalities on which international relations were based during the nineteenth century"[9] and at the beginning of the twentieth century. The historical and political growth of the right to self-determination has been closely linked with the national history of a majority of the member states of the United Nations and their struggles to achieve or defend their freedom and independence.

The French Revolution (1789) and the Russian October Revolution (1917) are exemplary events which have been instrumental in the development of the principle of self-determination. By the close of the nineteenth century, "it was accepted as one of the basic elements of modern democracy".[10] During the eighteenth and nineteenth centuries Libertarians like J. Bentham, J.S. Mill, and Rousseau gave

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9 Self-Determination, n. 6, para 92.

10 Ibid.

prominence to the concept of self-determination on the individual and in the state.[11] Subsequently, this idea found expression in Monroe Doctrine and American President Wilson facilitated its application to solve the European nationhood and self-sufficiency.

After the First World War, the principle of self-determination gained a distinct status among the principles of international politics. Though in the Covenant of the League of Nations the right to self-determination was not incorporated but its influence made itself felt in the practice of inter-state relations. W.R. Bisschop writing in early 1920s said that "self-determination is based on the principle of decision by a majority of those who are directly concerned".[12]

Significance of the principle of self-determination was acknowledged by the international community even prior to the former's inclusion in the UN Charter. This principle was invoked on many occasions during the Second World War. The Atlantic Charter adopted on 14 August 1941 envisaged this principle as thus:

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11 For details, see C.L. Wayper, Political Thought (London, 1974), pp. 113-15.

12 W.R. Bisschop, "Sovereignty", British Year Book of International Law (BYIL) (London), 1921-22, p. 130.

(...)

2. They desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.

3. They respect the right of all peoples to choose the form of government under which they will live, and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them. 13

These provisions of the Atlantic Charter were "redefined in the Declaration by the United Nations signed at Washington on 1 January 1942, in the Moscow Declaration of 1943 and in other important instruments of the time."[14]

The resultant effect of these developments was felt on the work of the San Francisco Conference of 1945 where the Charter of the United Nations was adopted. The principle of equal rights and self-determination of people was incorporated in the Article 1 (2) and Articles 55 and 56 of the UN Charter. These are just principles or objectives rather than binding rules. Article 1(2) of the Charter reads: "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace."[15]

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13 League of Nations, Treaty Series, Vol. CCIV, 1941-43, No. 4817.

14 Self-Determination, n. 6, para 93.

15 UN, Everyone's United Nations (9th edn.) (New York, 1979), p. 382.

Similar content is envisaged in Article 55 of the Charter which states:

> With a view to the creation of conditions of stability and wellbeing which are necessary for peaceful and friendly relations among nations based on respect of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standard of living, full employment, and conditions of economic and social progress and development;
>
> (b) solution of international economic, social, health and related problems, and international cultural and educational cooperation; and
>
> (c) universal respect for, and observance of human rights and fundamental freedom for all without distinction as to race, sex, language or religion. 16

The principle of self-determination has been incorporated in the UN Charter because the past experience, especially of the two world wars, had shown that minority problems could cause international friction, and they require early and peaceful solution. At the present juncture, "the objective of the principle is the liberation of colonial peoples".[17]

Since the adoption of the Charter of the United Nations and the incorporation of the principle of self-determination in the former, the latter is gaining support

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16 Ibid., p. 39.

17 Self-Determination, n. 6, para 94.

among the nations gradually and has emerged as one of the constituents of international law. The developments in international law since 1945 indicate that "in the colonial field the point may have been reached where the principle has generated a role of international law by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of the inhabitants".[19]

The UN General Assembly and other organs of the UN have on many occasions emphasised the need of implementing the principle of self-determination in letter and spirit. The UN Commission on Human Rights, at its sixth session held in 1950 had a proposal to include this principle in the draft international covenant on human rights. It inter alia provided that:

> Every people and every nation shall have the right to national self-determination. States which have responsibilities for the administration of Non-Self Governing Territories shall promote the fulfilment of this right, guided by the aims and principles of the United Nations as relation to the peoples of such territories. 20

Inclusion of these principles in the draft covenant was not of binding nature, but it was a recommendation.

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19 D.J. Harres, Cases and Material in International Law (Second edn.), 1979, p. 105.

20 UN, Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5, Document No. E/1681, Annex. III.

Subsequently, UN Commission on Human Rights (UNCHR), gave priority to the principle of self-determination. The International Covenants on Human Rights adopted by the UN General Assembly and opened for signature on 16 December 1966 and which has been in force since 1976, the principle of self-determination is incorporated in Article I, paragraph 1, which envisages that "All the peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[21]

Despite the fact that the principle of self-determination has been incorporated in the Covenants on Human Rights, very few countries have ratified these covenants. Until 31 December 1976, 42 countries had ratified the International Covenant on Economic, Social and Cultural Rights. The International Covenant on Civil and Political Rights has been ratified by only 15 countries.[22] The right of self-determination has not yet gained universal recognition.

In 1950s, the inclusion of the right of the peoples to self-determination in the Covenant on Human Rights had

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21 UN, Yearbook on Human Rights for 1966 (New York, 1969), p. 437.

22 UN, Yearbook on Human Rights for 1975-76 (New York, 1981), pp. 350-59.

evoked a critical attitude among the experts on international law.[23] This divergence of opinion on self-determination as right of the people among the legal luminaries has been overcome in recent years in the wake of various resolutions adopted by the UN General Assembly and the advisory opinion given by the International Court of Justice on Western Sahara, about which we will deal in succeeding pages. As a UN study reveals:

> For contemporary international law, for current legal theory, as well as for certain writers who can be regarded as fore-runners in this field, the self-determination of people, in addition to being a principle of international law, is a right of people under colonial and alien domination and a condition or pre-requisite for the existence and enjoyment of all the other rights and freedoms of the individual. 24

The adoption of "Declaration on the Granting of Independence to Colonial Countries and Peoples" by the General Assembly on 14 December 1960 vide its Resolution 1514 (XV) affirmed that "All the peoples have the right to

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23 For details, see A. Cobban, National Self-Determination (London, 1945), p. 17. Also see S. Eagleton, "Self-Determination in the United Nations", The American Journal of International Law (AJIL), Vol. 47, No. 1 (Washington, 1953), pp. 91-93; and M. Sibert, Traite de drout International Public (Paris, 1951), Vol. I, pp. 304-305, as cited in Right to Self-Determination, n. 7, para 52.

24 Right to Self-Determination, n. 7, para 52.

self-determination; by virtue of that "right they freely determine their political status and freely pursue their economic, social and cultural development."[25] This is the reaffirmation of the Article 1(1) of the Covenants on Human Rights as cited supra.

In the South-West Africa case also called Namibia case, the ICJ held that "... the subsequent developments of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."[26]

In its advisory opinion on the Western Sahara case, the ICJ stated that "the principle of self-determination is a right of peoples".[27] In the light of these developments, there prevails almost unanimity among the experts of international law that self-determination is a right of peoples and as such constitutes a part of international law.

Self-Determination and Falkland Islands

Falkland Islands is a British colony since 1833. The principle of self-determination as we discussed in

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25 UN, The United Nations and Decolonization (New York, 1980), back cover. Also see, Self-Determination, n. 6, p. 6.

26 ICJ Reports (1971), p. 37.

27 Ibid. (1975), p. 31.

preceding pages is applicable to the Falkland Islands. But there prevails a controversy over the application of this principle, between Argentina and UK.

Britain has reiterated on many occasions that it would not unilaterally decide the future of the Falkland Islands without the consent of the people living there. On 26 April 1982, the British Prime Minister, Mrs. Margaret Thatcher said:

> The sticking point for us is the right of self-determination. The Falklanders' loyalty to Britain is fantastic. If they wish to stay with Britain we must stand by them. Democratic nations believe in the right of self-determination.... The people who live there are of British stock. They have been for generations, and their wishes are the most important thing of all. Democracy is about the wishes of the people. 28

During April 1982, when the situation had become grave in the wake of Argentine seizure of the Falkland Islands on 2 April 1982, the British statesmen repeatedly referred to their faith in the principle of self-determination in the course of their pronouncements. Mrs. Thatcher said on 3 April 1982 that "the people of the Falkland Islands ... have the right to determine their own allegiance."[29] Reiterating the same stand, she said on 14 April 1982 that any solution to the Falkland Islands "must regard the

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28 The Times (London), 27 April 1982.

29 Ibid., 4 April 1982.

principle that the wishes of the islanders shall remain paramount.... We have a long and proud history of recognising the rights of others to determine their own destiny."[30]

According to the census carried out in November 1980 about the Falkland Islands, of the 2,000 total inhabitants, 95 per cent of the population is of British origin. This fact has been dealt with in Chapter I. As regards the application of the principle of self-determination in the case of Falkland Islands, two points emerge. Firstly, the bulk of Islanders are of British origin who, according to British claims, want to remain with UK. Secondly, the United Kingdom has always expressed its adherence to the principle of self-determination.

Argentina disputes the British argument about self-determination. According to Argentine arguments, prior to 1833 when Britain occupied the Islands, the Falkland Islands were under its occupation and Argentine population inhabited the Island. After 1833, the Britishers started settling there and now they constitute the majority.[31] "Against this background, the application of the principle of self-determination is irrelevant because, despite this presence of British settlers, the initial British invasion

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30 Ibid., 15 April 1982.

31 For details, see Chapter III.

was illegal."[32] A.B. Bologne, an Argentinian scholar further holds that "the outcome of any referendum although predictable, would not reflect the underlying legality of Argentina's position."[33] Thus Argentina does not accept the British argument of the application of the principle of self-determination in respect of the Falkland Islands.

Decolonization and Falkland Crisis

Conclusion of the Second World War was instrumental in inaugurating the process of decolonization. The imperial colonies in Africa, Asia and Latin America started gaining independence. Emergence of the United Nations was followed by the wave of independence sweeping the continents of Asia, Africa and Latin America. By the beginning of 1960, the process of decolonization had been almost complete.

Some territories were still under the control of the United Kingdom and a couple of other countries. On 14 December 1960, the General Assembly vide its Resolution 1514(XV) adopted Declaration on the Granting of Independence to colonial countries and peoples which inter alia stated that "the subjection of peoples to alien subjugation,

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32 Alfredo Bruno Bologne, "Argentinian Claims to the Malvinas under International Law", Journal of International Studies (London), Vol. 12, No. 1, Spring 1983, p. 40.

33 Ibid.

domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation".[34]

The Falkland Islands which have been under British occupation since 1833, is still a British colony. The dispute over the legal title to Falkland Islands between Argentina and UK dates back to 1833. The UN General Assembly through its various resolutions has called for the end of colonialism in all its forms. The issue of Falkland Islands being a British colony has also come up before the General Assembly.

The General Assembly in one of its resolutions stated that it "was prompted by the cherished aim of bringing to an end everywhere colonialism in all its forms, one of which governs the case of the Falkland Islands (Malvinas)."[35]

In the light of entire discussion in this chapter and Chapters III and IV, the question of decolonization is not primary in this issue. Because if we analyse the post-Second World War international behaviour of Britain, the latter has granted independence to most of its colonies

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34 The Decolonization, n. 25, back cover.

35 UN Document S/PU.2350, pp. 104-105.

during this period. Even with regard to the Falkland Islands, Britain has taken the stand that the future of the Islands should not be decided without the will of its inhabitants. In other words, UK recognizes the principle of self-determination in respect of the Islanders.

As we have seen above, Argentina is not prepared to accept the principle of self-determination in respect of the Falkland Islands. This disagreement on the basic approach coupled with respective claims on other grounds, has created a stalemate between Argentina and Britain over the legal title to Falkland Islands.

