Sovereignty and the Falklands crisis

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On 6 November 1982 the General Assembly of the United Nations voted by a large majority, ninety votes to twelve, with fifty-two abstentions, to request 'the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to resume negotiations in order to find as soon as possible a peaceful solution to the sovereignty dispute relating to the question of the Falkland Islands (Malvinas)'. The resolution was co-sponsored by one of the parties to the dispute, namely Argentina, and may therefore be regarded as evidence that that country regards its claim to the territory in question to be a strong one. Mr Francis Pym, the British Foreign Secretary, on the other hand has stated publicly (4 May 1982) that Britain has no doubts, and never has had, as to the validity of its claim. As Peter Beck has recently shown, historically this is not absolutely true. The Foreign Office has on a number of occasions since 1910 been the scene of doubts about the validity of Britain's case in international law[1] and in fact the grounds on which Britain has based its claim have been changed not once but twice during the period. Moreover, Argentina has not been historically as resolute in pursuing its claims as it would like people to think. The claims on both sides are based on historical facts that are by turns vague, confused and disputed, and if there is to be any resolution of the question a great deal of homework will have to be done first by both parties.

This, then, is a contribution to the debate. First of all, an outline of the problem.

The historical dispute to 1833

The Falkland Islands consist of two large islands, East and West Falkland, and a number of smaller ones, which lie in the South Atlantic some 300 miles east of the island of Tierra del Fuego at the southern tip of the South American continent. They had no human inhabitants before the age of exploration. It is possible that they were sighted before 1592, when the captain of the English ship *Desire*, John Davis, reported 'certaine Isles never before discovered by any knowen relation lying fiftie leagues or better from the shoare East and northerly from The Streights',[2] and it is certain that the outlying islands were sighted by the Dutch sailor Sebald de Weert of the *Geloof* in 1600, after which they were included under the name of the Sebaldines on Dutch charts. Considerable uncertainty about their whereabouts persisted for decades, however, and the first recorded landing was not made until 27 January 1690, by the crew of the British ship *Welfare*, whose Captain, John Strong, named the sound between the two islands after Viscount Falkland, the Treasurer of the Royal Navy.

At the beginning of the eighteenth century, the accession of the Bourbons to the throne of Spain opened up new opportunities for their ships to trade in the formerly

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1. Peter J. Beck, 'Cooperative confrontation in the Falkland Islands dispute', *Journal of Inter-American Studies and World Affairs*, February 1982, Vol. 24, No. 1, pp. 37–58.

2. Julius Goebel, *The struggle for the Falkland Islands* (New Haven, London: Yale University Press, 1982), p. 35.

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closed Spanish colonies. French sailors from St Malo in Brittany who called at the islands named them the Iles Malouines, subsequently Hispanized into Islas Malvinas. After the close of the Seven Years War, Louis Antoine de Bougainville, acting on the authority of Louis XV of France, sailed to colonize the Falklands, which were seen as the key to the Pacific route. After reconnoitring the shore line and founding a settlement at Port St Louis on East Falkland, he took formal possession of the island on 5 April 1764 on behalf of France and sailed for home. News had already reached Spain from Montevideo of the expedition, and protests were made, as a result of which the French claim was formally transferred to Spain on 25 February 1767, in return for an indemnity equivalent to £24,000.

Meanwhile, however, in conditions of great secrecy, a British expedition to colonize the Falklands had also been fitted out in the spring of 1764 before news of the French settlement was known in Europe. On 12 January 1765 Commodore John Byron of HMS *Dolphin,* having located the islands and sailed along their coasts for over 400 miles without seeing any trace of habitation, had taken formal possession of the islands in the name of King George III and founded a settlement, Port Egmont, on Saunders Island off West Falkland. The settlement was occupied on 8 January 1766 by a fresh expedition, and, like the rival French settlement, which they were unable to locate, on a permanent basis.

