The Maritime Depths of *Ex Aequo et Bono*: Towards an Equitable Transcendence of the Terracentric Juridical Reproduction of the Falklands/Malvinas Dispute

Vicky Kapogianni

Lecturer in EU and International Law, University of Reading, Reading, The United Kingdom; Senior Research Associate at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, a Centre of the Faculty of Law, University of Johannesburg, Johannesburg, South Africa

Eric Loefflad

Lecturer in Law, University of Kent, Canterbury, The United Kingdom

Abstract

Differing from most territorial contests, the Falklands/Malvinas dispute is entangled in a clash of ideologies embedded in maritime and legal imaginations. From the standpoint of international law, there is no definitive answer, as conventional legal frameworks – grounded in terrestrial notions of sovereignty – find themselves ill-equipped to resolve the maritime complexities of this dispute. The rival territorial integrity and self-determination arguments respectively lodged by Argentina and the UK reveals the struggle between two nations seeking to impose their own international legal interpretation. Against these conflicting claims, this article explores the potential application of the equitable principle of *ex aequo et bono* as a means of transcending entrenched geopolitical binaries. By focusing on the broader implications of the law of the sea, and its emphasis on the interrelation of maritime and terrestrial space, this article reimagines sovereignty in relation to the Falklands/Malvinas not as a fixed territorial possession, but as a dynamic relational process. The use of equity, as opposed to rigid legal entitlements, provides space to reframe the dispute, allowing both Argentina and the UK to move beyond territorial impasses. In doing so, it not merely addresses legal rights, but additionally considers broader geographical, ecological, and human dimensions, fostering a cooperative framework through the principles of equity to transcend entrenched geopolitical divides and prioritise collective stewardship of the region's ecological and resource-based future.

Keywords

Falklands/Malvinas – equity – legal geography – law of the sea – territorial integrity – self-determination

1. Introduction – The Law of the Sea: Where Equity Meets Geography

On 2 April 1982, Argentine forces invaded the islands they deemed the 'Malvinas' held by the British who deemed them the 'Falklands'. While the UK prevailed militarily by 14 June 1982, no comprehensive settlement concerning sovereign title to the Islands was reached. Argentina claims it inherited the Islands upon its independence from Spain (and they are thus integral to its territorial integrity) while Britain claims the inhabitants of the Islands (predominately descendants of British settlers) are a 'people' entitled to the right of self-determination. For their part, international lawyers (in addition to applying the laws of war to the 1982 conflict) had little choice but to assess these conflicting claims of 'territorial integrity versus self-determination' to the best of their ability.[1] While modern international lawyers are exceedingly familiar with the tensions between these two axiomatic precepts,[2] the Falklands/Malvinas dispute brings them together as it does in no other situation on Earth. According to D.W. Greig's account of how this novelty impacts prospects for resolution:

> From the standpoint of international law there is no definitive answer. The Argentine case is based upon extending the decolonisation concept in an entirely novel way, or at least to a quite different situation. The British reaction has been to assert that the principle of self-determination is applicable to a group of people who originated in, and were not subject to alien occupation by, the alleged colonial power. This is an equally novel application of the legal principle. The Falklands War was not about absolute right, but was the attempt by two countries, each to

[1] See e.g., O. Bring, 'The Falklands Crisis and International Law' (1982) 51(3–4) Nordic Journal of International Law 129–163; F. Hassan, 'The Sovereignty Dispute over the Falkland Islands' (1982) 23(1) Virginia Journal of International Law 53–74; A. Schwed, 'Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute' (1982) 6(3) Fordham International Law Journal 443–471; M. Antonio Sanchez, 'Self-Determination and the Falkland Islands Dispute' (1983) 21(3) Columbia Journal of Transnational Law 78–101; M. Reisman, 'The Struggle for the Falklands' (1983) 93(2) Yale Law Journal 287–317; H. Fox, 'Legal Issues in the Falkland Islands Confrontation 1982: With Particular Reference to the Right of Self–Determination' (1983) 7(6) International Relations 2454–2475; A.F.J. Hope, 'Sovereignty and Decolonization of the Malvinas (Falkland) Islands' (1983) 6(2) Boston College International and Comparative Law Review 391–446; J. Lindsey, 'Conquest: A Legal and Historical Analysis of the Root of United Kingdom Title in the Falkland Islands' (1983) 18(1) Texas International Law Journal 11–36; H.E. Chehabi, 'Self-Determination, Territorial Integrity, and the Falkland Islands' (1985) 100(2) Political Science Quarterly 215–225; A. Muś, 'Self-Determination and the Question of Sovereignty over Falkland Islands/Malvinas' (2017) 9(1) Silesian Journal of Legal Studies 78–95; E. Henry, 'The Falklands/Malvinas War – 1982' in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018) 361–378.

[2] See J. Castellino, 'Territorial Integrity and the Right to Self-Determination: An Examination of the Conceptual Tools' (2008) 33(2) Brooklyn Journal of International Law 503–568.

impose its view of international law on the other. For the international lawyer this is perhaps the ultimate irony.[3]

In seeking to novelly interpret this highly commented-upon situation, our starting point is this dispute's striking geography: the Islands in question, inhabited by just 3,662 people, are separated from their claimants by vast swarths of ocean – 500 kilometres from Argentina and almost 13,000 kilometres from Britain. In centring this reality, given their preoccupations with terrestrial space, the doctrines of both territorial integrity and self-determination (especially as they conflict) are exceedingly difficult to reconcile with the largely maritime spatiality of the Falklands/Malvinas dispute.[4] This, we argue, is cause for exploring what other possibilities might exist when considering a potential resolution – a matter that is especially important given how the natural resources fuelling geopolitical competition between the Islands' claimants are located not on terrestrial insular space, but in, or in relation to, the surrounding ocean.[5] On this point, we turn to the idea of equity – a provision of flexibly tempering the otherwise rigid application of legal rules – as a means of imagining progress on this point.

While often narrowly construed in its application to international law,[6] taking a broad view of equity allows for an innovative reconciliation of doctrinal and theoretical considerations when confronting unique situations such as the Falklands/Malvinas dispute. This is especially true as equity applies to the law of the sea, one of the areas of international law where – by virtue of its consciousness of geography – equitable considerations are eminently important.[7] Here, beyond technical provisions and applications (important as they may be), this ocean-concerned legal area provides an entry point into vast engagement with the

[3] D.W. Greig, 'Sovereignty and the Falkland Islands Crisis' (1978–1980) 8(1) Australian Yearbook of International Law 20–70, at 70.
[4] Genealogically, this terracentrism stems from how so many foundationally influential international legal conceptions of sovereignty, statehood, and self-determination emerged from the overwhelming land-based geographies of Central Europe. See M. Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15(1) Redescriptions: Political Thought, Conceptual History, and Feminist Theory 45–70; E. Weitz, 'Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right' (2015) 120(2) American Historical Review 462–496; N. Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press 2023).
[5] C. Joyner, 'Anglo-Argentine Rivalry after the Falklands/Malvinas War: Laws, Geopolitics, and the Antarctic Connection' (1984) 15(3) Lawyer of the Americas 467–502; G. Livingstone, 'Oil and the Falklands/Malvinas: Oil Companies, Governments, and Islanders' (2022) 111(1) Round Table 91–103.
[6] See C. Titi, *The Function of Equity in International Law* (Oxford University Press 2021).
[7] L.M.D. Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries' (1990) 84(4) American Journal of International Law 837–858, at 839.

ways in which law produces elaborate imaginaries of connected, and contested, global space.[8] As Itamar Mann notes, 'despite the fact that the law of the sea is generally understood as a particular state-centric area of international law, the sea exposes the essentially transnational nature of law'.[9] Faced with this paradox, we argue that equity's promise of interpretive flexibility provides a means of bridging law's technical provisions with its offering of a vantage point for creatively imagining the world. Few places illuminate this law/space interface more powerfully than the Falklands/Malvinas: a site often depicted as being at the 'edge of the world', where abstract geopolitical models often conceal the ways in which envisioning this space, from whatever perspective, reveals deeper truths about the human condition.[10] The perspective one adopts is never far from the question of who is legally entitled to these Islands. Yet the possibility of answering this question is, in turn, constrained by the deeply terracentric assumptions embedded in the two main international legal doctrines at play: territorial integrity and self-determination. How might we think beyond this contradiction?

In addressing this point, this article unfolds as follows: Section 2 details the background of the Falklands/Malvinas dispute and its translation into the persisting rival Argentine and British title claims. Section 3 develops the theoretical framework, arguing that the principle of *ex aequo et bono* could be broadly interpreted as a form of 'radical equity' capable of uncovering, and defying, the roots of international law's construction of a land–sea spatial binary that defines the present intractability of the Falklands/Malvinas dispute. Having uncovered this framework, Section 4 then centres the law of the sea as it turns to Argentina's claims regarding its proximity to the Islands and its assertions grounded in the Continental Shelf. From there, Section 5 frames conflicting characterisations regarding the Falkland Islanders' British-proclaimed right to self-determination through reference to broadly equitable considerations of the spatial relationship between land and sea. Finally, Section 6 sketches what an application of *ex aequo et bono* to the Falklands/Malvinas might entail and reflects on how underlying structural pathologies must be addressed in order for genuine progress to be made, rather than reproducing the existing impasse.