Despite their respective stands on the claims to Falkland Islands, both Argentina and UK showed willingness to negotiate the matter peacefully. The United Nations played a notable role. The UN General Assembly's Resolution 3160 (XXVII) and its decision of 13 December 1974 and 8 December 1975 called upon both the countries to negotiate the matter amicably. In its Resolution 31/49 of 1 December 1976, the General Assembly called upon:

> (...)
>
> (3) ... the Governments of Argentina and the United Kingdom to expedite the negotiations concerning the dispute over sovereignty.
>
> (4) Calls upon the two parties to refrain from taking decisions that would imply introducing unilateral modifications in the situation. 37

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37 Cited in Right to Self-Determination, n. 7, p. 60.

Subsequently, both the Governments started negotiations on 26 April 1977, a joint United Kingdom-Argentina communique was issued stating that:

> The British and Argentine Governments have now reached agreement on the terms of reference for resolution about the Falkland Islands (Malvinas) dispute as follows:
>
> The Governments of Argentine Republic and the United Kingdom of Great Britain and Northern Ireland have agreed to hold negotiations from June or July 1977, which will concern future political relations, including sovereignty, with regard to Falkland Islands (Malvinas), South Georgia and South Sandwich Islands, the economic cooperation with regard to the said territories, in particular and the South West Atlantic, in general. In these negotiations, the issues affecting the future of the Islands will be discussed, and negotiations will be directed to the working out of a peaceful solution to the existing dispute on sovereignty between the two states, and the establishment of a framework for Anglo-Argentine economic cooperation which will contribute substantially to the development of the Islands and the region as a whole. A major objective of the negotiations will be to achieve a stable, prosperous and politically durable future for the Islands, whose people in Government of the United Kingdom will consult during the course of the negotiations. The agreement to hold these negotiations, and the negotiations themselves are without prejudice to the position of either Government with regard to sovereignty over the Islands. 37

After this, both the Governments held a series of negotiations, the latest being in February 1982. But the situation took a serious turn after Argentine seizure of

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37 Ibid.

the Falkland Islands on 2 April 1982. The exchange of armed hostilities between the two countries over Falkland Islands turned the situation from peaceful negotiations to that of tension.

Chapter III

AN EXAMINATION OF ARGENTINA'S CLAIMS

Chapter III

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The dispute over Falkland Islands between Argentina and Britain dates back to 1833 when the latter occupied them. Argentina has since then staked its claim over the Falkland Islands protesting against British occupation of the same. The basis of Argentine claims to the Falkland territory originates from its claims to other regions of the Antarctica. It deems appropriate to understand Argentine claims to Antarctica in order to have a better analysis of former's claims to the Falkland Islands.

Argentine Claims to Antarctica

Argentine claims to Antarctica's region comprises "the area between the 25° W and 74° W meridians of longitude. This sector comprises all the islands and most of the mainland of the Falkland Islands Dependencies."[1] Argentine claims also extend to Weddell Sea, South Orkneys Island and Deception Island.[2] Argentina launched its

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1 J. Daniel, "Conflict of Sovereignties in the Antarctica", The Year Book of World Affairs 1949 (London, 1949), p. 246.

2 R.D. Hayton, "The 'American' Antarctic", American Journal of International Law (AJIL) (Washington), Vol. 50 (1956), p. 591.

activities in the Antarctic region in 1903 when its ship Uruguay cruised the Atlantic Waters. Later it succeeded in establishing a meteorological station in 1904 on the Laurie Island in the South Orkneys.

Until 1939, the Antarctic activities of Argentina were more or less limited to the Laurie Island. It was in July 1939 that Argentina established a permanent National Antarctic Commission and during 1942-43 launched expeditions to the Grahamland and South Shetlands. An expedition by Argentine vessel Primero de Mayo in 1942 "set up plaques on islands off the Argentine territory on 25° and 68° 34'W, south of 60° S."[3]

"By 1946, the Antarctica became the major focus of Argentine political, military and diplomatic activity".[4] Since then it has been able to establish a number of small stations in the region, particularly at Grahamland. The National Antarctic Commission's activities were also augmented. The Argentine Government has since then "pursued a relatively vigorous policy of exploration and the establishment of bases to support its contention of effective

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3 F.M. Auburn, Antarctic Law and Politics (Bloomington, 1982), p. 48.

4 Madan Lal, "The Falkland Crisis: A Preliminary Assessment", Foreign Affairs Reports (New Delhi), Vol. XXXI, No. 6, June 1982, p. 102.

occupancy."[5]

The Argentine Government established in 1951, "the Institute Antartico Argentino placed under the Ministry of Army. Its function has been to centralize Antarctic matters within the Argentine Government".[6] In 1955, a major station "General Belgrano" was set up on the Fiechner Ice Shelf. Later it occupied in January 1959 Ellsworth station with the US concurrence but evacuated the same in 1962. Argentina has constantly augmented its activities in the Antarctic region.

Argentine claims over the Antarctic region are based on four grounds:

(i) The succession to original Spanish rights;

(ii) geographical proximity;

(iii) geographical affinity based on the presumed geological continuation of the Andes through the island claims into the nearby Antarctic region;

(iv) effective occupation including the maintenance of the Laurie Island station since 1904.[7]

The conceptual and legal evaluation of the Argentine claims follows in the succeeding pages with reference to Falkland

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5 John Hanessian, "National Interests in Antarctica", in Trevor Hetherton (ed.), Antarctica (London, 1965), p. 11.

6 Ibid.

7 Ibid., p. 12.

Islands as detailed discussion about Argentine claims to Antarctica is out of the scope of present study.

For quite some time, Argentina did not openly make public its formal claims over Antarctica but pleaded that "Antarctica Argentina" formed an inseparable part of its territory since the emergence of the Republic. In February 1967, it re-established what is now known as "The National Territory of Tierra del Fuego", the Antarctic and the Islands of South Atlantic and also extended administrative arrangements to cover the Falkland Islands.[8]

Argentina has adopted a well-guarded approach to its Antarctic claims while opposing any moves aiming at relinquishing its claims of sovereignty over the region. It has strongly opposed the US proposals of 1948 that urged all the nations claiming territory in the Atlantic to create "some form of international regime within the framework of the United Nations to reconcile their conflicting interests".[9] Argentina was also a reluctant signatory to the Antarctic Treaty of 1959 which recognized that "it is in the interest of all mankind that Antarctica shall continue to be used exclusively for peaceful purposes and shall not become the

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8 Madan Lal, n. 4, p. 102.

9 C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", British Yearbook of International Law (BYIL) (London, 1948), p. 311.

scene or object of international discord".[10]

Argentine Claims to Falkland Islands

The claims of Argentina over the Falkland Islands are based on three grounds: (i) geographical contiguity, (ii) Discovery; and (iii) succession to original Spanish rights.

(i) Geographical Contiguity

Concept of geographical contiguity is broadly called sectoral principles in international law. According to sector principles all lands south of certain inhabited areas are deemed to be the national property of the Governments of those areas -- the Pole being taken as the meeting point of the frontiers of the various sectors.[11] According to C.H.M. Waldock, "Sectors are, however, usually represented to be not mere paper annexations but applications of the principle of geographical proximity, whether expressed as the principle of 'contiguity' or of 'continuity' of territory."[12] This view is supported by jurists like Berianel and Lakhtine who claim that polar regions and uninhabited islands belong to their "natural regions of attraction".[13]

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10 For the text of the Antarctic Treaty, see International Conciliation (New York), No. 531, January 1961, pp. 318-22.

11 Daniel, n. 1, p. 259.

12 Waldock, n. 9, p. 339.

13 Cited in Daniel, n. 1, p. 258.

Sectoral principle was firstly applied in the Arctic region. This principle was elaborated by Canada during the first decade of the present century. It was argued that "countries whose possessions went up to the Arctic should have a right to all lands in the waters between lines extending from their east and west extremities to the North Pole."[14] Supporters of the Arctic sector principle trace its origin to nineteenth century agreements defining Alaska's boundary. These treaties, besides having historical significance, are also beset with some problems of the sector principle.

In the wake of the free movements of the American nationals in Alaska for fur trade, Soviet Union issued "an Ukase in 1821 proclaiming Russian territorial waters along the Northwest Coast of America for 100 miles offshore from Bering Straits to 51° N and closing the area to all foreigners."[15] Both the United States and Britain contested Soviet legislation of Ukase. However, later the United States reserved its position in the Fur Seal Arbitration in 1893 and endorsed the Ukase. The dispute was resolved as a sequel to the treaty signed between Russia and Britain in 1825 which envisaged a line of demarcation and the subsequent

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14 Canadian Senator, P. Poirier's statement, Senate Debates (Canada), 20 February 1907, p. 271.

15 Auburn, n. 3, p. 18.

Treaty of Cession of 1867, introduced an Alaska-Canada boundary.

A Polar sector is usually defined as an area lying between two designated meridians and a parallel of latitude on a coastline. States adhering to the sector principles stake their claims on the principles of convenience, contiguity, discovery and the theory of hinterland. But none of these hold legal validity in the contemporary norms and practices of international law.[16]

The sector principle cannot be fully "applicable in Antarctica, large areas of which face the open sea, with the 'nearest' land to the north beyond the Tropic of Capricorn or the Equator itself."[17] Arctic sector claims are not applicable to those of in Antarctica. Because in the Antarctic region "no state has a territory continuing so far to the south that it is cut by the polar circles; nor is there, so far to the south, any territory effectively taken possession of by any state."[18] John Hanessian is also of the opinion that "the application of the 'sector' theory

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16 Even majority of the proponents of sector principle disagree on the basic ingredients comprising this theory. For a detailed discussion on this, see J.P.A. Beruhardt, "Sovereignty in Antarctica", California Western International Law Journal (San Diego), Vol. 5 (1974-75), pp. 330-40.

17 Daniel, n. 1, p. 259.

18 Y.S. Bhadauria, "The Legal Status of Antarctica" (Unpublished M. Phil Thesis, Jawaharlal Nehru University, New Delhi, 1982), p. 67.

in the Antarctica ... lacks the foundation upon which it rests in the north and has no recognizable legal basis."[19]

Argentina stakes its claims over the Falkland Islands on the basis of sectoral principle, as its geographically being more contiguous to the Islands than Britain. "Argentina is geographically more contiguous to the Islands -- only about 700 kms. away -- as compared to Britain which is at a distance of about 13,000 kms."[20] There is a virtual continuity of the submarine platform which links the Falkland Islands with the Argentine mainland."[21]

Britain, as a sequel to its long occupation of the Falkland Islands and South Georgia has claimed "all Antarctic territory between 20° W and 60° W while Argentina claims a sector from 25° W to 74° W."[22] Despite Argentine protests of sovereignty over the Falklands, the sector principle still constitutes a conflict between Argentina and UK as parts of the Falkland Islands Dependencies are south of Argentina rather than of the Falklands.

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19 Hanessian, n. 5, p. 9.

20 Madan Lal, n. 4, p. 103.

21 Government of Argentina, "Malvinas", Economic Information on Argentina (Buenos Aires), No. 122, January-April 1982, p. 43.

22 Daniel, n. 1, p. 259.

Argentine claims to Falkland Islands on the basis of sector principle lack adequate recognition under the existing norms and practices of international law. The application of the sector principle by Britain in Antarctic region aims at defining the boundaries of its mainland territories.[23] British sectoral claims are based on the principle of geographical continuity of territory and are more or less new examples of hinterland doctrine.

Arctic sectors, though also based on the principle of proximity, are "really examples of another proximity doctrine called 'contiguity'."[24] There is a difference from the legal point of view between Arctic and Antarctic sectors. The doctrine of contiguity is invoked in support of claims to Islands lying beneath state's territory but outside its territorial waters.[25] Argentine claim to sectors in Antarctica have more in common with the Arctic sectors than with the other Antarctic sectors.[26] Waldock opines that sector doctrine cannot by itself be a sufficient legal root of title.[27]

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23 Waldock, n. 9, p. 341.