In due course the Spanish, having taken possession of the French settlement, made protests in London; however, finding that the French were unwilling to support them in war, it was not until 1770 that, acting on the orders of the Captain General of Buenos Aires, a Spanish force under Don Juan Ignacio de Madariaga, with four frigates, an xebec and 1,400 men arrived at Port Egmont, and ordered the settlers to leave, which they had no alternative but to do. When news of the action reached Britain a strongly worded diplomatic protest brought the two countries to the brink of war. After long negotiation, however, the government at Madrid agreed to disown the action, to return Port Egmont to Britain and 'to restore all things precisely to the state in which they were before the 10th of June, 1770'.[3] Such action, the Spanish Ambassador declared on behalf of his sovereign, 'cannot nor ought in any wise to affect the question of the prior right of sovereignty of the Malouine Islands, otherwise called Falkland's Islands'. No corresponding declaration was made on behalf of King George III.

Three years later the settlement at Port Egmont was withdrawn, a plaque being left behind on its site recording that the islands were the property of King George III. The Spanish presence on East Falkland lasted until the collapse of the Spanish empire in the Indies. In 1776 the islands were included in the jurisdiction of the Viceroy of Buenos Aires. But in 1811, a year after Buenos Aires had created its own government, the Spanish garrison at Port Louis (then called Puerto de la Soledad) was withdrawn on the orders of the Governor of Montevideo and the islands left uninhabited.

On 6 November 1820 a frigate, the *Heroina,* under the command of Colonel (*sic*) Daniel Jewitt, arrived at the Falklands and claimed to take possession of the group in the name of the government of the United Provinces of the Rio de la Plata, giving notice to the masters of more than fifty ships that he found there that the United Provinces prohibited all fishing or hunting on the islands. Subsequently the government at Buenos Aires in 1826 chartered a French merchant from Hamburg,

3. Goebel, p. 359.

Louis Vernet, to establish a settlement on the islands, naming him governor in 1828, and in a decree of 10 June 1829 formally claimed that Buenos Aires had succeeded to the claims of Spain at 25 May 1810. This claim was firmly disputed on behalf of Great Britain by its consul general, Woodbine Parish, shortly afterwards. Vernet was recalled to Buenos Aires when he seized three United States ships fishing off the islands, and in 1831 the Captain of the USS *Lexington* in reprisal destroyed the settlement, deported the settlers, and declared the islands again free of all government.

At this point the British government decided to reassert its claim to the islands, and dispatched HMS *Clio* and HMS *Tyne* to enforce it. On 2 January 1833, *Clio* arrived at Soledad, and its Captain, J. J. Onslow, informed the fifty Argentinians there under the command of Captain J. M. Pinedo of the Argentine schooner *Sarandi* of his orders to 'exercise the rights of sovereignty' over the islands. At 9.00 a.m. the next day, 3 January, Onslow raised the Union flag on the shore and delivered that of his opponent to him politely wrapped up in a bundle. From that date until 2 April 1982 the islands were peacefully and continuously administered as a British colony, though in the first year there was trouble with some escaped convicts who were still at large, and the first agents of the colony were murdered before the convicts were rounded up.[4]

The emergence of rival claims

It is directly from this action in 1833 that the current dispute stems. In order to determine the rights and wrongs of the matter, however, it is necessary to answer several questions. How did the Spanish and British claims to sovereignty arise? Did the British claim survive the period from 1774 to 1833? How was the Spanish claim transmitted to Argentina? Who had the better claim in 1833? What changes, if any, have been created by Britain's possession of the islands since 1833, and what, if any, by other changes in the nature of the international community and international law?

Between 1833 and 1842 there were several protests about the events of 1833 from the government at Buenos Aires. Later in the nineteenth century the protests were renewed, while a substantial literature began to develop in Spanish over the question. It was only after 1945, however, that Argentina, representing the question as one of decolonization, took up the matter within the context of the United Nations, and consolidated it with other claims to the Falkland Islands Dependencies and Antarctica which are not the subject of this paper. Today, following the war of 1982, the situation is that Britain continues to hold the islands and to exercise over them all the rights of sovereignty, and Argentina, refusing to negotiate a formal end to hostilities, has made it quite clear that it intends to continue to press its claims. The question is, therefore, very much a live political issue, and the political questions involved tend to make it very difficult to discern the true legal position, if, indeed, one exists. What makes it particularly difficult to the general public is the fact that the argument ranges back and forward over some 400 years of history. Though this is the inevitable consequence of the basic principle of international law that title is determined by the state of international law at the moment of acquisition of territory, this moment in itself and its circumstances are in dispute.