[8] See H. Jones, 'Lines in the Ocean: Thinking with the Sea About Territory and International Law' (2016) 4(2) London Review of International Law 307–343; I. Braverman (ed.), *Laws of the Sea: Interdisciplinary Currents* (Routledge 2022).
[9] I. Mann, 'Law and Politics from the Sea' (2024) 16(1) International Theory 78–101, at 79.
[10] See J. Blair, *Salvaging Empire: Sovereignty, Natural Resources, and Environmental Science in the South Atlantic* (Cornell University Press 2023).

2. Colonial Echoes in the Maritime Realm: The Falklands/Malvinas, Sovereignty, and Geopolitical Stakes

True to established methods for framing the Falklands/Malvinas dispute, a detailing of the basic facts must be undertaken. While accounts are conflicting, the first Europeans likely spotted the South Atlantic Islands known today as the Falklands/Malvinas at some point in the 1500s.[11] However, it was not until 1764 that the first European land-based settlement occurred on the Eastern one of the two main islands undertaken by neither Englishmen nor Spaniards, but rather by the French.[12] On the Western Island in 1766, the British established a small settlement.[13] The French transferred control of the Eastern Island to Spain who removed the British in 1770, but following a 1771 agreement allowed their return.[14] Later, in 1774, the British, preoccupied with the rebellion in their North American colonies, withdrew from the Western Island.[15] While Spain remained the sole source of authority within the Islands, as revolutions against the Spanish Crown erupted across their varied colonies in the Americas, and the Buenos Aires-ruled viceroyalty declared independence as the United Provinces of the Río de la Plata in 1810, Spain withdrew its presence from the Islands in 1811.[16] As fighting against the Spaniards continued, in 1820 David Jewett, a US American privateer fighting on behalf of those rebelling against Spain, planted the flag of Argentina on the Islands[17] – Argentina being the ultimate successor of the United Provinces of the Río de la Plata that also gave rise to Bolivia, Paraguay, and Uruguay.

In 1823, Buenos Aires granted the islands to the German merchant Louis Vernet whose efforts to control whaling and sealing activities earned him the ire of the US Navy who – while Vernet was in Buenos Aires – devastated his settlement in 1832.[18] As an Argentine attempt to retake the Islands ended via an 1832 mutiny, the British asserted their claim to the Islands in 1833. Following a rebellion against Louis Vernet's Scottish deputy Matthew Brisbane upon his return, British forces returned to suppress the rebellion, established a lasting presence, and the

[11] A. Rubin, 'Historical and Legal Background of the Falklands/Malvinas Dispute' in A. Coll and A. Arend (eds), *The Falklands War: Lessons for Strategy, Diplomacy, and International Law* (Routledge 1985) 9–21, at 9–10. For the classic detailed history, see J. Goebel, *The Struggle for the Falkland Islands* (Yale University Press 1927).
[12] Rubin, 'Historical and Legal Background of the Falklands/Malvinas Dispute', at 12.
[13] Ibid., at 12.
[14] Ibid., at 12.
[15] Ibid., at 13.
[16] Ibid., at 13.
[17] Blair, *Salvaging Empire*, at 30.
[18] Ibid., at 30–32.

Falkland Islands became a Crown Colony in 1840.[19] However, as the British maintained this presence and facilitated population of the Islands by largely Scottish and Welsh settlers, Argentina maintained a wide-ranging claim to the former lands of the United Provinces of the Río de la Plata and their often-unclear points of extension under the banner of the '*uti possidetis* of 1810'.[20] While a source of irredentist contention with the other States formerly part of the United Provinces, this claim also motivated Argentina's military campaigns against the indigenous peoples of the southward Pampas and Patagonia regions deemed the 'Conquest of the Desert'.[21] While the Falkland Islanders would often aid in Argentine campaigns of dispossession as mercenaries,[22] Argentina's '*uti possidetis* of 1810' arguments rarely failed to include the Malvinas within its scope of proclaimed territorial entitlement.[23] Argentine claims took on a new dimension of intensity as Anglo–Argentine relations deteriorated immensely in the 1930s.[24] However, following the Second World War, the dispute over the Falklands/Malvinas could not but be transformed by the decline of European overseas empires and new visions of maritime space.

Against this backdrop, a statement by US President Lyndon Johnson in the 1960s embodying post-imperial approaches to managing the world's oceans, gains renewed relevance. Warning against a 'new form of colonial competition' in ocean territories being subject to the expanding jurisdiction of coastal States, Johnson argued that wealth derived from undersea resources should be considered a 'legacy of all human beings'.[25] Emphasising humanity's interconnectedness, he invoked Longfellow's assertion that 'the sea – yes, the great sea – divides and yet unites mankind'.[26] President Johnson's perspective serves as a critique of contemporary maritime practices, urging nations to refrain from the unilateral resource claims that perpetuate economic disparities and colonial power dynamics that defined the imperial era of the 'free seas'. This critique resonates within Argentina's stance, where it argues that British

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[19] Ibid., at 32–35.
[20] P. O'Donnell, 'Inherited Sovereignty: "Uti Possidetis Juris" and the Falklands/Malvinas Dispute' (2025) War & Society 1–28.
[21] Ibid., at 10–11.
[22] Blair, *Salvaging Empire*, at 172–173.
[23] O'Donnell, 'Inherited Sovereignty', at 12–15.
[24] Ibid., at 17–19.
[25] 'Remarks at the Commissioning of the Research Ship-Oceanographer' (13 July 1966) The American Presidency Project, available at <https://www.presidency.ucsb.edu/documents/remarks-the-commissioning-the-research-ship-oceanographer#:~:text=We%20must%20be%20careful%20to,divides%20and%20yet%20unites%20mankind.%22> (accessed 27 October 2024).
[26] Ibid.

control over the islands and adjacent waters epitomises a modern form of colonialism cloaked under the guise of international legal entitlements.[27] While the UK began negotiations with Argentina in the late 1960s, with the rise of a 'Falklands lobby' intimately linked to the identity crisis spawned by the broader collapse of Britain's empire, such negotiations broke down.[28] The 1982 war and its non-resolution only exacerbated this problematic situation.[29]

Thus, a contentious saga unfolds. Argentina alleges that on 3 January 1833 the UK violated its territorial integrity by unlawfully occupying the Falkland Islands, forcibly displacing the Argentine population and legitimate authorities who had established a presence there.[30] Argentina promptly protested this act, categorising the British occupation as an unlawful exercise of force to which it has never consented. Since then, the Islands have remained at the centre of an unresolved sovereignty dispute between the two countries, formally recognised in General Assembly Resolution 2065(XX)[31] and reiterated across several regional and multilateral forums.[32] Argentina's contemporary argumentation regarding its imprescriptible sovereignty rights over the Malvinas, South Georgia and South Sandwich Islands, and their associated maritime areas, is articulated through a sophisticated amalgamation of international legal, historical, and political arguments.[33] First, Argentina contends that the principle of the self-determination of peoples is not applicable in the case of the Malvinas Islands asserting that this principle is only relevant to recognised nations/'peoples', and the United Nations does not classify the Malvinas as such.[34] Second, the General Assembly explicitly rejected the UK's proposals to incorporate the principle of self-

[27] R. Petrović, 'Argentina's Struggle to Preserve Sovereignty and Territorial Integrity on the Malvinas Islands' (2022) Review of International Affairs 73–89, at 84.
[28] K. Dodds, *Pink Ice: Britain and the South Atlantic Empire* (I.B. Tauris 2002), at 118–137; see also M.A. González, *The Genesis of the Falklands (Malvians) Conflict: Argentina, Britain, and the Failed Negotiations of the 1960s* (Palgrave Macmillan 2013).
[29] See E. Mercau, *The Falklands War: An Imperial History* (Cambridge University Press 2019).
[30] UNGA, 'Falkland Islands (Malvinas)' (26 February 2024) UN Doc. A/AC.109/2024/6, available at <https://documents.un.org/doc/undoc/gen/n24/084/68/pdf/n2408468.pdf> (accessed 30 October 2024), at para. 65.
[31] UNGA Res. 2065(XX), 'Question of the Falkland Islands (Malvinas)' (16 December 1965), available at <https://treaties.un.org/doc/source/docs/A_RES_2065-Eng.pdf> (accessed 30 October 2024) a non-binding resolution adopted on 16 December 1965 that recognises the existence of a sovereignty dispute between the United Kingdom and Argentina.
[32] UNGA, 'Falkland Islands (Malvinas)', at para. 65.
[33] See E. Esteves Duarte (ed.), *The Falklands/Malvinas War in the South Atlantic* (Palgrave 2021); Peter Beck, *The Falkland Islands as an International Problem* (Routledge 1988).
[34] A.B. Bologna, 'Argentinian Claims to the Malvinas Under International Law' (1983) 12(1) Millennium 39–48, at 40.

determination into the draft resolution on the matter on two occasions in 1985.[35] Third, Argentina argues that the so-called referendum conducted in 2013, where an overwhelming majority of Falkland Islanders affirmed the territory's status as a British Overseas Territory, was a unilateral act by the UK, as it occurred without the authorisation, intervention or approval of the United Nations.[36] In this regard, Argentina maintains that this referendum neither resolves the sovereignty dispute nor affects its legitimate rights. Fourth, Argentina has condemned the UK's unilateral activities related to the exploration and exploitation of renewable and non-renewable natural resources within the still contested territory and maritime areas.[37] This, in tandem with the continued British military presence in the South Atlantic, is viewed as a violation of United Nations resolutions, notably General Assembly Resolution 31/49.[38] Such actions have elicited expressions of concern and rejection by the international community,[39] thus further complicating the 'colonial situation' rather than facilitating the sovereignty negotiations.[40]

From the United Kingdom's vantage point, the sovereignty of the Falkland Islands is grounded in an unambiguous legal and historical foundation rooted in its effective occupation. Here, the UK maintains that upon re-establishing its administration on 3 January 1833, no

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[35] UNGA, 'Sixty-Seventh Session, Question of the Falkland Islands (Malvinas)' (11 April 2013) UN Doc. A/67/832, at 4.