24 Ibid.

25 This point has been elaborately dealt with in "Island of Palmas Case", AJIL, Vol. 22 (1928), pp. 867-912.

26 Waldock, n. 9, p. 341.

27 Ibid., p. 342.

The doctrine of hinterland, contiguity and other geographical doctrines were much in vogue during the nineteenth century. The ostensible aim of invoking these doctrines was to earmark areas to be claimed for future occupation. By the dawn of twentieth century international law rejected geographical doctrines as the only basis of legal title and rather envisaged effective occupation as the sole test of claim of title to new lands. Geographical proximity, along with other geographical considerations, are "certainly relevant, but as a fact assisting the determination of the limits of an effective occupation, not as an independent source of title."[28]

The doctrine of the sectoral claim has lost its rationale in the contemporary international law. It was in vogue during the nineteenth century but became untenable subsequent to the growth of the rule of effective occupation. In the Island of Palmas Case, Judge Max Huber, while repudiating the sector doctrine, observed:

> It is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearings to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and

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28 Ibid.

> contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity in regard to islands may not be out of place when it is a question of allotting them to one state rather than another by agreement between the parties or by a decision not necessarily based on law; but as a rule establishing ipso jure the presumption of sovereignty in favour of a particular state, this principle would be in conflict with what has been said as to territorial sovereignty and so as to the necessary relation between the right to exclude other states from a region and the duty to display thereon the activities of a state. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. 29

Max Huber further made it clear that "the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law".[30] The subsequent authorities in international law have also reiterated the views of Judge Huber.[31] In the light of these views, Argentine claim over Falkland Islands on the basis of sector principle is rendered untenable in international law.

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29 AJIL, n. 25, pp. 907-8.

30 Ibid., p. 910.

31. Waldock says that "International Law therefore, appears to take account of continuity or contiguity of territory only within the principle of effective occupation". See Waldock, n. 9, p. 344. Also see Hanessian, n. 5, p. 9.

(ii) Discovery

Argentina stakes its claim over the Falkland Islands on the basis of the principle of discovery. Before examining the validity of the Argentine claim on the basis of discovery, it seems essential to ascertain the legal basis of this doctrine in international law.

The principle of discovery has been widely used as a major legal argument by countries claiming sovereignty over Antarctic territory. Despite the well known statement that discovery alone is insufficient to provide sovereignty,[32] even if there exists an intention to occupy it eventually.[33] This view still exists. The doctrine of discovery was used in the past to acquire new lands with a view "to ascertain the existence of territory previously unknwon to civilization".[34] Discovery in the past was regarded in international law as an act of bestowing an absolute title upon the state by whose agent the territory was discovered.[35] But the existing norms and practices of international law disregard this traditional doctrine. Even under traditional

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32 AJIL, n. 25, p. 908.

33 R.Y. Jennings, The Acquisition of Territory in International Law (Manchester, 1963), p. 4.

34 C.C. Hyde, International Law (Boston, 1951), Vol. I, p. 322.

35 For elaboration of this opinion, see W.E. Hall, Treatise on International Law (4th edition) (London, 1895), pp. 126-27.

international law, the mere fact of discovery by seeing, without acquiring possession at least by symbolic annexation did not confer sovereignty over the territory.[36] Grotius also opined similar view when he wrote that the "act of discovery is sufficient to give a clear title of sovereignty only when it is accompanied by actual possession."[37]

International Law does not accept discovery alone as jus in re. Vander Heydte opines that as and when the statesman based their claim of sovereignty over discovery, it was not that the protagonists were convinced of the validity of their claims but because they lacked better arguments for validating their political claims and the claimant state staking its claims on the basis of discovery, almost always declined to recognise discovery as bestowing sovereign title to the other claimants.[38]

Mere fact of discovery does not in itself vest in a state full title to a territory. The doctrine of discovery

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36 For details, see Oppenheim, International Law (London, 1955) (8th edn.), p. 558.

37 Grotius quoted in J.P.A. Bernhardt, "Sovereignty in Antarctica", California Western International Law Journal (San Diego), Vol. 5 (1974-75), pp. 322-23.

38 See Van Der Heydite, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law", AJIL, Vol. 29 (1935), p. 452.

has sometimes been interpreted as conferring "inchoate title" subject to perfection by subsequent legislative measures such as the exercise of national authority over the territory. The concept of "inchoate title" is akin to the doctrine of discovery which envisages that though discovery does not bestow title, it does provide an exclusive right to occupy the territory. This concept has found favourable treatment by some writers but it has widely been criticized. Max Huber in Island of Palmas case observed that "an 'inchoate title' of discovery must be completed within a reasonable period by the 'effective occupation' of the region claimed to be discovered."[39]

There prevails an opinion that discovery could be relied upon as giving an inchoate title if completed by effective occupation within a reasonable period.[40] This "reasonable period" depends on the circumstances,[41] but there is no consensus about the period. Writers have "suggested twenty, twenty-five or forty years".[42] The Soviet jurists do not accept the reasonable time limit after which such a

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39 AJIL, n. 25, p. 896.

40 Ibid.

41 J.B. Scott, "Arctic Exploration and International Law", AJIL, Vol. 3, pp. 928 and 939.

42 Anburn, n. 3, p. 9.

historic right could lapse.[43] The doctrine of discovery has given rise to a multitude of overlapping and conflicting claims in the South Polar region so that the extent of such discovery, over rival claims, would create an arduous task for any international tribunal deciding such a case.[44]

From the foregoing discussion, it emerges that the doctrine of discovery alone vests no right to claim sovereignty over a territory. Title on the basis of discovery only is contrary to the accepted rules and norms of international law and "no claimant today relies on this root of title alone".[45]

The Argentine claim over the Falkland Islands on the basis of discovery has to be examined in the light of foregoing discussion. Argentina holds that Falkland Islands were discovered originally by Spain during early part of the sixteenth century and were marked as such on early Spanish maps. "Upto the middle of the 18th century the Malvinas (Falklands) had been scarcely heard of in England and it was only in 1748 that a plan had been made to discover the

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43 For Soviet viewpoint, see P.A. Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctica", AJIL, Vol. 50 (1959), p. 613.

44 H.E. Holder and G.A. Brennan, The International Legal System (Melbourne, 1972), p. 339.

45 Anburn, n. 3, p. 9.

islands."[46]

According to Argentina, "The Islands were discovered by the Spaniards (perhaps by Ameenco Bespucio, in the service of Spain) or more probably by navigators of Megellan's expedition in 1540 and what is more certain, by that of the bishop of Plasencia in 1549. It is proved by the maps of that time."[47]

The main thrust of Argentine argument for claiming title to Falkland Islands on the basis of the doctrine of discovery is that these Islands were discovered by Spain and as a legal successor to original Spanish rights, it is entitled to claim sovereignty over the Falkland Islands. As we have seen above, discovery alone is not recognised as a basis of title over the territory in international law. The Argentine claim thus lacks legal justification under the international law.

(iii) As a Successor to Original Spanish Rights

Argentina further stakes its claim over Falkland Islands as a successor to original Spanish rights. Its contention is that Falkland Islands constitute an integral

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46 Speech of the Argentine representative in sub-committee III on the Falkland Islands, Official Records of the General Assembly (GAOR), 19th session, 1964-65, Annexure 9, Part 10, p. 441.

47 Economic Information, n. 21, p. 44.

part of Argentine territory which it inherited from Spain when it got independence. As dispute over Falklands spans over a period of 15 decades, before going into details about the historical facts put forth by Argentina, it is deemed necessary to discern the position of international law over the theory of succession to original colonial rights.

There prevails a conflict between Anglo-Saxon approach and Latin American approach to the doctrine of "effective occupation" in international law. The prevailing norms and practices of international law regards "effective occupation" as the basis of title to sovereignty over a territory[48] to which UK and majority of other nations ascribe to. But in the Spanish-speaking countries of south and central America, whose number exceeds 20:

> neither Governors nor jurists are prepared to admit that occupation can constitute a valid title to sovereignty; they uphold the doctrine of uti-possidetis juris of 1810 which maintains that no territory in the New World is res nullius and that the whole of the former Spanish and Portuguese empires have been occupied in law by the legitimate heirs of those empires since their independence. [49]

These countries envisage a sharp distinction between their sovereignty and any property rights in private law which

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48 For detailed discussion on "effective occupation", see Chapter IV.

49 Daniel, n. 1, p. 262.

colonial powers might acquire by occupation to which the former do not contest. This distinction is deeply rooted in Spanish legal tradition. Alfonso, a Spanish jurist, wrote in 1265 that "it seldom occurs that new islands arise out of the sea. But if it should happen that a new island arise, we state that it must belong, as property, to whomsoever inhabit it first. But he or they, who colonize it, our obedience to the lord within whose dominions the new islands arose."[50] According to this opinion occupation conferred rights in private but not in public law.

The principle of uti-possedetis in international law is defined as "a phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war".[51]

When the Spanish colonies of Latin America gained independence during the early part of the nineteenth century, they "claimed to be the full and complete territorial successors of the motherland, so that there could be no gaps in sovereignty over the continent".[52] The doctrine of uti-possedetis was invoked by these new independent countries to

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50 Cited in ibid.

51 Bernhardt, n. 37, p. 346.

52 D.P. O'Connell, International Law (London, 1970), edn. 2, Vol. I, p. 426.

define their administrative divisions of the former Spanish empire. In the beginning, the practice of this doctrine had less legal implications. The boundaries between Brazil and its neighbouring former Spanish colonies were fixed on the basis of this principle. However, uti-possedetis was "not relied on as a principle in any treaty contemplating arbitration of a boundary dispute before 1830, except in so far as boundary adjustments were to proceed on a basis of determining the real administrative divisions of the old Spanish empire".[53]

The doctrine of uti-possedetis was invoked at a time when vast areas of the Latin American subcontinent were unexplored. This "doctrine was specifically intended to forestall attempted occupation by European powers".[54] It has been decided in Beegle Channel Arbitration case in 1978 that "all land in Spanish America, however remote or inhospitable, is deemed to have been part of one of the former administrative divisions of colonial rule".[55]

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53 Ibid.

54 J.B. Scott, "The Swiss Decision in the Boundary Dispute between Columbia and Venezuela", AJIL, Vol. 16 (1922), p. 429.

55 Cited in Anburn, n. 3, p. 50.

The principle of uti-possedetis has come under vigorous attack[56] and S.O. Butler even called it as an "exotic argument".[57] But this concept enjoys a general support in Latin American practice and arbitration as an intra-American international law rule.[58] This principle is more useful to South American states for their claims over the Antarctic regions. According to Anburn, if the principle of uti-possedetis is "a rule of international law, then the South American sector was not res nullius at the time when Britain's acts of sovereignty were carried out. Britain would argue t.. that as a regional custom, it is subordinate to general international law".[59] This principle is applicable only to "territory over which Spain had title in 1810, and there is little evidence of a Spanish claim to any part of Antarctica".[60]

The principle of uti-possedetis is regarded by some legal scholars as a valid rule of international law.

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56 For details, see E. Honnold, "Thaw in International Law? Rights in Antarctica Under the Law of Common Space", Yale Law Journal, Vol. 87 (1978), p. 814.