4. Peter Calvert, *The Falklands crisis: the rights and the wrongs* (London: Pinter, 1982), p. 7.

There is no known historical evidence of any formal claim to possession being made to any of the islands before 5 April 1764, and consequently it has been assumed that they were previously *res nullius*. If so, the declaration and occupation of East Falkland by the French would have had the effect of constituting that island, at least, as territory of the King of France, by right of occupation. Here, however, such certainty as exists evaporates. Goebel argues[5] that the declaration makes the subsequent British act of annexation invalid and of no legal effect. But the very fact that the British settlement took place unhindered is the clearest possible evidence that French occupation was not effective over other islands in the group, and, given the numbers involved, probably not as far as the island of East Falkland itself was concerned.

At first sight the transfer of the French rights in the islands to Spain on 25 February 1767 seems to have been a straightforward act of cession, enabling Spain thereafter to assert title in the islands, and to reinforce it by their own act of occupation. Again, unfortunately, the facts are not so simple, for Spain did not choose to regard the actions of 1767 *at the time* as an act of cession. Its protest to its ally, France, at the occupation rested on two grounds. One was purely political: that by making such a settlement the British would be impelled to follow suit and make settlements of their own. The other was the legal argument that the islands were in fact already part of the Spanish dominions by geographical proximity. The agreement between France and Spain for the release of the islands does not confirm that France accepted the grounds for the Spanish claim, but it does serve as evidence that they did accept the claim itself, for Bougainville is paid compensation for his personal expenses '*pour équipements et fondation de ses établissements illégitimes dans les Iles Malouines appartenant à Sa Majesté Catholique*'.[6]

At that time there were no Spanish settlements on the mainland of Patagonia, and indeed no settlements were made there until well on in the nineteenth century.[7] Even if there had been, however, the distance of the islands from the continent make it most improbable that the claim of geographical proximity would have been generally recognized in Europe at that time as valid. Today, of course, it is no longer recognized as a valid principle in international law, though it is still used by politicians, for example, by Sukarno in the case of West Irian.

When Spain protested to Britain at the British settlement, interestingly enough, quite a different argument was used: that settlement in the area by Britain was an express violation of Article VIII of the 1713 Treaty of Utrecht. This Article is long and complex. It establishes first that 'there be a free use of navigation and commerce between the subjects of each kingdom', i.e. Spain and Great Britain, 'as it was heretobefore in time of peace and before the declaration of this late war, in the reign of Charles II of glorious memory, Catholic King of Spain, according to the treaties of friendship, confederation and commerce which were formerly made between both nations . . .'. In fact this limited the use of the seas around Spanish possessions in the Indies to the carrying of slaves, and, as the Article later specifically confirmed, thereby excluded 'the French or any nation whatever' from trafficking with the Spanish colonies. Lastly:

5. Goebel, passim.
6. Goebel, p. 228.
7. J. C. J. Metford, 'Falklands or Malvinas? the background to the dispute', *International Affairs*, Summer 1968, Vol. 44, No. 3, pp. 463–81.

> . . . neither the Catholic King nor any of his heirs and successors whatsoever, shall sell, yield, pawn, transfer or by any means under any name alienate from them and the Crown of Spain to the French or to any nations whatever any lands dominions or territories or any part thereof belonging to Spain in America. On the contrary, that the dominions of Spain in America may be preserved whole and entire, the Queen of Great Britain engages that she will endeavour and give assistance to the Spaniards, that the ancient limits of their dominions in the West Indies be restored and settled as they stood in the time of the abovesaid Catholic King Charles II.

Now as Goebel, who is in no way a writer sympathetic to the British case, points out, Spain itself had accepted as early as 1648 that actual possession was the mark of ownership of land in the Indies, and 'by no perversion of fact is it possible to regard the Falklands as part of the Spanish dominions as they existed during the reign of Charles II'.[8] Hence, if the French settlement was valid, Spain could only obtain title by cession; if invalid, then the British settlement of 1766 constituted occupation of a *res nullius*. The documents are quite clear that the French settlement was relinquished as invalid and that no cession took place. A British claim by right of occupation seems incontrovertible.