[36] UNGA, 'Falkland Islands (Malvinas)', at para. 65; see also R. Greenslade, 'Falklands' Referendum Fools Nobody – It Amounts to a Rigged Ballot' (11 March 2013) The Guardian, available at <https://www.theguardian.com/media/greenslade/2013/mar/11/falklands-argentina> (accessed 31 October 2024).

[37] 'Question of the Malvinas Islands: Argentina Reaffirms Once Again Its Sovereignty' (3 January 2020) Ministry of Foreign Affairs, International Trade and Worship, Argentine Republic, available at <https://www.cancilleria.gob.ar/en/announcements/news/question-malvinas-islands-argentina-reaffirms-once-again-its-sovereignty> (accessed 31 October 2024).

[38] According to Argentina, the UK military presence also contravenes UNGA Resolution 41/11. See ibid.; see also UNGA Res. 41/11, 'Zone of Peace and Co-Operation of the South Atlantic' (27 October 1986) ('The General Assembly […] [c]alls upon all States of all other regions, in particular the militarily significant States, scrupulously to respect the South Atlantic as a zone of peace and co-operation, especially through the reduction and eventual elimination of their military presence there.')

[39] On 8 December 2022, the Community of Latin America and Caribbean States (CELAC), adopted a statement condemning the UK's plan to incorporate members of the Kosovo's 'Security Forces' into its infantry army in the Malvinas, characterising this action as an unjustified provocation and a violation of multiple General Assembly resolutions, notably Resolution 31/49, as well as other international commitments. UNGA, 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (26 July 2023) UN Doc. A/AC.109/2023/SR.7, at 6.

[40] 'Address by Mr. Alberto Fernández, President of the Argentine Republic' in UNGA, 'Seventy-Eighth Session, 5th Plenary Meeting' (19 September 2023) UN Doc. A/78/PV.5, available at <https://documents.un.org/doc/undoc/gen/n23/271/38/pdf/n2327138.pdf> (accessed 31 October 2024), at 15.

civilian population was expelled from the Islands. Rather, three months prior to this date, an Argentine military garrison had been sent to the Islands in an attempt to impose Argentine sovereignty over what the UK regarded as British sovereign territory, which the latter expelled without any use of force or loss of life.[41] Additionally, the UK claims that the civilian population – who had previously sought and obtained British permission to settle on the Islands – was encouraged to remain under British administration.[42] Accordingly, the UK's claim to sovereignty over the Falkland Islands rests on the argument that, with the 'exception of two months of illegal occupation in 1982',[43] the UK has 'continuously, peacefully, and effectively inhabited and administered' the Islands since 1833.[44] This claim is bolstered by the principle of self-determination, which posits that the inhabitants of non-self-governing territories such as the Falklands possess the inherent right to determine their own political status and exploit their natural resources for their economic benefit as an integral part of this right.[45] In sum,

> the United Kingdom has no doubt about its sovereignty over the Falkland Islands, South Georgia Islands and South Sandwich Islands and the surrounding maritime areas, nor about the principle and the right of the Falkland Islanders to self-determination, as enshrined in the Charter of the United Nations.[46]

At this juncture, it should be noted that Argentina's counterclaim is based on Spain's historical possessory title to the territory and the principle of territorial continuity stressing that its geographic proximity to the Islands should be a factor in it taking sovereignty of them.[47] Nonetheless, the UK argues that, without effective occupation, possessory title lacks

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[41] UNGA, 'Question on the Falkland Islands' (31 January 2012) UN Doc. A/66/677. Though it may have settled title, Britain never claimed the Islands by right of conquest, see S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford University Press 1996), at 105–109.

[42] UNGA, 'Question on the Falkland Islands'.

[43] The Falkland Islands have been on the UN's list of non-self-governing territories since 1946. House of Lords Library, 'Sovereignty Since the Ceasefire: The Falklands 40 Years On' (1 August 2022) UK Parliament, available at <https://lordslibrary.parliament.uk/sovereignty-since-the-ceasefire-the-falklands-40-years-on/> (accessed 31 October 2024).

[44] Foreign and Commonwealth Office and the Rt Hon William Hague, 'Falkland Islanders Must be Masters of Their Own Fate' (21 January 2012) UK Government, available at <https://www.gov.uk/government/news/falkland-islanders-must-be-masters-of-their-own-fate> (accessed 4 November 2024).

[45] UNGA, 'Falkland Islands/Malvinas' (1 March 2021) UN Doc. A/AC.109/2021/6, at para. 12.

[46] Ibid., at para. 10(A).

[47] S. Karadima, 'Why Are the Falkland Islands So Important to Argentina and the UK?' (10 October 2022) Investment Monitor, available at <https://www.investmentmonitor.ai/features/falkland-islands-important-argentina-the-uk/?cf-view> (accessed 4 November 2024).

recognition as a general principle of international law, thereby weakening the legitimacy of Argentina's case.[48]

Historically, the principle of *uti possidetis juris* has been applied to clarify the territorial rights of newly independent States, stipulating that States emerging from decolonisation shall presumptively inherit the administrative borders of their former colonial provinces held at the time of independence.[49] Nonetheless, it must be noted that this principle does not have universal applicability within the broader international law framework.[50] The doctrine that the boundaries of the American republics typically align with those of prior Spanish administrative divisions and subdivisions was not codified in any of the early treaties among the newly independent nations, nor was it reflected in agreements with Spain.[51] Instead, this principle emerged gradually as a widely accepted norm in South America and was known as the doctrine of *uti possidetis juris* of 1810,[52] subsequently being proclaimed at the Congress of Lima in 1848.[53] Thus, *uti possidetis* initially served as a proposal that did not attain regional consensus among the former Spanish colonies until after the critical year of 1833 relevant to claims over the Falklands/Malvinas.

Given the complex historical and regional nuances surrounding the doctrine of *uti possidetis,* it is pertinent to turn to the International Court of Justice (ICJ) to inform our understanding of how the Court has interpreted and applied this doctrine. In its dictum in the *Burkina Faso/Republic of Mali* judgment, the ICJ stated that *uti possidetis juris*, which mandates respect for the intangibility of frontiers, is a 'general principle' that was first invoked

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[48] Disagreement is exacerbated by how Argentine jurists, accustomed to Roman civil law, understand acquiring prescriptive title very differently than English common law lawyers, see J. Myhre, 'Title to the Falklands-Malvinas Under International Law' (1983) 12(1) Millenium 25–38, at 33–34.

[49] On its Latin American origins and later application to Africa and Southeast Asia, see M. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1997) 67 British Yearbook of International Law 75–154, at 98–109.

[50] Stephen Potts, 'Falkland Islands – What the ICJ (International Court of Justice) Might Say About Argentina's Claims' (2015) Falklands Timeline, available at <https://falklandstimeline.wordpress.com/wp-content/uploads/2018/01/falkland-islands-potts.pdf> (accessed 4 November 2024), at 27.

[51] Ibid.

[52] When the Spanish colonies of Central and South America declared their independence in the second decade of the nineteenth century, they adopted a constitutional and international legal principle known as *uti possidetis juris of 1810*. This principle established that the boundaries of the newly formed republics would be those of the Spanish provinces they replaced. This general principle had the advantage of affirming, as an absolute rule, that there was no 'land without a master' in former Spanish America. See *Affaire des frontières Colombo-Vénézuéliennes (Colombie contre Vénézuela)* [1922] RIAA 223, at 228.