57 See S.O. Butler, "Owning Antarctica", Journal of International Affairs (London), Vol. 31 (1977), p. 42.

58 In Beagle Channel Arbitration case, Judge Gros supported this view. Cited in Auburn, n. 3, p. 50.

59 Ibid.

60 See J.C. Puig, La Antartide Argentina ante el Darecho (Buenos Aires, 1960), pp. 115-21, cited in ibid.

Latin American jurists hold it as a "valid rule of intra-American customary international law".[61] Daniel also opines that the "uti-possedetis rule is a legal criterion".[62]

Argentine argument in support of its claim over Falkland Islands as a successor to original Spanish rights is that these Islands formed a part of Spanish empire when Argentina got independence in 1816. In the wake of the formal Argentine declaration of independence in 1816 "the newly-born Republic was formed with the territories of its former metropolis, by virtue of the right of "succession of states", the entire extension of the former viceroyalty of La Plata now constituted the United Provinces of Rio de la Plata, with new authorities".[63]

According to Argentina, Falkland Islands were discovered by Spain.[64] Buenos Aires also invokes the Papal Bull decrees to establish Spanish sovereignty over the region of which the former deems to be the legitimate heir.

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61 Ibid.

62 Daniel, n. 1, p. 265.

63 Government of Argentina, Malvinas Argentinas (Buenos Aires, n.d.), pp. 10-11.

64 For details, see Chapter I.

Between 1514 and 16th century "the Holy Sea -- whom the European powers respected and obeyed ... issued a series of decrees, known as Papal Bulls, with a view to put some order and avoid conflicts and disputes for the new territories which were being discovered."[65] During this period the famous "Bulls" were: Inter Caltera, Dudum si quidem of 1493 and Ea Quae of 1596.

The Papal Bull decree of Dudum si quidem of 1493 "fixed the limits of the discoveries and settlements of Spain and Portugal in South America at 45° longitude."[66]

By virtue of the Treaty of Tordesillas signed in 1494 both Spain and Portugal had agreed "to partition the world along a line 370 leagues to the west of the Cape Verde Islands".[67] The Holy See had formally endorsed the treaty. For "centuries, without the least opposition or discussion from other countries, Spain enjoyed full rights over the lands bestowed upon it by Pope".[68]

As we have seen in the first chapter, since the discovery of the Falkland Islands by the close of the

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65 Argentine Embassy in India, News From Argentina (New Delhi), no. 18, p. 1.

66 Ibid.

67 Peter Calvert, "The Causes of the Falkland Conflict", Contemporary Review (London), Vol. 241, No. 1398, July 1982, p. 7.

68 News from Argentina, n. 65, p. 1.

sixteenth century till the later period of sixth decade of the eighteenth century, the Islands had remained also inhabited and devoid of any political activity by any power. It was during early 1760s that French navigational expeditions resulted in the occupation of the Islands in 1764. Louis Antonio de Bougainville, a French navigator, established a colony on East Falkland. Spain came to know about French occupation over the Islands and the former invoked the Treaty of Pacto de Familia of 1743 and the Treaties of Utrecht of 1713 and 1714 pleading that "occupation of Spanish lands in America was not possible".[69] Consequently, in 1767 France "formally resigned its claim to Spain".[70]

In the meanwhile, Britain had also established a colony at Port Egmont in early 1760s. In June 1770, Spanish detachment arrived at Port Egmont and the British settlers were sent back to London. These developments had brought Spain and Britain virtually on the brink of war.[71] Negotiations between the two countries led to the peaceful settlement of the issue and Port Egmont was restored to Britain. By 1774,

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69 Ibid., p. 4.

70 Calvert, n. 67, p. 7.

71 For details, see HMSO, Falkland Islands and Dependencies: Report for 1966-67 (hereafter Falkland Report) (London, 1969), pp. 54-55.

Britain also withdrew its forces from the Islands and from then till early part of the nineteenth century, the Falkland Islands remained uninhabited.

Britain acknowledges that "for the rest of the century and the early part of the nineteenth century, Spain maintained its settlement at Solebad".[72] In the wake of British withdrawal, "Spain was left in sole possession of the Islands".[73] In 1776, Spain elevated its possession in Argentina to viceroyalty. The dawn of the nineteenth century had envisaged the Argentine struggle for national liberation reaching at zenith. In 1806 British forces invaded Buenos Aires but were defeated in 1807.[74]

According to British claims, Spain abandoned its settlement at Solebad in June 1806 following the British invasion of Buenos Aires and "at this point Spanish jurisdiction over the Falkland Islands ended."[75]

Argentina was formally declared independent in 1816. There seems to be a consensus between British and Argentine authorities that between 1807 and the beginning of 1820, no nation held sway over the Falkland Islands. It was in

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72 Ibid., p. 55.

73 Calvert, n. 67, p. 289.

74 For details, see News from Argentina, n. 65, p. 9.

75 Falkland Report, n. 71, p. 55.

November 1820 that Argentina took the formal possession of the Islands. British documents also acknowledge this fact.[76]

In 1823, Buenos Aires appointed Pable Aregnsti as the new governor of the Falklands "who developed the establishment which soon had more than 500 Argentine inhabitants".[77] In 1825, Britain and Argentina signed a Treaty of Peace, Friendship and Navigation in which the former recognised the latter without "making any reservations whatsoever about the Islands".[78] Till the beginning of 1831, everything went well and Falkland Islands were in Argentine possession.

Following the seizure of three American schooners by the then Argentine Governor of Falklands, Louis Vernet, the US reprisals resulted in the demolition of Argentine settlements at Solebad. A year later, in 1832, Britain despatched its troops to the Islands and "re-asserted its sovereignty".[79] The Argentine settlers in the Islands were forced to quit. In 1833, Britain occupied the Falkland Islands.

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76 Ibid., p. 56.

77 News from Argentina, n. 65, p. 10.

78 Ibid.

79 Falklands Report, n. 71, p. 56.

Since then Argentina has regarded the "seizure of the Islands by force by Britain in 1833 as an illegal act".[80]

It is in this context that Argentina lays its claim over the Falkland Islands as a successor to regional Spanish rights. Argentine contention is that the Falklands were in possession of Spain prior to former's independence and it formally acquired possession of the Islands in 1820. It was in 1833 that Britain forcefully seized them and since then is in "illegal occupation" of the Islands.

Other Claims

Since the British occupation of the Falkland Islands, in 1833, there has been no change in Argentine claims which have been voiced from time to time, objecting to British occupation and urging restoration of the territory. Argentina made its claim over the archipelago probably for the first time at the meeting of the Universal Postal Union in 1927, when its representative said that "The Argentine territorial jurisdiction extends in fact and in right over the continental area, the territorial sea and the islands of Tierra del Fuego, the Archipelago of Estado, Ano Nuevo, South Georgia and to the Pollar lands not yet delimited."[81]

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80 Calvert, n. 67, p. 8.

81 Cited in Hayton, n. 2, p. 587.

From 1940 onwards, Argentina has stretched its claims that include most of the British sector, asserting its sovereignty over a zone "to which occupation, geographical proximity and ice sector formed by the prolongations of the American continent confer just title"[82] in its favour. Apart from this, Argentina has a "sentimental attachment to these Islands. Argentine maps, postage stamps and text books show these as part of the Republic and the population is included in its national census".[83] The inhabitants of the Falkland Islands visiting Argentina are treated as the citizens of Argentina.

Argentina regards Falkland Islands as a part of its "territorial patrimony". This feeling was contained in an Argentine note to British Government in 1948 which sums former's claims:

> Argentine sovereignty ... is based, among other reasons, in the aggregate of the historical antecedents of its titles -- maintained firmly in all circumstances by the Argentine Government and spiritually with the feelings of the nation's entire population; in the insuperable geographical position of the Republic; in the geological continuity of its land with the Antarctic lands; in the climatological influence that the neighbouring polar zones exercise over its territories in the right

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82 R.K.M. Nickle, "Antarctica Claims", Editorial Research Reports (Washington), Vol. II, 1949, p. 787.

83 George Pendle, Argentina (London, 1955), pp. 128-29.

> of first occupancy; in the pertinent of diplomatic measures; and finally, in its uninterrupted activity in the same Antarctic terrain. 84

Thus from the fore-going discussion, it emerges that Argentina stakes its claim mainly on grounds of geographical contiguity or doctrine of sector, discovery and as a successor to the original Spanish rights. The principle of geographical contiguity as well as discovery as a sole basis to title are untenable in the existing norms and practices of international law. The Argentine argument of being a successor to original Spanish rights is supplemented by the principle of uti-possedetis being accepted norm in the Latin American countries. But Britain does not ascribe to this view. The other argument of Argentina is based on sentiments which almost is a corollary of the third argument. Thus only the principle of uti-possedetis finds a support for Argentine claim over the Falkland Islands in international law.

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84 Cited in Hayton, n. 2, p. 594.

Chapter IV

AN EVALUATION OF BRITISH CLAIMS

Chapter IV

AN EVALUATION OF BRITISH CLAIMS

Britain stakes its claims of sovereignty over the Falkland Islands on four grounds: (i) Discovery, (ii) Sectoral doctrine, (iii) Effective occupation, and (iv) Desire of the people of the Falkland Islands to remain under Britain. The doctrine of discovery and sectoral claim have been widely discussed in the preceding chapter. Here we will adhere to the factual arguments advanced by UK to support its claim over the Islands on the basis of discovery and sectoral claim.

(i) Discovery

Britain stakes its claim over the Falkland Islands by invoking the doctrine of discovery. It has been discussed in the previous chapter that discovery alone does not constitute a basis to claim title over a territory under the existing norms and practices of the international law.

According to British claims, the Falkland Islands were "first sighted on 9 August, 1592"[1] by Thomas Cavendish, a British navigator. Nine months later, another British

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1 HMSO, Falkland Islands and Dependencies: Report for 1966-67 (hereinafter Falklands Report) (London, 1969), p. 53.

navigator, John Davis, launched a second expedition to the Islands whose ship was "driven in among certain isles never before discovered".[2]

Subsequent to the initial discovery by Davis, early British navigators sighting the Islands also included Sir Richard Hawkins. John Strong made the first recorded landing on the Islands in January 1690 and gave them the name "Falkland Islands". Till the second half of the eighteenth century, there was no hectic claim to the Falkland Islands and the archipelago was visited by various navigators of different countries for whaling and fishing purposes. Between 1771-74 Britain was in possession of the Islands and maintained a settlement at Port Egmont which abandoned in April 1774 and it was considered as an "... uneconomical naval regulation".[3]

According to Christie, "South Georgia was discovered in 1675 by Anthony de la Eoche and claimed in 1775 for Great Britain by Captain Cook, who made the first landing on the Island. Captain Cook also discovered the South Sandwich Islands. The South Shetlands were discovered by William Smith in 1819.... Edward Bransfield R.N. discovered Grahamland in January 1820 ... the South Orkney Islands were discovered

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2 Ibid.

3 Ibid., p. 55.

in 1822 by George Powell...."[4]

Britain has laid claim over the Falkland Islands on the basis of discovery. Similar claim it laid over the Rass Dependency in 1922. The British Colonial Office held that "the British claim to the Rass Dependency rests on Discovery ... the territories being at the time of discovery, and now, wholly uninhabited and never having been at any time inhabited except for a few months by expeditions".[5] At the Imperial Conference of 1926, British title by virtue of discovery was asserted over the whole of what now constitutes the Australian Antarctic Territory.[6]

Thus, Britain claims title to Falkland Islands on the basis of discovery. But we have seen in the preceding chapter that discovery alone does not constitute a basis to title over a territory in the current international law.

(ii) Sector Doctrine

Britain invokes sector doctrine in support of its claim over the Falkland Islands. These Islands are situated at a distance of about 13,000 kms. from the British coast.

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4 E.W. Hunter Christie, The Antarctic Problem (London, 1951), p. 239.