It does not appear, however, that this claim was made, at least initially. Captain Hunt, commander of Port Egmont, in his confrontation with the Spaniards, claimed the islands for his sovereign on the grounds of prior discovery by John Davis in 1592. Neither he nor the British government could have been aware at the time that the transfer of the French settlement to the Spaniards was not regarded by either as an act of cession. In discussions of the declaration, moreover, Lord North seems to have rejected a Spanish counterclaim to prior discovery, so it seems clear that even at this late date the Spaniards were still using these archaic grounds as a basis for their own claim, rightly or wrongly. In also denying the Spanish right by occupation, North did, then, at least implicitly, make this claim on behalf of his own Crown.

As for the Treaty of Utrecht, the British simply did not regard it as applicable. In this, amusingly enough, they were at one with the French minister Choiseul, who had told the Spaniards as much. Moreover (a significant point, in view of the controversy over whether they should have done the same with Argentina in 1947), the British government offered to submit the matter to arbitration together with another issue troubling the two courts at the time. The offer was not accepted, no reply was made, and, for internal reasons, it was not until 25 February 1768 that orders were sent to Bucareli, the Captain General of Buenos Aires, to 'expel by force' any English settlements he might find. This, as noted above, he eventually did, bringing the two countries to the verge of war, a threat only finally averted by the joint declarations of 22 January 1771.

Of themselves, these declarations did nothing to alter the existing position with regard to sovereignty. What it has been claimed *did* is the fact that the negotiations were concluded only after the prime minister, Lord North, had verbally agreed to the proposal of Francés, the French chargé in London, that, if the satisfaction asked for were given, the ministry would agree subsequently to evacuate the islands.[9] It was therefore not solely on account of the expense of the colony, as was stated at

8. Goebel, p. 268.
9. Goebel, p. 308.

the time, but in fulfilment of this secret promise, that the settlement at Port Egmont was withdrawn in 1774. It would indeed be an irony if, two hundred years after losing for Britain the American colonies, Lord North should also be found responsible for losing the Falklands.

As far as international law is concerned, however, the existence or nonexistence of the secret agreement does not change the situation. The Spanish sources themselves make it quite clear that in agreeing to evacuate the islands the British government did not thereby renounce its claims, and consequently that its evacuation was *sine animo derelinquendi.* Thus, at a conference on 22 April 1771, the Earl of Rochford, the Secretary of State, made it quite clear that the ministry would deny any promise, and that in their view 'the reciprocal abandonment of the Falklands was a matter different from the question of right, which had never been settled, and even if they abandoned they could always return and occupy them reciprocally in case of dispute . . .'.[10] The leaving of the plaque of lead on the site of Port Egmont made this distinction quite clearly. What is more interesting—and is not mentioned by Argentinian publicists—is the fact that the withdrawal was, as the French mediators had originally proposed, to be reciprocal, and if this was the agreement that Spain did not comply with it. It is at least possible, therefore, that Britain's agreement to withdraw from the islands, precisely because of the political necessities of the day, was induced by considerations which afterwards were not fulfilled.

The Argentine claim—an anachronism?

If, then, Britain had a good claim to sovereignty in 1774, did this case survive the years until 1833? In the nature of intertemporal law this is very hard to answer. If Spain's claim had been decisively overcome before 1774 it almost certainly would have, though the only precedent then available was the involuntary abandonment of St Lucia in 1640, which had been occupied by the French within months. In the face of the evidence comprising the maintenance of the claim and the plaque, a long period of time—how long cannot now easily be determined—would have been needed to give Spain a title by prescription. As time went by, however, a contemporary arbitrator would inevitably have inclined towards Spain, and might well have considered (assuming that he thought Britain had a case in the first place) that the British claim had lapsed through neglect. By 1811 Spain had exercised all the rights of sovereignty in the islands for thirty-seven years, and by the Nootka Sound Convention of 1790 Britain had appeared to recognize this fact. Then, on the orders of the governor of Montevideo in what is now Uruguay, not only the garrison, but the entire settlement on East Falkland was withdrawn.