[53] G. Ireland, *Boundaries, Possessions, and Conflicts in South America* (Harvard University Press 1938), at 327.

and applied in Spanish America.[54] Nevertheless, the Court emphasised that this principle is not a 'special rule' or a 'mere practice contributing to the gradual emergence of a principle of customary international law' [55] but rather a 'rule of general scope' in the case of decolonisation,[56] serving an important function in safeguarding the 'independence and stability of new states from being endangered by fratricidal struggles provoked by the challenging frontiers following the withdrawal of the administering power'.[57]

Pursuant to the ICJ's assertion, the principle of *uti possidetis* has several facets, notably in its well-known application in Spanish America. One key aspect, emphasised by the Latin genitive *juris*, is the pre-eminence accorded to legal title over effective possession as the foundation of sovereignty.[58] This was undoubtedly important at the time of the achievement of independence by the former Spanish colonies of America, as it aimed to 'scotch any designs which non-American colonising powers might have had over regions' that had been assigned by the former colonial authority to various divisions yet remained uninhabited or unexplored.[59] Notwithstanding, the *uti possidetis* principle extends beyond this dimension. Its essence lies in its primary aim to ensure the 'intangibility' of territorial boundaries at the moment of independence.[60]

As such, arguments by scholars that Argentina was not recognised by Spain until 1859 – a full twenty-six years after the Falkland Islands had come under British rule in 1833 – and thus that Spain was in no position to transfer sovereignty to a State it had yet to recognise,[61] are ultimately irrelevant to the sovereignty dispute. For the *uti possidetis* principle establishes that territorial sovereignty over lands administered by the former colonial administration is automatically transferred to the newly independent State, without requiring any formal cession

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[54] This is due to the fact that the continent witnessed the initial phase of decolonization, where multiple sovereign States emerged from a single metropolitan territory. *Frontier Dispute (Burkina Faso v. Republic of Mali) (Judgment)* [1986] ICJ Rep. 554 ('*Burkina Faso/Mali*'), at 565.
[55] Ibid., at 565.
[56] Ibid., at 565*;* see also, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad) (Judgment)* [1994] ICJ Rep. 6.
[57] *Burkina Faso/Mali (Judgment)*, at 565.
[58] Ibid., at 566.
[59] Ibid., at 566.
[60] Ibid., at 566.
[61] Calvert argues that 'no act of cession or "quasi-cession"' of rights took place in the Falklands, echoing Judge Huber's statement in the *Island of Palmas* arbitration: 'it is evident that Spain could not transfer more rights that she herself possessed'. P. Calvert, 'Sovereignty and the Falklands Crisis' (1983) 59(3) International Affairs 405–413, at 411; *Island of Palmas Case (Netherlands v. United States)* [1928] RIAA 829, at 842.

of sovereignty from the colonial power.[62] The Treaty of Recognition, Peace and Friendship, signed on 21 September 21 1863 between Spain and the Argentine Republic or Confederation, arguably serves to consolidate Argentina's claim to sovereignty by affirming Argentina's status as a free, sovereign, and independent nation.[63] This recognition extended to all provinces listed in Argentina's Federal Constitution then in force, as well as any territories that legally belong or will belong to it in the future, thereby reinforcing the *uti possidetis* principle in relation to Argentina's claim. Notably, Article IV of the Treaty recognises 25 May 1810, as the date on which the Argentine Confederation 'acquired the rights and privileges corresponding to the Crown of Spain', thereby assuming 'all corresponding duties and obligations'.[64] This retroactive affirmation of Argentine sovereignty dating from 1810 strengthens Argentina's assertion of territorial continuity, confirming that the legal foundation for its claim to the Falklands was already established, irrespective of Britain's occupation in 1833.

In the face of this impasse, the more dynamic element of the Falklands/Malvinas dispute concerns the surrounding seas containing within them abundant resources sought by both the UK and Argentina. Here, owing to a newfound confidence in its claims following the 1982 war, the UK, while maintaining it was entitled to 200 Nautical Miles ('NM') under UNCLOS, declared a 150NM Exclusive Economic Zone ('EEZ') around the Islands via the Falklands Interim Conservation and Management Zone of 1986.[65] Having reached agreement with Argentina concerning fisheries management, in 1990 Britian extended its EEZ to 200NM to the east, north, and south via the Falkland Islands Outer Conservation Zone, yet maintained the 150NM EEZ in the western proximity of Argentina.[66] While mutual agreement between the two States enabled Anglo–Argentine coexistence in the South Atlantic despite the continued

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[62] M.G. Kohen and F.D. Rodriguez, 'The Malvinas/Falklands Between History and Law: Refutation of the British Pamphlet "Getting it Right: The Real History of the Falklands/Malvinas"' (July 2017) Government of Argentina, available at <https://www.argentina.gob.ar/sites/default/files/2021/12/malvinas_falklands_kohen_rodriguez.pdf> (accessed 8 November 2024), at 80.

[63] Article I of the Treaty of Recognition, Peace and Friendship Between the Argentine Republic and Spain (signed 21 September 1863), available at <https://sparc.utas.edu.au/index.php/treaty-of-recognition-peace-and-friendship-between-the-argentine-republic-and-spain-signed-at-madrid-extract> (accessed 8 November 2024).

[64] Ibid., at Article IV.

[65] C. Symmons, 'The Maritime Zones Around the Falkland Islands' (1988) 37(2) International and Comparative Law Quarterly 283–324, at 285–286; see also Y.H. Song, 'The British 150-Mile Fishery Conservation and Management Zone Around the Falkland (Malvinas) Islands' (1998) 7(2) Political Geography Quarterly 183–197.

[66] R.R. Churchill, 'Falkland Islands – Maritime Jurisdiction and Co-Operative Arrangements with Argentina' (1997) 46(2) International and Comparative Law Quarterly 463–477.

non-resolution of the underlying sovereignty dispute, the prospect of oil exploration proved just how fragile such arrangements were.[67] After all, oil – unlike fish and squid – is a non-renewable resource and, as such, depleting its reserves in locations Argentina believes it is entitled to represents a grave affront to sovereignty.[68] Thus, when the UK declared oil exploration campaigns in 2010, Argentina, having withdrawn from the 1995 Joint Declaration for Hydrocarbons in 2007, lodged a series of objections that re-raised the issue of its sovereign claims over the Malvinas.[69] Given how these issues are liable to persist so long as the underlying sovereignty dispute remains, international lawyers – faced with no easy answer – have little choice but to creatively reevaluate some of their field's most central presuppositions.

3. Radical Equity and the Land–Sea Continuum: Reimagining the Falklands/Malvinas Deadlock

For both the UK and Argentina, international legal arguments regarding title to the Falklands/Malvinas are mutually oppositional, nigh-irresolvable, and a source of political identity that can be mobilised for a great host of reasons. Given this reality, it is highly unlikely that this issue will ever be settled through international adjudication in a forum such as the ICJ or the International Tribunal on the Law of the Sea (ITLOS).[70] Commentators are thus left to imagine what principles – and their potential to inform Anglo–Argentine negotiations – might contribute to breaking this deadlock. When considering this, a central problematic lies in the distinct binary between the spatial-cum-juridical character of land versus sea that drives this dispute. On the one hand, the claims of territorial integrity and self-determination respectively lodged by Argentina and the UK are overwhelmingly land-based. On the other hand, it is legal entitlement to marine resources in the waters surrounding the Islands that fuels ongoing contention. This distinct geopolitical condition is not adequately captured – and is actively obscured – by Argentine and British legal arguments that mobilise all orders of uncertainty.

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[67] See H.R. Schopmans, 'Explaining (Non-)Cooperation on Disputed Maritime Resources: Joint Development Agreements, Disputed Territory, and Lessons from the Falkland Islands' (2018) 10(2) Australian Journal of Maritime and Ocean Affairs 98–117.
[68] Livingstone, 'Oil and the Falklands/Malvinas', at 98.
[69] A. Ruzza, 'The Falkland Islands and the UK v. Argentina Oil Dispute: Which Legal Regime?' (2011) 3(1) Goettingen Journal of International Law 71–99; Y. van Logchem, 'Exploration and Exploitation of Oil and Gas Resources in Maritime Areas of Overlap Under International Law: The Falklands (Malvinas)' (2015) 28(1) Hague Yearbook of International Law 29–64.
[70] M. Milanovic, 'Why the Falkland Dispute Will (Probably) Never Go to Court' (25 February 2010) EJIL:Talk!, available at <https://www.ejiltalk.org/why-the-falklands-dispute-will-probably-never-go-to-court/> (accessed 22 November 2024).

Given this, we must consider whether any principle known to international law might centre otherwise ignored spatial considerations, in the name of reconfiguring the present impasse.

One possible avenue for holistically approaching the distinct land–sea continuum in the South Atlantic would involve centring equity as a meta-principle: a flexible method for tempering the rigid application of legal standards through broader considerations of justice/fairness that the law ostensibly intends to advance.[71] When identifying the advantages of an equitable framework, an approach towards this end would possess an enhanced ability to conduct a wide-ranging assessment of the dispute as it exists within the overall scope of the parties' conduct and motivations.[72] Such an approach could do much to progress characterisation of the present dispute beyond the narrowly isolated legal questions of 'did Argentina inherit the Malvinas via *uti possidetis* from Spain in 1810?' or 'are the Falkland Islanders a "people" entitled to self-determination?' that have hitherto dominated the debate.