5 Cited in D.P. O'Connell and A. Riondan (eds.), Opinions on Imperical Constitutional Law (Sydney, 1971), p. 311.

6 Summary of Proceedings, Command Papers (2768) (London, 1926), pp. 33-34.

The British sectoral claim to Falklands forms part of its activity in the Antarctic region as a whole. According to Hayton, "The British claim extends in a sector between 20° and 80° west longitude ... Bound by the 50th parallel in the part between 20° and 50°; by the 58th parallel from 50° to 80°."[7]

Britain made first declaration of a sector by the "issue of a Letters Patent of 1907 defining the Falkland Islands Dependencies".[8] However, the Letters Patent did not invoke any particular doctrine but merely defined territories claimed to be already held by Britain. Britain authors claim that Argentina made no protests whatsoever to the British Letters Patent and it was only in 1940s onward that Argentina, while laying its sectoral claims in the region, protested against British sectoral claims.[9]

The application of the sector doctrine as the sole basis for the title by laying claim over a territory is untenable under contemporary norms and practices of international law. Hence the British sectoral claim as a title

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7 R.D. Hayton, "The American Antarctic", AJIL, Vol. 50 (1956), p. 584.

8 C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", British Yearbook of International Law (London, 1949), Vol. 24 (1948), p. 377.

9 See ibid., pp. 338-9. Also see J. Daniel, "Conflict in the Antarctic", Yearbook of World Affairs, 1949 (London, 1949), p. 260.

over the Falkland Islands lacks the sanction or concurrence of international law. It has to be supplemented by effective occupation which Britain has in case of Falkland Islands. This argument is discussed in succeeding pages.

(iii) Effective Occupation

Britain has also invoked the doctrine of "effective occupation" as a basis for its title over the Falkland Islands. Occupation is one of the major instruments of acquiring a territory. Occupation has to be continuous and effective to sustain the control over the territory. Oppenheim is of the opinion that occupation is envisaged by taking possession of, and establishing administration over the territory in the name of and for the claimant state. Occupation thus asserted is the real occupation in contra-distinction to fictitious occupation, and is called effective occupation.[10]

According to L.F.E. Goldie, the requirement that "a clear title of sovereignty" emanates when "it is accompanied by actual possession", has been traditionally recognised. But the doctrine of effective occupation requires that:

(a) the territory required should be a "res nullius civitalis" or "terra nullius" - masterless territory;

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10 Oppenheim, International Law (London, 1955), edn. 8, p. 557.

(b) the occupying power should have an *animus rem sibi habendi*;

(c) there should be an assertion of control amounting to acts of sovereignty;

(d) the occupation should be peaceful; and

(e) there should be a continuous and effective control; otherwise the occupying state's title is said to be "inchoate" or non-existent. 11

Terra nullius is also called *res nullius*.[12] *Res nullius* is defined as the property of no body, i.e. a thing which has no owner, either because a former owner has finally abandoned it or because it has never been appropriated by any person or because, as in the Roman Law, it is not susceptible of private ownership.[13] This concept has a Euro-centric origin in international law which deemed the discovered land as *res nullius* so that the same could be put under the sovereignty of the discoverer. The practice of this concept was instrumental in the colonization of a substantial portion of the world during the past several centuries.

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11 L.E.E. Goldie, "In the National Relations in Antarctica", *The Australian Quarterly* (Sydney), Vol. 30, No. 1, March 1958, p. 15.

12 *Res* means a thing, an object and is mainly used for objects of property and also such as are not capable of individual ownership, *terra* is used for land or soil - since both convey the same sense. See H.C. Black, *Black's Law Dictionary* (St. Paul's Minn., 1968), pp. 1469, 1641.

13 Ibid., p. 1470.

The second requirement of asserting sovereignty over a newly discovered territory stipulates that there should be a bona fide intention on the part of the claimant state to occupy and control at the time of the first ever declaration of occupation. Vettel opines that "... it is questioned whether a nation can by the bare act of taking possession, appropriate to itself countries which it does not really occupy and thus engross a much greater extent of territory than it is able to people or cultivate".[14]

This entails that intention is a pre-requisite for a claimant. In the case of Antarctica, it is doubtful whether the claimant states had bona fide intention at the time of laying claims to occupy and to assert sovereignty over the region. The claimant states were faced with a host of handicaps like harsh climate, ignorance about the strategic-economic potential of the region, and lack of adequate infra-structure to prolong their stay in the region, etc.

The third pre-requisite stipulates an assertion of control amounting to acts of sovereignty. This stipulation demands the type of control pertaining to acts of sovereignty.

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14 Vettel cited in J.P.A. Bernhardt, "Sovereignty in Antarctica", California Western International Law Journal (San Diego), Vol. 5 (1974-75), pp. 322-23.

This is an acknowledged fact that the claimant state should display such authority and control over the territory and other states should accord due acceptance to that. It also devolves on the claimant state that it should be strong enough to defend its competence as and when attacked by others. In any eventuality, mere unfurling of a flag or other symbolic acts "without settlement are not considered as amounting to acts of sovereignty".[15] Hackworth, while supporting the same argument, writes that "a state does not gain sovereignty over a no-man's land by sending scientific expeditions to the land, nor by establishing wireless stations or scientific posts in the land".[16]

The fourth requirement stipulates that a claimant state may not allege title by occupation in the wake of violence and dispute with another state over the issue as to which state was actually the first occupant. Almost no claim to Antarctica can be regarded as peaceful. From 1833 onward, Argentina has registered protests against British title to the Falkland Islands Dependencies. The United States has been vocal in refuting the claims and their recognition by the claimants of Antarctica. It entails that a state's

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15 M.M. Whiteman, Digest of International Law, Vol. 2 (Washington, 1963), p. 1235.

16 G.H. Hackworth, Biggest of International Law, Vol. I (Washington, 1940), p. 406.

claims of title to territory cannot be regarded as peaceful which is the basic attribute of sovereign jurisdiction over a terra nullius.[17]

The last requirement of "effective and continuous control" forms the pith and substance of an occupation. Effectiveness of occupation coupled by permanent settlement is the touchstone in which all title to territory is based.

Claim to territorial sovereignty in the absence of settlement is nothing but a mere "paper claim".[18] Effectiveness is deemed as the manifestation of a continuous development of control commencing with discovery which endows an inchoate title, to be supplemented by permanent settlement and administration which is instrumental in consolidating that title.

De Martin emphasizing on the same point asserts that the basic nature of the display of authority demands:

> ... the limits of the occupation are determined by the material possibility to cause to be respected the authority of the government throughout the extent of the occupied territory. When the power of the state does not make itself felt, there is not an occupation. In order that it may be effective it must receive its entire execution. 19

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17 For details, see George Schwarzenberger, "Title to Sovereignty: Response to a Challenge", AJIL, Vol. 51 (1957), p. 308.

18 Goldie, n. 11, p. 15.

19 De Martin, cited in Bernhardt, n. 14, p. 323.

The doctrine of occupation "appeared in modern international law" following the discovery of America. The new lands, being inhabited by "uncivilized" natives, were regarded as res nullius.[20] Papal Bulls issued by the Vatican were invoked to avoid the conflicts between the claimant states during the fifteenth and sixteenth centuries. By the eighteenth century, the doctrine of discovery which till then was regarded sufficient title to territory in early stages of international law was reduced to a mere inchoate title[21] and the doctrine of effective occupation emerged as the sole criterion.[22]

During the second half of the nineteenth century, the competing powers in Africa and North America vied with each other for acquiring territories. The European Powers signed the Berlin Convention of 1885 which envisaged that occupation was essential to claim legal title to a terra nullius. Actual occupation was deemed necessary for the acquisition of a territory.[23] The judicial decisions during

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20 Daniel, n. 9, p. 249.

21 G. Schwarzenberger, International Law, Vol. I (London, 1945), p. 123.

22 F.A. Van der Heydte, "Discovery Symbolizes Annexation and Virtual Effectiveness in International Law", AJIL, Vol. 29 (1935), p. 448.

23 J. Zimsarian, "The Acquisition of Legal Title to Terra Nullius", Political Science Quarterly, Vol. 53 (1938), p. 127.

this period also required occupation and settlement, more or less permanent under sanction of a state as essential[24] and "possession must be actual, continuous and useful".[25] Subsequently, the doctrine of effective occupation emerged as the sole legal basis for title to sovereignty over a territory.

Application of the doctrine of effective occupation in international law, keeping in view the inhabiting conditions, to territorial claims in Antarctica, gives rise to the problem whether the contestant states did enjoy the effectiveness prior to the signing of the Antarctica Treaty of 1959. The answer is most negative.

But in case of Falkland Islands, Britain has been in effective and continuous occupation since 1833. UK introduced civil administration on the Islands in 1841 with R.C. Moody as its Governor. The occupation was followed by settlement and introduction of administration. The first Legislative Council was set up during Moody's term of office.[26]

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24 Mortimer V. NY Elevated Railroad Co., 6 NY Suppl. (1889), p. 904, cited in F.M. Auburn, Antarctic Law and Politics (Bloomington, 1982), p. 11.

25 Jones Vs. US 137, US (1890), p. 212, quoted in ibid.

26 Falklands Report, n. 1, p. 57.

During the later decades of the nineteenth century, Britain introduced sheep farming, and agricultural infrastructure in the Falkland Islands. In 1851, the Falkland Islands Company was incorporated under a charter to look after the property and trade in the region. The Company within a short span managed to get extensive tracts of land and throughout the colony and started business as shipping agents and general merchants.

The commencement of the twentieth century witnessed augmentation in British activity in the Antarctic region and the introduction of modern whaling systems in the region. In 1908, Britain declared the South Shetlands, South Georgia, South Orkney and Grahmanland as the dependencies of the Falklands. A Letters Patent of 1908 formalized the arrangement vesting their governance in the Executive Council of the Falkland Islands. This also defined the Dependencies as:

> The group of Islands known as South Georgia, the South Orkneys, the South Shetland and the Sandwich Islands and the territory known as Grahamlands, situated in the South Atlantic Ocean to the south of the 50th parallel of south latitude and lying between the 20th and 80th degrees of West longitude. 27

In 1917, another Letters Patent was issued which defined British claim over the Falkland Dependencies as:

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27 HMSO, State Papers (London), Vol. CI, 1907-8, pp. 76-77.

> All Islands and territories whatsoever between the 20th degree or west longitude and the 50th degree of west longitude which are situated south of a 50th parallel of south latitude, and all islands and territories whatsoever between the 50th degree of west longitude and 80th degree of west longitude which are situated south of the 58th parallel of south latitude. 28

By issuing Letters Patents, Britain laid claim to all territories within a stipulated geographical area. "There was, however, no immediate protest by Argentina". 29 These Letters Patents had almost established British claim to territory by means of its effective and continuous occupation. Following the strong incidents of Argentine tresspassing in the Falklands during 1946-47, UK Government in its note of 17 December 1947, while protesting to Argentine Government, asserted its right over the Islands:

> Argentine claims to territorial sovereignty over the Falkland Islands Dependencies are unfounded, that in case of the greater part of these territories an initial British right to sovereignty was first acquired by virtue of discovery; and that right was confirmed on 21 July 1908 and on 28 March 1917 by the issue of Letters Patent formally reciting the title of the British Crown to the whole of these territories and providing for their administration... Argentina failed to protest at the time against this alleged inclusion of Argentine territory under British jurisdiction. 30

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28 Ibid., Vol. CXI, 1917-18, pp. 16-17.

29 Madan Lal, "The Falkland Crisis: A Preliminary Assessment", Foreign Affairs Reports (New Delhi), Vol. XXXI, No. 6, June 1982, p. 106.

30 British note of 17 December 1947 to Argentina, Documents on International Affairs 1947-48 (London, 1948), pp. 804-5.

Despite British position on the Falkland Islands, Argentine Government repeated its claims of sovereignty over the Islands. In 1955, Britain suggested that "they should bring their claim to sovereignty in the Antarctic before the International Court of Justice".[31] But Argentina declined British suggestion.