We must ask, therefore, how the Spanish claim to the islands passed to Argentina.

The Argentinian publicists are surprisingly vague on this point. As one puts it: 'On November 6, 1820, the Provinces of the River Plate (Argentina) took possession of the Malvinas Islands as heirs to the Spanish possessions and proceeded to colonize them (*sic*)'.[11] The self-contradictory nature of this statement admirably illustrates the dilemma which Argentines face in making any claim whatsoever to

10. Goebel, p. 405.

11. *The ISDET Faculty's perspective* (Buenos Aires: Instituto Superior Evangelico de Estudios Teologicos, 1982), mimeograph.

the Falklands, and of which they have for a century and a half been resolutely and remarkably unaware.

Once again we must disregard modern notions of state succession and identify the international situation as it actually existed at the time. In 1810, there was as yet no generally accepted right for new nations to come into existence. Spain, having striven for three centuries to establish her colonial empire, was in no hurry to give it up, and had not as yet recognized the independence of a single one of its American territories. The Falklands had been abandoned in 1811 under pressure of military necessity and not with any intention of handing them over to Argentina, which in any case did not formally proclaim its independence until 1816. That independence was not recognized by Spain until 1859, twenty-six years after the Falklands had come back under British control, and involved no explicit transfer of sovereignty over the islands.[12] No act of cession or 'quasi-cession'[13] of rights in the Falklands took place, and, as Judge Huber remarked in the *Island of Palmas arbitration*, 'it is evident that Spain could not transfer more rights than she herself possessed'.[14]

If Argentina acquired sovereignty over the Falklands in 1820, therefore, as the act of formal possession purports to claim, it cannot be by transfer from Spain, but only by occupation, the only other of the accepted modes of acquiring sovereignty open to it at the time. No actual occupation took place until 1826, but this in itself is not an important consideration on this point, although it is in another respect, since it meant that in 1824 Britain's recognition of Buenos Aires did not include the Falklands. What is directly relevant is the question of whether the islands were *res nullius*. For this it would not in any way be sufficient to show that there had been an act of dereliction by Britain, which as we have seen cannot be proved, and which is denied by British publicists. It would also be necessary to prove that there had been an act of dereliction by Spain. There is no evidence that this is the case. Indeed, Spain's refusal to recognize the new state of affairs in the Americas, and in particular her attempt in the 1820s to reconquer the Rio de la Plata itself, is strong supporting evidence to the contrary. If, therefore, Spain was the sovereign power in the Falklands in 1811, it was still the sovereign power in 1820, and, for that matter, in 1833, for the brief period of Argentine occupation was much too short to enable Argentina to gain a title by prescription, even in the absence of Spanish protests.

But, it has been argued, the law of state succession is well established: 'In the matter of territory the sovereignty of the new state extends to those regions which in fact it controls successfully against the parent state. If this is not settled by treaty, the *de facto* exercise of sovereignty is the decisive factor. The question of succession to territory is therefore merely a question of power as between the new state and the parent state'.[15] If Goebel means by this to demonstrate the validity of the Argentine claim to the Falklands, at least four points must be made about it.

First of all, he is putting the cart before the horse; at best the view represents the state of the law at the end of the nineteenth century, not at its beginning—the result

12. Metford, pp. 468–73.

13. Michael Akehurst, *A modern introduction to international law. 3rd edn.* (London: Allen & Unwin, 1977), p. 141.

14. R. Y. Jennings, *The acquisition of territory in international law* (Oxford: Clarendon (Oxford University Press), 1962), p. 16.

15. Goebel, p. 467.

of the experience of Latin American independence and not its antecedent. In 1810, in 1820, and for some indefinite period after the first international recognition of a Latin American state by the United States in 1823, there can be no doubt that under the rules of the prevailing international order Spain was the sovereign authority in the Americas.