On this point, one must acknowledge the robust tradition of applying equitable principles to maritime issues that, even beyond narrow matters such as delimitation, can nevertheless illustrate how sea-related disputes might be holistically approached.[73] In a manner relevant to the under-theorised land–sea continuum sustaining the Falklands/Malvinas dispute, maritime applications of equity can be viewed as an art of considering a vast array of relevant factors beyond the remit of more narrow modes of legal reasoning.[74] Such an extension of analytical methods is needed considering how pressing maritime boundary questions are being vastly expanded by environmental transformation, the depletion of marine resources, and the proliferation of new sensory/information technologies for mapping oceanic spaces in previously unheard-of detail.[75] As all of these forces challenge existing legal understandings of the ocean, equity is unique in its ability to force law to encounter its limits in relation to transformed understandings of maritime space. This poses questions of what law should become in the face of this transformation. In other words, 'blue equity' provides a uniquely valuable vessel for generating consciousness of the 'blue legalities' increasingly needed for

[71] H. Smith, 'Equity as Meta-Law' (2021) 130(5) Yale Law Journal 1050–1145.
[72] T. Franck, 'Equity in International Law' in N. Jasentuliyana (ed.), *Perspectives on International Law* (Brill 1995) 23–48.
[73] See T. Cottier, *Equitable Principles of Maritime Boundary Delimitation* (Cambridge University Press 2015).
[74] Ibid., at 513.
[75] P.Y. Hung and Y.H. Lien, 'Maritime Borders: A Reconsideration of State Power and Territorialities Over the Ocean' (2022) 46(3) Progress in Human Geography 870–889, at 871.

conceptualising human existence in a more than human world.[76] Yet despite equity's important offerings of circumstance-demanded flexibility when confronting legal gaps, some precision here is needed. Would equity in this context supplement existing law? Would it be an alternative to existing law? How does the unique character of the Falklands/Malvinas dispute shape the operation of these questions? What larger considerations are needed to frame equity's application here?

When assessing options towards this end, there are three – arguably four – manifestations of equity currently recognised within public international law. Equity *infra legem* acts as a method for interpreting existing doctrines of international law.[77] Equity *praeter legem* functions as a grounds for rectifying gaps existing within international legal doctrine in a manner consistent with international law's internal logic.[78] Equity *contra legem* enables an overly harsh legal application to be set aside in the interests of achieving justice on a case-by-case basis.[79] In other words, 'equity [is] used in derogation from the law, to remedy the social inadequacies of the law'.[80] Finally, there are decisions *ex aequo et bono* where decisions made according to principles of general fairness 'do not have to be at all related to judicial considerations'.[81] While certainly a tempering of law's normal operation, the *ex aequo et bono* principle has attracted considerable debate on whether it is an exemplification of equity or an alternative to equity[82] – a line of debate adding considerable complexity to already complex questions of where and how equity fits within the broader operation of international law.[83]

In the face of this complexity, despite maintaining a firmly entrenched position within the ICJ Statute as a basis for consensual dispute resolution, the actual application of *ex aequo et bono* here is exceedingly rare.[84] Rather, this principle is generally used within investor–State

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[76] I. Braverman and E. Johnson (eds), *Blue Legalities: The Life and Laws of the Sea* (Duke University Press 2020).
[77] V. Lowe, 'The Role of Equity in International Law' (1992) 12(1) Australian Yearbook of International Law 54–81, at 56–58.
[78] Ibid., at 58–63.
[79] Ibid., at 63–67.
[80] Ibid., at 56.
[81] Ibid., at 56 (quoting R. Lapidoth, 'Equity in International Law' (1987) 22(2) Isreal Law Review 161–183, at 172).
[82] L. Trakman, '*Ex Aequo et Bono*: Demystifying an Ancient Concept' (2008) 8(2) Chicago Journal of International Law 621–642, at 627.
[83] See A. Gourgourinis, 'Delineating the Normativity of Equity in International Law' (2009) 11(3) International Community Law Review 327–347.
[84] S. Dothan, '*Ex Aequo et Bono*: The Uses of the Road Never Taken' in A. Skordas and L. Mardikian (eds), *Research Handbook on the International Court of Justice* (Edward Elgar 2025) 165–178.

arbitrations where it is typically narrowly construed.[85] However, the lack of a deep record of *ex aequo et bono*'s usage to diffuse potential interstate conflict can itself be a source of potential when imagining how this principle might creatively advance analysis of the Falklands/Malvinas dispute beyond the self-determination/territorial integrity impasse.[86] To broadly deploy *ex aequo et bono* in this way would be an illustration of what Stephen Humphreys has deemed 'radical equity' that 'is concerned with the fundamentals of law, but sourced outside it'.[87] In Humphreys' portrayal the 'idea of radical equity does not […] translate into a specific doctrine of law or programme of action. Rather it matters as an element in a larger conceptual landscape, pulling a general discourse further perhaps in one direction than it might otherwise have gone'.[88] In this way, such an application would be one of 'equity as an alternative to the law' that, while limited in offering definitive prescriptions, nevertheless provides new foundations for reimagining how existing understandings of law sustain the present situation.

When considering this exercise as providing insights beyond the parameters of adjudication, there is no reason why thinking in terms of *ex aequo et bono* cannot crack open the limitations of international legal consciousness made clear in the South Atlantic. As Anthony Carty has shown, the limits of international law in providing a clear and sufficient answer to the Falklands/Malvinas question is indicative of the larger lack of any deep international legal conception of territory that goes beyond superficial analogies to private property.[89] According to Carty, by virtue of this deficiency, international lawyers are prone to producing distorted abstractions that prevent them from seeing their subject matter as actual communities of living people.[90] Central to this lack is how peoples and their interactions (including their international legal claims) are shaped by dynamic multifaceted forces of geography that are rarely reflected in the flat two-dimensional maps that form the spatial

[85] Titi, *The Function of Equity in International Law*, at 139–160.
[86] One situation where *ex aequo et bono* offered an innovative solution to interstate conflict (also involving boundary/resource disputes in South America) was the 1932–1935 Chaco War between Bolivia and Paraguay, see B. McCormack, 'A Historical Case for the Globalisation of International Law: The Chaco War and the Principle of *Ex Aequo et Bono*' (1999) 13(3) Global Society 287–312.
[87] S. Humphreys, 'Equity before "Equity"' (2023) 86(1) Modern Law Review 85–121, at 88.
[88] Ibid., at 88.
[89] A. Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 2019), at 90–101, 169–176.
[90] Ibid., at 2.

assumptions of most international lawyers[91] – especially those focused on the law of the sea.[92] However, through liberally invoking *ex aequo et bono* and the freedom it offers from embedded disciplinary reasoning, international lawyers can find themselves with greater licence to consider the spatial constitutions of human relations that have typically been the purview of political geographers.[93] Relatedly, this approach to *ex aequo et bono* can shed light into how international law evolved in a capacity that limited its spatial imaginary by dividing maritime and terrestrial geographies through an uneven consciousness of equity. While a critical approach enabled by *ex aequo et bono* can expand the horizons for equitably reconsidering the Falklands/Malvinas beyond the present impasse, we must first uncover the contingent construction of the land-sea binary within international legal doctrine.

When considering this under-developed conceptualisation, it makes great sense to return to the ICJ's *Burkina Faso v. Mali* case and its authority regarding the all-important doctrine of *uti possidetis*. Importantly, while minimally reflected in the Court's narrow holding that *uti possidetis* prevented the unilateral revision of colonial borders, the arguments made by the parties to this case provide valuable insights into the differing character of terrestrial versus maritime boundary division within international legal consciousness. This land–sea binary was reflected in the Court's recounting of how the two parties fundamentally disagreed on the relevance of equity when revising the uncertain or overly harsh application of legal standards in light of their dispute. Mali – relying heavily on Chief Justice of the US Supreme Court Charles Hughes's 1933 arbitration of the Guatemala–Honduras boundary dispute – proposed an extensive approach to equitably revising colonial borders.[94] Burkina Faso, by contrast, 'emphasized that in the field of territorial boundary delimitation there is no equivalent to the concept of "equitable principles" so frequently referred to by the law applicable in the delimitation of maritime areas'.[95]

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[91] See S. Elden, 'Legal Terrain – The Political Materiality of Territory' (2017) 5(2) London Review of International Law 199–224; G. Lythgoe, 'Eradicating the Exceptional: The Role of Territory in Structuring International Legal Thought' (2024) 37(2) Leiden Journal of International Law 305–322.
[92] S. Ranganathan, 'Decolonization and International Law: Putting the Ocean on the Map' (2020) 23(1) Journal of the History of International Law 161–181, at 162–163.
[93] The Falklands/Malvinas have been a productive site of such engagement, see e.g., M. Benwell and K. Dodds, 'Argentine Territorial Nationalism Revisited: The Malvinas/Falklands Dispute and Geographies of Everyday Nationalism' (2011) 30(8) Political Geography 441–449; M. Benwell and A. Pinkerton, 'Everyday Invasions: *Fuckland*, Geopolitics, and the (Re)Production of Insecurity in the Falkland Islands' (2020) 38(6) Environment and Planning C: Politics and Space 998–1016.
[94] *Burkina Faso/Mali (Memorial of Mali)* [1985], at 43–45.
[95] *Burkina Faso/Mali (Judgment)*, at 567.