The foregoing discussion reveals that the doctrine of effective occupation, on the basis of which Britain stakes its claims over the Falkland Islands as a legal basis for title over a territory is an accepted norm in international law. This view was accepted in the Clipperton Island Case:

> ... If a territory, by virtue of the fact it was 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. 32

John Hanessian also holds that "continuous and effective occupation is a generally recognized concept of international law".[33]

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31 Ibid.

32 For detailed text of the case, see AJIL, Vol. 26 (1932), p. 390.

33 John Hanessian, "National Interests in Antarctica", in Trevor Hetherton (ed.), Antarctica (London, 1965), p. 7.

In the wake of the emergence of the Afro-Asian nations, contemporary international law is undergoing gradual change. The doctrine of effective occupation was only a "convenient imperialist device" to colonize the weaker and so-called "uncivilized states" and this doctrine holds no longer validity under current international law. "The application of such a doctrine with respect to any problem of legal order in the contemporary world community would no doubt be highly dangerous."[34]

(iv) Desire of the Falkland Islanders to remain with Britain

Britain further stakes its claim to the Falkland Islands on the basis of the so-called desire of the Islanders to remain with UK. This argument involves the problem of self-determination which has been discussed in detail in Chapter II. Here we briefly present a resume of British contentions. According to Britain:

> There is no pressure for independence since the Islanders are united in their wish to remain British.... The Falkland Islands' position as a non-self-governing territory has been debated by the United Nations. The Islanders elected representatives have explained the population's wish to retain its association with Britain and not to become independent or associated with any country. 35

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34 See McDougal and Others, Law and Public Order in Space (New Haven, 1963), p. 342.

35 HMSO, The Falkland Islands (London, 1982), p. 7.

Thus Britain emphasizes the fact that prior to deciding the future of the Islanders, their will should be ascertained on the principle of self-determination. Argentina disputes British claim on the ground that all the Islanders are of British origin which renders the contention of self-determination as ineffective.[36]

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36 For details, see Chapter II.

Chapter V

USE OF FORCE FOR THE SETTLEMENT OF DISPUTES

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Resort to force as an instrument for settling disputes among nations has been in vogue since the dawn of civilization. "All systems of law-government have means of legitimising resort to physical force in order to enforce policy under some circumstances".[1] Consequent upon the expansion of the empires, the resort to force was further legitimized. International law was well aware of the growing use of force. "The concern of international law with rules governing force is hardly new".[2]

The use of force in the settlement of disputes among the nations continued to be accepted as legitimate until the dawn of the thirteenth century. Even the first systematic treatise on the law of nations, De Jure Belli ac Pacis (1625) by Hugo Grotius, was basically a study of the laws of war. Use of force was identified with resort to war

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1 Morton A. Kaplan and Nicholas de B. Katzenbach, "Resort to Force: War and Neutrality", in Richard A. Falk and Saul H. Mendlovitz (eds.), International Law (New York, 1968) (Third edition), p. 276.

2 Jeffrey Golden, "Force and International Law", in F.S. Northedge (ed.), The Use of Force in International Relations (London, 1974), p. 196.

which was regarded as an instrument of national policy.

There were no rules governing the law of war or Jus in bello. Even Grotius opined "that a war may be lawful ... if publicly declared".[3] A fresh thinking on this centuries old practice was given at the Second Hague Conference held in 1907 where an endeavour was made to codify state practice under the Hague Convention Relative to the Opening of Hostilities. It was agreed that hostilities between the states "must not commence without a previous and unequivocal warning which shall take the form either of a declaration of war, giving reasons or of an ultimatum with a conditional declaration of war."[4]

The attempts made at the Hague conventions and the Covenant of the League of Nations were directed more towards imposing restrictions on the initiation of war than to prohibit war. It was through Kellogg-Briand Pact signed in 1928, also known as the General Treaty for the Renunciation of War, that resort to war as an instrument of national policy was made illegal.[5] But the Kellogg-Briand Pact did

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3 Hugo Grotius, De Jure Belliac Pacis (Oxford, 1925), p. 633.

4 James Brown Scott, The Hague Conventions and Declarations of 1899 and 1907 (New York, 1915), p. 96.

5 For the text of Kellogg-Briand Pact, see J.W. Sheeler-Beunett, Information on the Renunciation of War (London, 1928), pp. 188-89.

not outlaw the resort to war for self-defence.[6] The spirit generated by the Kellogg-Briand Pact soon gained universal recognition. Its manifestation is discernible from Article 2(4) of the UN Charter which is described in succeeding pages. After the conclusion of the Second World War and the emergence of the United Nations, the old concept of resort to force to be identical with resort to war has undergone a change in the wake of changing political scenario at the global level. "The rules for the use of force take on added meaning in modern society where the decision to use force and its effective deployment can occur simultaneously."[7]

The term use of force is used in a comprehensive sense. According to Richard Falk, "a use of force may be described as "aggression", "self-defence" or "reprisal"."[8] The prevailing norms and practices of current international law prohibit the use of force as an instrument of national policy. Article 2(4) of the UN Charter also prohibits the use of force. The use of force is allowed only for self-defence.

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6 George Schwarzenberger, International Law, Vol. II (London, 1968), p. 45.

7 Golden, n. 2, p. 196.

8 Richard A. Falk, "The Legal Control of Force in the International Community", n. 1, p. 308.

Use of force as an instrument for settling disputes after the establishment of the United Nations and the established norms and practices of international law with special reference to the Falkland Islands crisis is discussed in the succeeding pages.

United Nations and the Use of Force

The use of force in settling the dispute, as we have seen in the foregoing discussions, was discouraged in the wake of the First World War. Articles 10-12 of the League of Nations Covenant limited the "right of starting wars, by decreeing that member states were under an obligation to avoid war in certain instances."[9] It was the unprecedented devastation and disaster wrought by the Second World War that reinforced the conviction that waging a war was a criminal act.

Restoration of peace was the prime need that prompted the nations of the world in the immediate post-World War II period to found the United Nations on 24October 1945 to "save succeeding generations from the scourge of war."[10]

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9 Geza Herczegh, General Principles of Law and the International Legal Order (Budapest, 1969), p. 84.

10 Preamble to the Charter of the United Nations, United Nations, Everyone's United Nations, 9th edn. (New York, 1979), p. 381.

The UN Charter prohibits the use of force except in common interest or in self-defence. The Preamble to the Charter says, "that armed force shall not be used, save in the common interest."[11] Article 2(4) decrees that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purpose of the United Nations."[12] However, the UN Charter does not completely outlaw the use of force. Article 51 stipulates that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security. 13

Article 2(4):

The purpose of the Article 2(4) was to outlaw resort

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11 Ibid.

12 Ibid., p. 382.

13 Ibid., p. 390.

to traditional war.[14] Louis Henkin opines that "the framers of the Charter obviously excluded other uses of forces, whether or not in declared war whether or not in all-out hostilities".[15] The use of force is prohibited against the territorial integrity or political independence of any state or in any other manner which is not consistent with the purposes of the United Nations. The generality that follows from Article 2(4) "does not affect a common sense understanding of this provision of the principles of non-acquisition of territory by force".[16] The practice of General Assembly has also established the same understanding. In 1962, when the General Assembly decided to undertake a study of "the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter with a view to their progressive development and codification, so as to secure their effective application,[17]

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14 Arab claims since 1947 of right to wage war against Israel lack justification in international law and found no support outside the Arab World; when Israel resorted to force, it justified its actions as acting in self-defence under Article 51. There has been a wider support for Arab claims that Israel should vacate Arab territories.

15 Louis Henkin, How Nations Behave: Law and Foreign Policy (New York, 1979), second edn., p. 140.

16 Mahnoush H. Arsanjam, "United Nations Competence in the West Bank and Gaza Strip", The International and Comparative Law Quarterly (London), Vol. 31, Part 3, July 1982, p. 433.

17 General Assembly Resolution (hereinafter G.A. Res.) 1815 (XVII), 18 December 1962.

it also incorporated Article 2(4). Consequently, a special committee was set up in 1963 which recommended the following points regarding Article 2(4):

> (a) Wars of aggression constitute international crimes against peace.
>
> (b) Every state has the duty to refrain from organising or encouraging the organisation of irregular or volunteer forces or armed bands within its territory or any other territory for incursions into the territory of another state.
>
> (c) Every state has the duty to refrain from instigating, assisting, or organising civil strife or committing terrorist acts in another state, or from conniving at or acquiescing in organised activities divided towards such ends, when such acts involve a threat or use of force.
>
> (d) Every state has the duty to refrain from the threat or use of force to violate the existing boundaries of another state or as a means of solving its international disputes, including territorial disputes and problems concerning frontiers between states. 18

Article 2(4) protects the territorial integrity and political independence by prohibiting the use of force. It also precludes the use of force between states in their international relations but not within them, which renders state sovereignty supreme as a principle of domestic order.[19]

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18 UN Document A/5694 (1965), p. 95.

19 L.M. Goodrich and E. Hambro opine that the Article 2(4) does not prevent a state from using force within its metropolitan area ... nor in suppressing a colonial disorder, see their's, Charter of the United Nations (London, 1949), second edn., p. 103.

But despite its prohibition of the use of force under Article 2(4), territorial integrity and political independence can be impaired by actions not directly involving the threat or use of force. Economic or psychological methods of coercion can be used to impair the territorial integrity and political independence of a state. It was believed earlier that Article 2(4) "is not directed against economic and psychological methods of coercion".[20] The traditional view interprets Article 2(4) of the UN Charter as referring only to military force. This view, held by the developed Western countries, reflects the natural reluctance of these countries which wield enormous economic and political power.[21]

The Third World countries which possess little economic and political strength and are subject to Western economic and political dominance, advocate the expansion of the United Nations definition of the term "force" to include economic and political force. The Third World countries' viewpoint has been backed by a number of contemporary commentators on international law. They argue that the

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20 Ibid., p. 104.

21 For a detailed exposition of traditional approach to Article 2(4) of the UN Charter, see James A. Dehamis, "Force under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion", Vand. J. Transnat's L., Vol. 12, No. 1, Winter 1979, pp. 103-108.

drafters of the Charter purposefully left the meaning of force ambiguous with a view to allow further development of the term.[22] Experts on international law have further advanced the argument that since the framers of the UN Charter had left the meaning of force as unclear, the authority other than the Charter can be relied upon to have a clear and unambiguous interpretation of the term "force". The resolutions of the General Assembly can be relied upon for additional authority to have a clear interpretation of the term "force". As Boormain opines that "the Resolutions of the General Assembly ... represent at a minimum a conesnsus of world community expectations and therefore, reflect the customary laws."[23]

The viewpoint of the Third World has found adequate support in General Assembly, especially in its resolution of 1965 which declared that "no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the

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22 For details, see Brosche, "The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations", W. Res. J. Int'l L. (1974), pp. 22-23.

23 Boormain, "Economic Coercion in International Law: The Arab Oil Weapon and the Ensuing Juridical Issues", Journal of International Law and Economics, Vol. 9 (1974), p. 205. Also see Richard Falk, "On the Quasi-Legislative Competence of the General Assembly", AJIL, Vol. 60 (1966), p. 782.

subordination of the exercise of its sovereign rights or to secure from it advantages of any kind."[24] The General Assembly in its 1970 resolution on Permanent Sovereignty over Natural Resources, declared that it "deplored acts of state which use force, armed aggression, economic coercion or any other illegal or improper means in resolving disputes ... and emphasised the duty of all states to refrain in their international relations from military, political, economic or any other form of coercion...."[25]

Thus we have seen that in general Article 2(4) of the UN Charter prohibits the use of force -- military, economic and political. The only exception for the use of force is under Article 51 of the Charter in the event of self-defence, which we will discuss in succeeding pages.