Secondly, even today the position with regard to seceding states is not as clear as he seems to suggest. 'One of the peculiarities of secession is that an effective territorial entity can subsist for a period of time without any, or with only a provisional, legal status. If the entity subsequently establishes itself as a state, problems of commencement, continuity and responsibility arise'.[16] In his further discussion on these points, Crawford makes it clear that international law, intending to apply retroactively the effects of recognition to the earliest moment at which a recognizable entity could be discerned, does so only as a presumption; it will not act to ' "validate" governmental or state acts in the sense of curing any illegalities involved'.[17]

Thirdly, therefore, while it is undoubtedly true that in 1848, at the Congress of Lima, the Latin American states that then existed agreed among themselves to recognize in the fixing of boundaries the principle of *uti possidetis,* taking as reference the Spanish administrative boundaries of 1810, this decision inevitably recognized changes made since that time. Hence, though Argentina claimed the territory of the former Viceroyalty of Buenos Aires, both Paraguay and Uruguay, which had previously formed part of that entity, were recognized as separate states. This decision is of particular relevance, since the independence of Uruguay in particular involved not merely Spain and Uruguay, but a third state, Brazil, which annexed the disputed territory, thus constituting it for the first time and, as it proved, permanently as a distinct entity. Yet the historical fact is that hardly a single boundary in Latin America has survived unchanged since 1848, and that, despite the decision of the Congress, succession to territory in the Americas has depended almost wholly on power, not as against Spain, but as against one another, regardless of the principles involved, which, in any case, do not apply to outside states, Britain included.

Lastly, in view of the habit formed long afterwards of referring to 'Argentina' as an international actor in this early period, it must be stated as a matter of historical fact that in 1820 'Argentina' simply did not exist, and the 'United Provinces' were wholly disunited. It is not likely to be generally known, for example, that in claiming sovereignty over the Falklands in 1820, Colonel Jewitt acted effectively not on behalf of the Government of the United Provinces, since it did not exist, but the municipal government of the province of Buenos Aires.[18] Buenos Aires was independent of the rest of the provinces of 'Argentina' for much of the nineteenth century, before being finally joined with it. The point is, however, that in no way can we regard its colonial jurisdiction (as opposed to that of the Viceroyalty of the same name) as having extended to the Falklands, and consequently this act was invalid. Similar considerations apply to the other acts undertaken before 1829.

16. James Crawford, *The creation of states in international law* (Oxford: Clarendon (Oxford University Press), 1979), p. 270.

17. Crawford, p. 388.

18. Thomas B. Davis, Jr, *Carlos de Alvear: man of revolution* (Durham, NC: Duke University Press, 1955), p. 18.

Subsequently the events of 1831 and 1833 demonstrated clearly the ineffectiveness of the purported occupation of the islands.

We turn lastly to the British occupation of the islands in 1833. This action, as we have seen, followed British protests at Argentine activities on the islands, in which it was formally asserted that British claims had not been relinquished in 1774 since 'marks of possession had been left and all the formalities observed which indicated rights of ownership as well as an intention to resume the occupation'.[19] As we have already seen, there are good grounds for believing that those claims were valid, and that by protest and the dispatch of the *Clio* Britain revived them. I have also demonstrated that if this is not the case, the power alone able to assert sovereignty in the Falklands with any conviction was not Argentina, but Spain itself. The actions of Argentina in the 1820s, given Spain's prior claim and in the absence of evidence of her abandoning it, were therefore only those of squatters. As Palmerston told the Argentine Minister in London, Don Manuel Moreno, 'the Government of the United Provinces could not reasonably have anticipated that the British Government would permit any other state to exercise a right as derived from Spain which Great Britain had denied to Spain itself'.[20] It is the ultimate irony in the whole long story that in 1910, in a completely new age of international law, the British Foreign Office should have suddenly developed doubts about the grounds for its historic claim, which, after 1933, it was to seek to reinforce by adding new grounds for its claim of prescription.[21] After 1945, under the Charter of the United Nations, the Falklanders could finally claim, as Argentina had been one of the first to do, what was by now known as the 'principle of national self-determination'. But as in so many other cases, it was the earlier beneficiaries who now denied the same right to the later, and it was power that decided the question once more in 1982.

19. Goebel, p. 442.
20. Goebel, p. 457.
21. Beck, p. 53.