Regarding the Court's approach to this controversy over equity's relevance, while excluding *ex aequo et bono* as barred by the parties' lack of mutual consent, the Court used this as a basis to reject the applicability of equity *contra legem* and equity *praeter legem*, thus leaving only equity *infra legem*.[96] After reviewing several cases where equity *infra legem* was developed in relation to maritime boundary disputes, the Court ultimately stated

> that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity.[97]

On this basis, only a decision *ex aequo et bono* could have justified modification based on general equitable principles.[98]

Thus, through *Burkina Faso v. Mali*, we are presented with an encapsulation of how the equitable delimitation of maritime boundaries – which was reaching a high degree of geo-conscious sophistication by this point – is inherently suspect when determining terrestrial borders. Not the result of any strict legal rule (as the ICJ's openness to *ex aequo et bono* made clear), it was rather different historical lineages of spatial control over the terrestrial versus maritime domains that inscribed the present land–sea binary when it comes to the prospects of equitable demarcation. While, from the seventeenth to the mid-twentieth century, the international law of 'free seas' restricted States' maritime jurisdiction to their immediate coastal proximities, [99] a very different approach to the legal production of space was occurring on land. Consolidating in the late-nineteenth century, the entrenchment of territorial sovereignty was accompanied by a connected, yet conceptually distinct, process of linear border formation whereby once indeterminate frontiers were becoming subject to the greatest precision possible.[100] True to the imperial division of the world between legally-designated 'civilised'

[96] Ibid., at 567–568.
[97] Ibid., at 633.
[98] Ibid., at 633.
[99] M. Somos, 'Open and Closed Seas: The Grotius–Selden Dialogue at the Heart of Liberal Imperialism' in E. Cavanagh (ed.), *Empire and Legal Thought: Ideas and Institutions from Antiquity to Modernity* (Brill 2020) 322–361.
[100] K. Gotleich, 'The Rise of Linear Borders in World Politics' (2019) 25(1) European Journal of International Relations 203–228, at 212–218.

versus 'uncivilised' nations, it was the non-European world where dividing lines were most harshly drawn.[101] Eschewing the conditions and desires of local inhabitants, the appropriate characterisation here is 'partition': a 'fresh cut' into previously unified space, imposed without the substantive consent of those affected.[102] As the infamous 'Scramble for Africa' has shown, such partitions could be continental in scale.[103]

When considering how these colonial partitions continue to shape international legal realities, we must centre how the sovereign nation-State form acted as the vessel for realising the rights of peoples to self-determination as European empires in Asia and Africa collapsed after the Second World War. While the application of the formatively Latin American *uti possidetis* principle ironically entrenched colonial borders in the name of excising colonial rule, it must be remembered that for decolonising societies, the choice was often between bad and worse. Here, though *uti possidetis* preserved old partitions, it prevented new partitions by outgoing colonial powers who – by conditioning independence on redrawn borders/demographic engineering – sought to preserve imperial ends beyond formal imperialism.[104] Thus, as the inadmissibility of such new partitions became an entrenched facet of the right to self-determination, any mandated revision of postcolonial land borders is highly questionable.[105] This logic of border safeguarding was very much displayed in the majority's highly limited approach to equity in *Burkina Faso v. Mali*.

However, the limits of this equity-restricting line of reasoning were plainly apparent to Mali's appointed Judge Ad-Hoc Georges Abi-Saab who, in taking a functional view of *uti possidetis*, rejected the notion that this principle demanded rigid geometric line construction to account for sparse evidence.[106] For Abi-Saab, '[t]he fewer the points […] involved in its definition, the greater the court's "degrees of freedom" [...] And it is here that considerations of

[101] A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1–80. This was accompanied by a colonial opening of the seascape whereby non-European maritime tenures were destroyed as impediments to the 'free seas'. E.L. Enyew, 'Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea' (2022) 21(3) Chinese Journal of International Law 439–497, at 457–458.
[102] V. Kattan, 'The Persistence of Partition: Boundary-Making, Imperialism, and International Law' (2022) 94(1) Political Geography 1–16, at 2.
[103] C.H. Alexandrowicz, 'The Partition of Africa by Treaty' in D. Armitage and J. Pitts (eds), *The Law of Nations in Global History* (Oxford University Press 2017) 230–258.
[104] Kattan, 'The Persistence of Partition', at 9.
[105] Ibid., at 10.
[106] *Burkina Faso/Mali (Judgment) (Separate Opinion of Judge Abi-Saab)*, at 662.

equity *infra legem* […] come into play […] when interpreting and applying the law and the legal titles involved'.[107] Thus, while he believed the majority's opinion to be legally acceptable:

> it is not the only solution which would have been legally possible, nor in my opinion the best. I would have preferred another: one which, while respecting the points of reference (and it is not by chance that both are watering-places), would have been more deeply impregnated with considerations of equity *infra legem* in the interpretation and application of law, given that the region concerned is a nomadic one, subject to drought, so that access to water is vital.[108]

Through this non-fixation on precision in resurrecting a colonial past, Abi-Saab was far more focused on giving legal effect to material considerations of physical and human geography that matter to the present and future of affected populations. This position could hardly be more consistent with Abi-Saab's broader efforts to promote novel understandings of international law serving postcolonial peoples struggling against the weight of subordination originally justified through international law.[109] While Abi-Saab was able to reach such conclusions through the restrictive equity *infra legem*, we are left to imagine how the horizons of spatial imagination might be pressed even further if the more expansive *ex aequo et bono* were to be deployed.

Beyond the confines of the *Burkina Faso v. Mali* case that triggered this exposure, a fitting place to return when considering relevance to the Falklands/Malvinas dispute is how equitable imaginaries of the law of the sea developed parallel to the extreme legal rigidity of postcolonial land borders. With US President Harry Truman's assertion of jurisdiction over the Continental Shelf in 1945 came a proliferation of scepticism towards the doctrine of 'free seas' as a relic of an imperial world order increasingly at odds with the era of self-determined nation-States.[110] Despite its American vintage, extended coastal jurisdiction – and the new law of the sea it engendered – gained its greatest imaginative force in Africa, Asia, and Latin America, where the prospect of sovereignty over nationalised maritime zones and cooperative

[107] Ibid., at 662.
[108] Ibid., at 662–663.
[109] G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8(2) Howard Law Journal 95–121.
[110] D. Margolies, 'Jurisdiction in Offshore Submerged Lands and the Significance of the Truman Proclamation in Postwar US Foreign Policy' (2020) 44(3) Diplomatic History 447–465.

management of shared spaces became central to efforts to transform international law.[111] Famously providing impetus for the three iterations of UNCLOS,[112] considerations of equity connected a narrow case-by-case approach to individualised disputes with a broader redistributive ethic of global transformation.[113] While the US-led backlash against the most redistributive Third World approaches to the law of the sea famously restricted the definitive inclusion of redistributive equity in UNCLOS III in 1982,[114] the application of equity to individual disputes persists as a mainstay of the contemporary law of the sea.[115] This leaves open the question of whether any grand reunification of equity in relation to the law of the sea could ever become possible.

Given this backdrop, devising an inclusive approach to *ex aequo et bono* in relation to the Falklands/Malvinas is a twofold task. On one level, there is a need to consider how equity might be used to reframe terrestrial spaces in a manner that critically exposes the terra-centric operation of doctrines, including territorial integrity and the right to self-determination that, in their binary opposition, have dominated international legal discourse. This would require an expanded embrace of the geo-conscious approach sketched by Abi-Saab in his separate opinion in *Burkina Faso v. Mali*, which has gained little traction within international legal doctrine.[116] On another level, there is a need to extend the operation of maritime equity beyond its limited applications in individualised disputes and, without losing sight of these, to connect it to broader imaginaries of the world's oceans that take distributional justice very seriously. In connecting these threads, *ex aequo et bono* could overcome the deficiencies of actually-existing international law that reproduces a problematic land–sea spatial binary in relation to the Falklands/Malvinas. Revisiting and reframing Argentine and British arguments through a broad

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[111] See Enyew, 'Sailing with TWAIL', at 469–493; L. Juda, 'UNCLOS III and the New International Economic Order' (1979) 7(3–4) Ocean Development and International Law 221–255; S. Ranganathan, 'The Common Heritage of Mankind: Annotations on a Battle' in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: North–South Perspectives on the Decolonisation Era* (Cambridge University Press 2019) 35–51.

[112] See K. Sellars, *A 'Constitution for the Oceans': The Long Hard Road to the UN Convention on the Law of the Sea* (Cambridge University Press 2025).

[113] Cottier, *Equitable Principles of Maritime Boundary Delimitation*, at 130–176; K. Hossain, 'Equitable Solutions in the International Law of the Sea: Some Problems' in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (Bloomsbury 2013) 193–206.

[114] Enyew, 'Sailing with TWAIL', at 493–495.

[115] See Cottier, *Equitable Principles of Maritime Boundary Delimitation*.

[116] After the Cold War, border revision proposals became largely associated with a cosmopolitan liberal internationalism that Third Worldist remnants resisted through uncompromising proclamations of sovereignty, see e.g., S. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90(4) American Journal of International Law 590–624.

context-exposing understanding of equity enables us to explore how both States' claims are driven and shaped by broader factors they seek to obscure through their narrowly formulated legal positions.