Argentine Seizure of Falkland Islands and International Law

The Falkland Islands which had been under British occupation since 1833 were seized by Argentina on 2 April 1982 in an armed attack. Argentine seizure of the Falkland Islands by force constituted plainly "an armed attack

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24 G.A. Res. 2131, 20 UN, GAOR, Suppl. (No. 14), UN Doc. A/6014 (1965).

25 G.A. Res. 3171, 28 UN, GAOR, Suppl. (No. 30), 52 UN Doc. A/9030 (1973).

contrary to its obligations under the UN Charter, Article 2(4)."[26] Fawcet further opines that the taking of the Falkland Islands by force in 1833 by UK was not contrary to such law as was applicable at that time.[27]

As we have discussed above, Article 2(4) of the UN Charter outlaws the use of force -- military, economic and political in settling the disputes.

It is worthwhile to briefly review the Anglo-Argentina relations vis-a-vis Falkland Islands after the Second World War which show that both countries had resumed negotiations for the peaceful settlement of the dispute.

Conclusion of the Second World War changed the international political scene which marked a relative decline of Britain as a world and imperial power and won increased international support for the Argentine stand on the Falkland Islands. The developments in 1952 leading to the conclusion of an Uruguayan-British treaty allowing the former to carry on trade with the Falklands, aggravated Argentine sensitivity. The people of Argentina were "incensed, deeming the actions, a form of recognition of

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26 J.E.S. Fawcet, "The Falklands and the Law", The World Today (London), Vol. 38, No. 6, June 1982, p. 204.

27 Ibid.

British sovereignty over the Islands."[28]

During early 1960s, the active role of the United Nations in pressing for decolonization encouraged Argentina to pursue its claim over the Islands through the UN. In December 1965, the United Nations General Assembly through its Resolution 2065, invited Argentina and UK to proceed without delay with the negotiation as per the recommendations of the UN Special Committee on decolonization, with a view to settle the dispute peacefully.[29] The close of 1960s laid the foundation of negotiations between UK and Argentina. Buenos Aires demanded nothing short of sovereignty, while London, invoking the principle of self-determination, argued that there could not be transfer of sovereignty without the concurrence of the Islanders.[30]

This divergence of approach became the focal point of debate. However, both UK and Argentina continued negotiations during 1970-71 which resulted in the conclusion of an agreement to provide communication facilities to the people of Falkland Islands. In 1974, Argentina undertook to

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28 Allen Garlach, "The Falkland Islands", Contemporary Review (London), Vol. 240, No. 1397, June 1982, p. 291.

29 This aspect has been dealt with in detail in Chapter II.

30 Joan Pearce, "The Falkland Islands Dispute", World Today (London), Vol. 38, No. 5, May 1982, p. 161.

supply oil to the Falkland Islands at mainland price without altering their position with regard to the question of sovereignty. Anglo-Argentine negotiations continued during 1970s. Britain "proceeded to relinquish most of its remaining colonies and to run down its overseas presence but any hint of considering an accommodation with Argentina over the Falkland Islands was met with a barrage of protests in Parliament and the Press."[31]

There occurred a development on 4 February 1976 when the British research ship Shackleton was intercepted some eighty miles south of the Falkland Islands by an Argentine destroyer, the Almirante Storm.[32] Argentine destroyer warned the British ship to stop as it was cruising in Argentine territorial waters. Shackleton, without caring for the warnings, sailed towards the Islands. But for the restraint shown by two countries, the occurrence could have flared into a war. On 5 February 1976 British Secretary of State informed the House of Commons that "we should do everything possible to cool the situation."[33]

After the Shackleton affair, both UK and Argentina did not relent in their efforts for a negotiated settlement

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31 Ibid., p. 162.

32 The Times (London), 5 February 1976.

33 Parliamentary Debates, also called HANSARD, 26 April 1976 (London, 1977), pp. 273-74.

over the Falkland Islands. This trend was discernible by a series of Anglo-Argentine exchanges in New York, Lima and Geneva, also followed by the visits of British ministers to the Falkland Islands "to sound out the Islanders on methods for resolving the existing impasse over their future."[34] In November 1980, British Minister of State at the Foreign Office, envisaged various possibilities ranging from the outright repudiation of Argentina's claims to a transfer of sovereignty; intermediate options included a "freeze" on the claims issue or a lease-back arrangement.[35] The British initiative of November 1980 "indicated a radical alteration of Britain's hitherto uncompromising attitude",[36] in the face of Argentinian claims. Again in February 1981, Anglo-Argentine negotiations were held in New York which remained inconclusive.

It is apparent from the foregoing details that bilateral negotiations between UK and Argentina were in progress for the peaceful settlement of the dispute over Falkland Islands. The Argentine seizure of the Falkland Islands on 2 April 1982 by using force was in violation of

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34 Peter J. Beck, "Cooperative Confrontation in the Falkland Islands Dispute", Journal of Inter-American Studies (Bevery Hills), Vol. 24, No. 1, February 1982, p. 40.

35 The Times (London), 28 November 1980.

36 Beck, n. 34, p. 41.

the Article 2(4) of the UN Charter and against the existing norms and practices of the international law.

Re-Seizure of the Falkland Islands by Britain

The Argentine seizure of the Falkland Islands by force ended the British sovereignty over the Islands which had been under their possession since 1833. The "Security Council Resolution 502 recognised that Argentina was responsible for the breach of the peace, and demanded an immediate Argentine withdrawal. But, far from withdrawing her forces in accordance with the Resolution, Argentina sent reinforcements to the Islands."[37] The British military action in Falkland Islands in the wake of Argentine seizure of the Islands on 2 April 1982 had started immediately. A British naval task force reached the waters of Falklands in middle of April 1982 which immediately imposed a naval blockade against Argentina. Then ensued a fierce battle between Argentine and British forces from the second week of April till 15 June 1982 when Britain finally recaptured the Falkland Islands.

Both sides suffered heavy losses in terms of men and material in the undeclared war. Though Britain

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37 HMSO, The Falkland Islands: The Facts (London, 1982), p. 12.

recaptured the Falkland Islands, it also incurred the running costs of the campaign at about £500 million.[38] The British defence analysts put the estimated cost of replacing British ships and aircraft lost during the fighting at about £600 million.[39] The process of recapturing the Falkland Islands was economically a heavy exercise for Britain and its maintenance is equally expensive. According to a study done by Dr. Paul Rogers of Bradford University School of Peace Studies, it would cost Britain a military bill of £600 million annually to maintain the Falkland Islands.[40]

Use of force was involved in Argentine seizure of the Falkland Islands and British recapturing of the Islands. UK justified its use of force in recapturing the Falkland Islands as an act of "self-defence" under Article 51 of the UN Charter. In order to understand the legal implications and justification of British resort to force as an act of "self-defence" under Article 51 of the UN Charter, it is necessary to analyse the concept of use of force under self-defence and its legal validity under the existing norms and practices.

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38 Patriot (New Delhi), 17 June 1982.

39 Ibid.

40 Cited in Andrew Wilson, "Argentine Threat may Cost U.K. £600 million a year", Times of India (New Delhi), 24 June 1982.

Resort to force under self-defence is permissible vide Article 51 of the UN Charter. Further elaboration of this concept in international judicial decisions is contained in the judgements of the International Military Tribunals of Nuremberg (1946) and Tokyo (1948) and of the World Court in the Corfu Channel Case (1949). The International Military Tribunal of Nuremberg held that "preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defence, leaving no choice of means, and no amount of deliberation."[41] This finding of the Nuremberg Tribunal was further expanded by the Tokyo International Military Tribunal when it added that "the right of self-defence may also be exercised by a state threatened with impending attack."[42]

As it has been discussed in the preceding pages, recourse to force or war as an instrument of national policy was made illegal only by the Kellogg-Briand Pact of 1928 and prior to that the use of force was permissible. But the

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41 Command Papers (London, 1946), p. 28.

42 It also held that "any law international or municipal which prohibits recourse to force is necessarily limited by the right of self-defence. The right of self-defence involves right of the state threatened with impending attack to judge for itself in the first instance whether it is justified in resorting to force." International Military Tribunal Judgement (Tokyo, 1948), Part A, p. 31.

recourse to force as a matter of self-defence had been and is permissible under international law.

There have been absence of clear guidelines "on the degree of injury necessary to justify resort to force as a matter of self-defence"[43] even by the classical writers who "limited the right to protection of territory, nationals and property and later extended it to the violation of any rights."[44] However, the clear guidelines were provided in the Caroline case.[45] During the course of correspondence between Britain and the United States over Caroline incident, the United States sent a note to the former on 27 July 1842, which contained classical formulation of the conditions upon which recourse to war could be justified under the concept of self-defence. According to this, there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation ... and the action taken must not be unreasonable or excessive and limited by that necessity and kept clearly within it."[46]

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43 D.P. O'Connell, International Law, Vol. I (Second edn.), (London, 1970), p. 315.

44 Ibid., p. 316.

45 For details of this case, see R.Y. Jennings, "The Caroline and McLeod Case", AJIL, Vol. 32 (1938), pp. 82-99.

46 British and Foreign State Papers, Vol. 30 (London, 1843), p. 193.

The guidelines governing the use of force under self-defence as envisaged in the Caroline Case continued to be in vogue until the incorporation of Article 51 in the UN Charter. Article 51 of the UN Charter clearly states that nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs and until the Security Council has taken measures necessary to maintain international peace and security. If the Charter is treated as the derivative authority for the right to self-defence then the scope of exercising this right is narrower than what it has been traditionally. The fair reading of Article 51 permits "unilateral use of force only in a narrow and clear circumstances, in self-defence if an armed attack occurs".[47] This envisages that right to self-defence is inherent when an armed attack occurs.

Some luminaries of international law argue that Article 51 limits legitimate self-defence to defende against an armed attack.[48] Philip Jessup elaborates it further:

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47 Henkin, n. 15, p. 141.

48 For the support of this view, see Louis Henkin, "Force, Intervention and Neutrality in Contemporary International Law", Proceedings of the American Society of International Law (New York, 1963), pp. 147-49; Hans Kelsen, The Law of the United Nations (New York, 1950), pp. 797-98; Josef Kung, "Individual and Collective Self-defence in Article 51 of the Charter of the United Nations", AJIL, Vol. 41 (1947), p. 872.

> Article 51 of the Charter suggests a further limitation on the right of self-defence: it may be exercised only "if an armed attack occurs".... This restriction in Article 51 very definitely narrows the freedom of action which states had under traditional law. A case could be made out for self-defence under the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter alarming military preparations by a neighbouring state would justify a resort to the Security Council, but would not justify resort of anticipatory force by the state which believed itself threatened. [49]

The right of self-defence is also not preventive. Schwarzenberger also opines that "self-defence does not cover preventive measures against remote future contingencies".[50]

Thus it emerges from the above, that the right of self-defence can be exercised only by meeting the three requirements -- that when the danger is imminent, the territorial sovereign is unable to protect the territory and finally the use of force must be restricted to the objective of self-defence.[51]

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49 Philip C. Jessup, A Modern Law of Nations (New York, 1948), pp. 165-66.

50 G. Schwarzenberger, "Principles of International Law", Hague Recueil, Vol. 87 (1955), p. 333, as cited in Henry Cotton, Palestine and International Law (London, 1973), p. 132.

51 For details, see Waldock, The Regulation of the Use of Force by Individual States in International Law (Netherlands, 1952), p. 467, as cited in John R. O'Angilo, "Resort to Force by States to Protect Nationals: The US Rescue Mission to Iran and Its Legality under International Law", Virginia Journal of International Law, Vol. 21, No. 3, Spring 1981, p. 501.