4. Extending Sovereignty Seaward: Geographical Propinquity, Maritime Rights and Resource Control

In assessing the Falklands/Malvinas dispute through the contexts detailed above, a fitting entry point is the possible compatibility of Argentina's *uti possidetis* arguments with entitlements to coastal jurisdiction under the current UNCLOS framework. While British sovereignty assertions in the region (and Argentine contestation thereof) have perpetually deferred this assessment, speculating on what Argentina could claim despite this enables a broader equitable sense of how the Falklands/Malvinas issue might be addressed *ex aequo et bono*. Speculation on this point also exposes a highly relevant interplay of ideology and geography that renders international legal efforts to resolve the Falkland/Malvinas dispute so elusive. On the one hand, Argentina's broader framework stems from how, despite being in Latin America, it has long constructed itself in a European mould that included the settler colonial destruction of indigenous societies and disclaiming of the mixed multi-cultural identity that has otherwise defined the region.[117] This Argentine particularity has resulted in an elaborate tradition of geopolitical thought where, in supplementing its expansionist 'Conquest of the Dessert', dominion over oceanic space in its southern reaches proved vital to influential conceptions of national identity.[118] On the other hand, as the broader Latin American region embraced the postwar cause of Third Worldism, a key component of this was transforming the law of the sea to enable vast expansions of national coastal jurisdiction to secure counter-hegemonic promises of State-led development.[119] Becoming part of this larger process provided Argentina with a

[117] See L. Taylor, 'Four Foundations of Settler Colonial Theory: Four Insights from Argentina' (2021) 11(3) Settler Colonial Studies 344–365; G. Lublin, 'Adjusting the Focus: Looking at Patagonia and the Wider Argentine State Through the Lens of Settler Colonial Theory' (2021) 11(3) 386–409.
[118] K. Dodds, 'Geopolitics and the Geographical Imagination in Argentina' in D. Atkinson and K. Dodds (eds), *Geopolitical Traditions: Critical Histories of a Century of Geopolitical Thought* (Routledge 2000) 150–184.
[119] F.V. García-Amador, 'The Latin American Contribution to the Development of the Law of the Sea' (1974) 68(1) American Journal of International Law 33–50; A.A. Mawdsley, 'The Latin American Contribution to the Modern Law of the Sea' (1992) 39(1) Netherlands International Law Review 63–88. On the Latin American 'developmental State' and its international legal significance, see L. Eslava, 'The Developmental State: Independence, Dependency, and the History of the South' in von Bernstorff and Dann (eds), *The Battle for International Law: North–South Perspectives on the Decolonisation Era* (Cambridge University Press 2019) 71–100.

new array of arguments to bolster its longstanding claims over the South Atlantic.[120] Given this synthesis of rationales, contesting British presence in the Malvinas allows Argentina to reconcile its traditions as both an expansionist geopolitical power and a Third World nation contesting Western imperialism. Yet, to what extent is this synthesis complicated by the actually-existing law of the sea?

When analysing this uniquely Argentinian geopolitical vision through relevant international legal doctrine, two interconnected dimensions emerge: geographic proximity and associated rights over the continental shelf, particularly regarding the right to natural resource extraction. Here, Argentina's claim to the Malvinas is anchored in principles of proximity and propinquity, positioning the islands as a natural extension of its continental *terra firma*. This approach is underpinned by the logic of territorial continuity, resonating with broader postcolonial critiques of traditional, occupation-based doctrines of sovereignty.[121] Nevertheless, the ICJ apparently does not fully endorse this reasoning, suggesting a divergence in its interpretation of sovereignty and maritime rights, particularly regarding the delimitation of maritime boundaries in territorial disputes. Notably, in the case concerning *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, the ICJ demonstrated a tendency to weigh factors such as historical claims, geographical proximity, and the principle of equidistance, which contrasts with the more territorial continuity-based argument advanced by Argentina in the Falklands/Malvinas dispute.[122]

In this regard, Judges Bedjaoui, Ranjeva and Koroma, in their joint dissenting opinion, affirmed that international law provides 'a strong legal presumption that islands situated within the territorial waters of a State are presumed to belong to that State'.[123] This presumption is well-established in international law, particularly regarding islands located within the twelve-mile coastal belt, considered part of the coastal State's territory unless there is a compelling, well-documented case to the contrary.[124] One such example is the Channel Islands, where

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[120] García-Amador, 'The Latin American Contribution to the Development of the Law of the Sea', at 40–41.
[121] For Abi-Saab, *uti possidetis* served 'a defensive purpose towards the rest of the world, in the form of an outright denial that there was any land without a sovereign (or *terra nullius*) in the decolonized territories, even in unexplored areas or those beyond the control of the colonizers'; *Burkina Faso/Mali (Judgment) (Separate Opinion of Judge Abi-Saab)*, at 661.
[122] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain) (Judgment) (Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma)* [2001] ICJ Rep. 145 *('Qatar/Bahrain')*.
[123] Ibid., at 173.
[124] Ibid.

historical and political factors have established them as a separate jurisdiction under the sovereignty of the British Crown, despite their geographical proximity to France. Notably, in the 1953 *Minquiers and Ecrehos* case the unity principle was applied.[125] Quoting Judge Fitzmaurice, the judgment made it apparent that the 'disputed groups [Minquiers and Ecrehos] were part of an entity [the Channel Islands] over which *as a whole* English sovereignty had indisputably (and undisputably) existed for centuries'.[126] In this light, the ad hoc interpretation illustrates how the *metaphysics of partition* – namely, the legal and philosophical assumptions underpinning the division of natural geographic unities into distinct sovereign territories – continues to shape international adjudication. As Lauren Benton has aptly shown, territorial divisions were historically constituted through flexible and often inconsistent legal mappings that challenged the idea of natural or inherent spatial unities, as observed in how islands or maritime regions were treated under colonial and post-colonial law.[127] Judge Fitzmaurice, considering Judge Levi Carneiro's individual opinion – which supports a doctrine of spatial indivisibility, as opposed to fragmented or isolated components[128] – noted that 'sovereignty, once shown to exist in respect of an entity or a natural unity as a whole, may be deemed, in the absence of any evidence to the contrary, to extend to all parts of that entity or unity'.[129] This approach is significant in international jurisprudence, as it underscores the indivisibility of sovereignty within maritime or territorial entities that possess historical or political coherence.[130] In cases involving island groups or contiguous maritime spaces, sovereignty over the 'natural unity' of such entities takes precedence, ensuring their integrity under a unified sovereign claim.[131] This reflects an operative legal principle that preserves the unity of sovereignty within the spatial and historical bounds of established political territories. As a

[125] *The Minquiers and Ecrehos (France/United Kingdom) (Judgment)* [1953] ICJ Rep. 47 *('France/United Kingdom')*, at 55.
[126] G. Fitzmaurice, *Law and Procedure of the International Court of Justice* (Grotius Publications 1986), at 75.
[127] L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2009), at 162–221.
[128] *France/United Kingdom (Judgment) (Individual Opinion of Judge Levi Carneiro)*, at 102.
[129] G. Fitzmaurice, *Law and Procedure of the International Court of Justice*, at 75.
[130] On the principle of natural or geographical unity, see e.g., *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen) (Decision of 9 October 1998)* [1998] RIAA 209 *('Eritrea/Yemen')*, at 314–315; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore) (Judgment)* [2008] ICJ Rep. 12, at 99–101; *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Judgment)* [2012] ICJ Rep. 624 ('*Nicaragua v. Colombia*'), at 833–837.
[131] X. Ma, 'International Jurisprudence Concerning the Group or Unity Principle in Territorial Allocation' (2019) 18(1) Chinese Journal of International Law 165–178.

base presumption, this would seem to provide measurable support to Argentina's claims over the Malvinas.

Nevertheless, revisiting how the principles of propinquity and proximity have played out over time, outside of the twelve-mile coastal belt, no such presumption exists, and ownership of islands remains unequivocally disputed.[132] Expanding on the principle of proximity, Judges Bedjaoui, Ranjeva and Koroma emphasised that 'proximity alone does not constitute a title'.[133] This was further reflected in *Eritrea v. Yemen* where the court noted that an 'entity' or 'natural unity' – in terms of a 'presumption or of probability', 'coupled with proximity, contiguity, continuity', and similar concepts, well known in international law – are not, in themselves, sufficient to create a title, but rather serve as a possibility or presumption for extending an existing title to a proximate or contiguous area.[134] Thus, the principle of natural and physical unity or even proximity, is a double-edged sword: 'for if it is indeed to be applied then the question arises whether the unity is to be seen as originating from the one coast or the other'.[135] Rather, as has been commonly observed, the principle supplements or combines with other elements to constitute or substantiate a claim of sovereignty.[136] As the judges further stressed, the proximity concept is not alien to international law; it is closely related to the notion of 'distance', explicitly present in the law of the sea, with proximity being derived from it.[137] Ultimately, the title of a coastal State to its territorial sea is grounded in the principle of proximity, but it is essential to recognise that proximity, while a key factor, is not an absolute determinant. For instance, Bahrain, which claims the status of an 'archipelagic State', is primarily composed of islands united by their geographic proximity.[138] However, the judges emphasised that proximity alone cannot confer sovereignty over maritime zones or islands. The presumption that an island belongs to a coastal State if it lies within the limits of its territorial sea remains robust.[139] This presumption holds, irrespective of how it is framed – whether as the 'principle of proximity', 'contiguity', or by any other term – and cannot be

[132] *Qatar/Bahrain (Judgment) (Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma)*, at 173.
[133] Ibid., at 177.
[134] *Eritrea/Yemen (Decision of 9 October 1998),* at 315.
[135] Ibid., at 315.
[136] *Qatar/Bahrain (Judgment) (Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma)*, at 173.
[137] Ibid.
[138] Ibid.
[139] Ibid.

undermined merely by isolated challenges to it.[140] In this respect, proximity, while cloaked in different or revived conceptual guises, retains an influential role in determining territorial and even maritime claims.