J.E.S. Fawcett holds that "the right of self-defence can certainly be invoked by the United Kingdom against the armed attack by Argentina."[52] He further opines that "as for all broad concepts, limits have to be found and set to self-defence, if it is not to become an open door to any action. Measures and action taken in self-defence must be then confined to the reversal of the armed attack and its effects ... and be proportionate to the achievement of that aim".[53]

In the light of these arguments, it can safely be said that the British action in the re-seizure of the Falkland Islands by use of force in June 1982 is justified as a matter of self-defence.

All the three ingredients which justify the use of force under self-defence under Article 51 of the UN Charter were complied with by Britain. In the wake of the Argentine seizure of the Falkland Islands in April 1982, the use of force posed an imminent threat to British position in the Falkland Islands. Besides, the British force available in Falklands was insufficient to repulse the Argentine invasion. Thirdly, the British use of force under self-defence had a limited purpose of recapturing the Falkland Islands. The

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52 Fawcett, n. 26, p. 205.

53 Ibid.

contours of British attack were confined to the Falkland Islands and it was not taken to Argentine territory. Its immediate purpose was to liquidate the Argentine aggression on Falklands and reassert British supremacy over the Islands. As is well known, consequent upon the surrender of Argentine troops, British forces after having recaptured the Falkland Islands, did not launch attack on the territory of Argentina.

Some Ministers of Mrs. Thatcher's Government advanced rationale to justify the use of force around the Falkland Islands on the plea that it was designed to make aggression ineffective and unprofitable.[54] But this argument is refuted by Fawcett who opines that "this is plainly not an exercise of the right of self-defence".[55] Under Article 51 of the UN Charter, the suppression of an aggressor is the responsibility of the Security Council. But in the wake of the Argentine seizure of the Falkland Islands in April 1982, the Security Council's Resolution 502 (IV) called for the withdrawal of Argentine forces but the latter did not comply with the UN Resolution. Consequently, British forces launched counter-attack to recapture the Falkland Islands under Article 51 of the UN Charter.

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54 Cited in ibid., p. 206.

55 Ibid.

It emerges from the foregoing description that use of force is prohibited under the international law and also vide Article 2(4) of the UN Charter. But use of force is permissible only as a matter of self-defence under Article 51 of the UN Charter.

C O N C L U S I O N

CONCLUSION

Dispute over legal title to Falkland Islands is about a century and five decades old. Argentina and the United Kingdom (U.K.) have claims and counterclaims in support of their respective contest over the legal title to Falkland Islands. These Islands were reportedly discovered by Britain during the close of the sixteenth century. Spain, another contemporary colonial power, also maintained a settlement in these Islands during the latter half of the eighteenth century. Britain regained the formal possession of the Falkland Islands in 1774 which continued uninterruptedly till the middle of the third decade of the nineteenth century.

Argentina, a former Spanish colony, which attained independence in July 1816, staked its claims over the Falkland Islands. In 1826, an Argentine settlement was revived at Port Louis, one of the islands of the Falkland Archipelago. It was in January 1833, that UK formalized the acquisition of the Falkland Islands. Since then the Islands are under British possession.

Argentine claims to the Islands are based mainly on the grounds of geographical contiguity, discovery and as a successor to original Spanish rights. The British claims of

legal title over the Falkland Islands are based on the grounds of discovery, occupation and the reported desire of the people of Falkland Islands. The principles of geographical contiguity and discovery do not constitute the sole basis of claiming legal title to a territory under the contemporary norms and practices of international law. However, it is the principle of effective occupation which is widely accepted as a valid basis for claiming a legal title over a territory. The Falkland Islands have been under continuous and effective occupation of Britain since 1833. The Argentine claims on the basis of geographical contiguity and discovery lack adequate legal support in international law.

In the post-Second World War period, the principles of self-determination and decolonization have also emerged as potent factors affecting the legal status of a territory in international law. The principle of self-determination, when applied to the Falkland Islands, merely reinforces the British stand. Britain has asserted that it would not decide about the future of the Falkland Islands without ascertaining the wishes of the people of the Islands.

Argentina rejects the principle of self-determination on the ground that inhabitants of these Islands are of British stock and, therefore, do not constitute indigenous population. The principle of decolonization lends some support to Argentine

case. The process of decolonization was inaugurated after the conclusion of the Second World War. The UN General Assembly adopted in 1960 a Resolution on "Declaration on the Granting of Independence to Colonial Countries and Peoples".

The Non-Aligned Movement through its various resolutions has also given a call for granting independence to all the colonies including Falkland Islands. But these resolutions are of recommendatory nature and are not binding. All this strengthens the Argentine case politically.

British policy in the post-war period has been that of granting independence to its former colonies gradually. Even in the case of Falkland Islands, UK has expressed its willingness to settle the dispute through peaceful means.

In 1965, the UN General Assembly through its resolutions urged both Argentina and UK to negotiate the matter through peaceful means. Argentina reciprocated by agreeing to participate in the trilateral negotiations in London in 1970 between UK, Argentina and the representative from the Falkland Islands.

The Shackelton Committee on Falkland Islands constituted by UK in 1976, also recommended increased mutual cooperation between the two countries. Despite their conflicting viewpoints over the issue, both Argentina and UK

showed mutual desire for peaceful solution of the problem. In April 1980 and February 1981, both countries held negotiations in New York. During this period, UK mooted the suggestion of freezing the dispute for an agreed period of time during which both sides could cooperate to develop the Island's resources. In February 1982, both countries resumed the negotiations in New York.

The atmosphere of mutual negotiations was disrupted by Argentine seizure of Falkland Islands in early April 1982. Argentina resorted to the use of force in capturing the Islands at a time when both the countries were engaged in peaceful negotiations. The use of force is prohibited under the contemporary norms and practices of international law. Prior to the Kellog-Briand Pact of 1928, resort to force was regarded as a legitimate instrument of national policy. Since then there have been consistent efforts to make the use of force illegal in the settlement of international disputes.

Article 2(4) of the UN Charter prohibits use of force. Argentine use of force in capturing the Falkland Islands was against the tenets of the international law as well as the clear-cut infringement of Article 2(4). The UN Security Council vide its Resolution 502(IV) called for the withdrawal of Argentine forces and urged for the settlement

of dispute through peaceful means. There was no immediate withdrawal of troops by Argentina in accordance with the call given by the United Nations.

In the wake of Argentine seizure of the Falkland Islands on 2 April 1982, Britain justified its use of force in self-defence as permissible under Article 51 of the UN Charter. Use of force under self-defence requires that cause of action should be instant, overwhelming and leaving no choice of means and no moments for deliberations. These principles are still in vogue and constitute the part of contemporary international law.

Even a cursory analysis of the present problem relating to the legal status of Falkland Islands makes it clear that under the existing conditions, the legal title to the Falkland Islands is vested in the United Kingdom. Resumption of the broken negotiations between Argentina and UK depend on the British attitude and Argentine efforts and response towards the future legal status of the Falkland Islands.

A P P E N D I X

Appendix

Excerpts from UN Security Council Resolution 502(IV) and Other Comments

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The Security Council on 3 April demanded an immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas), and an immediate cessation of hostilities, by a vote of 10 in favour (France, Guyana, Ireland, Japan, Jordan, Togo, Uganda, United Kingdom, United States, Zaire) to 1 against (Panama), with four abstentions (China, Poland, Spain, Soviet Union).

The Council also called on the Government of Argentina and the United Kingdom "to seek a diplomatic solution to their differences and to respect fully the purposes and principles of the United Nations Charter".

In a preambular paragraph of the resolution, the Council recalled the statement made by the Council President on 1 April (S/14944) calling on the Governments of Argentina and the United Kingdom "to refrain from the use or threat of force in the region of the Falkland Islands (Islas Malvinas)".

In another preambular paragraph, the Council stated that it was deeply disturbed at reports of an invasion on 2 April 1982 by armed forces of Argentina, and determined that there existed a breach of peace in the region of the Falkland Islands (Islas Malvinas).

The Council's action was embodied in resolution 502 (1982). Following adoption of the resolution, sponsored in draft form by the United Kingdom, the Council agreed to a request by the Foreign Minister of Panama, Jorge E. Illueca, not to vote on a draft submitted earlier by his delegation (S/14950). Under that draft, the Council would have urgently called on the United Kingdom "to cease its hostile conduct, refrain from any threat or use of force and co-operate with the Argentine Republic in the decolonization of the Malvinas Islands, the South Georgias, and the South Sandwich Islands".

The Panamanian draft would also have had the Council request both Governments to carry out negotiations immediately in order to put an end to the present situation of tension, duly respecting Argentine sovereignty over those territories and the interests of their inhabitants.

Council President Issues Statement

The Council first took up the item on 1 April, at the request of the United Kingdom, which stated in its letter to the President of the Council that it had "good reason to believe that the armed forces of Argentina are about to invade the Falkland Islands" (S/14942), a British Crown Colony located in the South Atlantic Ocean some 300 miles off the Argentine coast.

Following statements by the United Kingdom and Argentina, the President of the Council, Kamanda wa Kamanda (Zaire), issued a statement on behalf of the Council.

In that statement, the President expressed the Security Council's concern about the tension in the region of the Falkland Islands (Islas Malvinas), and called on the Governments of Argentina and the United Kingdom to exercise the utmost restraint at the present time. He urged them in particular to refrain from the use or threat of force in the region and to continue the search for a diplomatic solution. The Security Council would remain seized of the question, the President stated.

The President also said that the Council had taken note of the statement issued by the Secretary-General of the United Nations, which reads as follows:

"The Secretary-General, who has already seen the representatives of the United Kingdom and Argentina earlier today, renews his appeal for maximum restraint on both sides. He will, of course, return to Headquarters at any time, if the situation demands it."

Argentine Letter Refers to South Georgia Dispute

The Council met again on 2 April at the request of the United Kingdom which stated in its letter to the President of the Council, dated 2 April, that "contrary to

the call of the Security Council on 1 April 1982 upon the Government of Argentina to refrain from the threat of force in the Falkland Islands (Islas Malvinas) region. Argentine armed forces are at this moment invading the Islands" (S/14946).

Other documents before the Council included a letter dated 1 April, from the Permanent Representative of Argentina, Eduardo A. Roca (S/14940), and a letter dated 3 April from the Permanent Representative of Belgium to the Security Council (S/14949).

The letter from the Permanent Representative of Argentina called the attention of the Council to "the situation of grave tension existing between Argentina and the United Kingdom" arising from a dispute over an incident in the South Georgia Islands.

The letter from Belgium transmitted to the Council the text of a joint statement of 2 April by the 10 States of the European Community condemning the armed intervention in the Falkland Islands by Argentina.

Altogether four meetings were held and participating in them along with the members of the Council, but without the right to vote, were: Australia, Bolivia, Brazil, Canada, Paraguay, Peru and New Zealand.

Call for Immediate Cessation of Hostilities

In presenting the draft resolution, on 2 April, Sir Anthony Parsons (United Kingdom) said that the Argentine Government had ignored the two appeals of the Secretary-General and the appeal by the President, in the name of the Council, for restraint and for the avoidance of the threat or use of force.

The United Kingdom said that, as the Council was meeting, a massive Argentine invasion of the Falkland Islands was taking place. It was a blatant violation of the Charter and of international law. It was an attempt to impose by force a foreign and unwanted control over 1,900 agricultural people who had chosen in free elections to maintain their links with Britain.

The Security Council faced an emergency and must act at once. To that end, the United Kingdom was offering a draft resolution (S/14947) which demanded the immediate cessation of hostilities, demanded the withdrawal of all Argentine forces from the Falkland Islands, and called on the Governments of Argentina and the United Kingdom to seek a diplomatic solution for their differences and observe the principles of the Charter.

Source: UN Chronicle, Volume XIX, No. 5, May 1982, pp. 5-6.

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