On the matter of maritime claims, our attention turns to the continental shelf dispute which is intrinsically tied to the right to resource accumulation. As articulated in the 2024 UN General Assembly working paper,[141] the UK has consistently maintained that, under international law, the continental shelf surrounding the Falkland Islands does not fall within Argentina's jurisdiction.[142] This position is grounded in the UK's unwavering support for the Islanders' right to independently develop their natural resources, viewing this as an integral component of their right to self-determination. Nevertheless, the UN resolutions on the issue do not recognise the Falkland islanders as entitled to self-determination.[143] Instead, they classify the matter as a 'special and particular colonial situation, which differs from others in light of the sovereignty dispute'.[144] Specifically, GA Resolution 2065(XX) calls on the two

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[140] Ibid., at 174.

[141] UNGA, 'Falkland Islands (Malvinas), Working Paper Prepared by the Secretariat' (26 February 2024) UN Doc. A/AC.109/2024/6, at 7.

[142] The United Kingdom first made a claim over the continental shelf surrounding the Falkland Islands in 1950, just five years after the Truman Proclamation, which marked the first-ever continental shelf claim, and 14 years prior to the UK's declaration of a continental shelf for its metropolitan territory. The 1950 Order established the outer limit of the Falklands' continental shelf at the 100-fathom isobath. However, in 1986, following significant developments in international law, particularly those arising from the Third UN Conference on the Law of the Sea, the outer limit of the Falklands' continental shelf was extended. The British government's 1986 Declaration on the Conservation of Fish Stocks and Maritime Jurisdiction around the Falkland Islands explicitly stated that, 'for the avoidance of doubt', the Falklands' continental shelf extends to a distance of 200 nautical miles, or to such other limit as prescribed by international law, including rules governing the delimitation of maritime jurisdiction between neighbouring States. Churchill, 'Falkland Islands', at 468; see also, *The Falkland Islands (Continental Shelf) (Order in Council)* [21 December 1950] University of Tasmania, Antarctic Documents Database, available at <https://sparc.utas.edu.au/index.php/falkland-islands-continental-shelf-order-in-council-1950> (accessed 18 November 2024).

[143] See UNGA Res. 2065(XX), 'Question of the Falkland Islands (Malvinas)' (16 December 1965); UNGA Res. 3160 (XXVIII), 'Question of the Falkland Islands (Malvinas)' (14 December 1973); UNGA Res. 31/49, 'Question of the Falkland Islands (Malvinas)' (1 December 1976); UNGA Res. 37/9, 'Question of the Falkland Islands (Malvinas)' (4 November 1982); UNGA Res. 38/12, 'Question of the Falkland Islands (Malvinas)' (16 November 1983); UNGA Res. 39/6, 'Question of the Falkland Islands (Malvinas)' (1 November 1984); UNGA Res. 40/21, 'Question of the Falkland Islands (Malvinas)' (27 November 1985); UNGA Res. 41/40, 'Question of the Falkland Islands (Malvinas)' (25 November 1986); UNGA Res. 42/19, 'Question of the Falkland Islands (Malvinas)' (17 November 1987); UNGA Res. 43/25, 'Question of the Falkland Islands (Malvinas)' (17 November 1988); UNGA, 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (26 July 2023) UN Doc. A/AC.109/2023/SR.7, at para. 62.

[144] UNGA, 'Special Committee on Decolonisation Recommends General Assembly Reiterate Call for Resumption of Negotiations over Falkland Islands (Malvinas)' (24 June 2010) UN Doc. GA/COL/3212, available at <https://press.un.org/en/2010/gacol3212.doc.htm> (accessed 18 November 2024).

governments to resolve the dispute peacefully within the process of decolonisation of non-autonomous territories' taking into primary consideration the *interest*[145] – not the *will* – of the Falklands/Malvinas' population, thus effectively rejecting their 'selfness'. This stance is reaffirmed in GA Resolutions 3160 (1973) and 31/49 (1976), the latter of which, in paragraph 4, explicitly urges *both States* to refrain from taking decisions or actions that would unilaterally modify the Falklands/Malvinas' condition and/or status prior to reaching a mutual agreement.[146] In response, the UK rejects Argentina's domestic legal claims and its attempts to impose its legislation on individuals engaged in hydrocarbon activities within the Falklands' waters. The United Kingdom views Argentina's actions – such as targeting assets and criminalising the activities of international companies operating in the hydrocarbon sector – as politically motivated exercises of extraterritorial jurisdiction that lack any legal foundation.[147] It argues that such actions pose serious risks to global business operations and undermine the principles of free trade, further disputing Argentina's claim that the management of both renewable and non-renewable resources in the Falkland Islands constitutes unilateral or illegal activity.[148]

Against this backdrop, in April 2009, Argentina, pursuant to Article 76 paragraph 8 of the UNCLOS, submitted a claim seeking recognition of an extensive continental shelf and associated sovereign rights over its resources in the southern Atlantic Ocean.[149] This claim was reviewed by the legally mandated international body, the Commission on the Limits of the Continental Shelf (CLCS). In March 2016, Argentine Foreign Minister Susana Malcorra announced that the submission had achieved international recognition stating that 'Argentina has made a huge leap in the demarcation of the exterior limit of our continental shelf' and emphasising that 'this reaffirms our sovereign rights over the resources of our continental

[145] UNGA Res. 2065 (XX), 'Question of the Falkland Islands (Malvinas)' (16 December 1965), at para. 1.
[146] UNGA Res. 31/49, 'Question of the Falkland Islands (Malvinas)', at para. 4.
[147] UNGA, 'Falkland Islands (Malvinas), Working Paper Prepared by the Secretariat', at 7.
[148] Ibid.
[149] 'Argentina, Outer Limit of the Continental Shelf Argentine Submission' (21 April 2009) United Nations Division for Ocean Affairs and the Law of the Sea, available at <https://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf> (accessed 19 November 2024); UN Oceans & Law of the Sea, 'Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Argentine Republic' (28 June 2024) United Nations Division for Ocean Affairs and the Law of the Sea, available at <https://www.un.org/depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm#:~:text=On%2021%20April%202009%2C%20the,the%20baselines%20from%20which%20the> (accessed 19 November 2024).

shelf'.[150] Two points are worth noting. First, the announcement itself made no reference to either the Falkland/Malvinas Islands and/or Antarctica.[151] This omission reflects the fact that Argentina's submission itself was unusually broad. Unlike countries such as Australia and the UK, which often make 'partial submissions' or include caveats excluding certain areas from review, Argentina opted not to pursue a 'partial submission' or a comprehensive submission with a caveat requesting selective non-consideration of certain areas.[152] Second, following the CLCS press release on 28 March 2016, Argentina and the international media[153] widely celebrated the country's significant expansion of marine and resource interests in the South Atlantic region. Yet, this celebration was based on inaccurate and misleading headlines suggesting that the UN had endorsed Argentine sovereignty claims over the Falklands,[154] largely overlooking CLCS's cautionary note.[155] In its summary of the achievements of the 40th session, the Commission emphasised that Argentina's submission lacked the authority to assess or qualify portions of the submission that were subject to ongoing disputes or pertained to the continental shelf adjacent to Antarctica.[156] Effectively, while the CLCS endorsed the scientific and technical aspects contained within the Argentine submission, this approval was limited to the continental shelf extending from Argentina's mainland. Politically, the CLCS sidestepped controversy by refraining from considering areas under dispute, including the South Atlantic islands and the particularly sensitive Antarctic Treaty Area.[157]

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[150] 'Argentina Celebrates UN Falklands Decision' (29 March 2016) Sky News, available at <https://news.sky.com/story/argentina-celebrates-un-falklands-decision-10221774> (accessed 19 November 2024); 'Falkland Islands Lie in Argentinian Waters, UN Commission Rules' (29 March 2016) The Guardian, available at <https://www.theguardian.com/uk-news/2016/mar/29/falkland-islands-argentina-waters-rules-un-commission> (accessed 19 November 2024).

[151] K. Dodds, 'Our Seabed? Argentina, the Falklands and the Wider South Atlantic' (2016) 52(5) Polar Record 535–540.

[152] Ibid., at 535.

[153] 'Argentina: UN Decision Expands Maritime Territory' (28 March 2016) The New Work Times, available at <https://www.nytimes.com/2016/03/29/world/americas/argentina-un-decision-expands-maritime-territory.html?_r=0#> (accessed 20 November 2024).

[154] P. Willets, 'Delimitation of the Argentine Continental Shelf' (September 2016) South Atlantic Council Occasional Papers, <https://www.staff.city.ac.uk/p.willetts/SAC/OP/OP14UPDT.HTM> (accessed 11 June 2025).

[155] Dodds, 'Our Seabed?', at 535.

[156] CLCS, 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (1 October 2009) UN Doc. CLCS/64, at paras 76 and 77; CLCLS, 'Progress of Work in the Commission on the Limits of the Continental Shelf: Statement by the Chair' (5 September 2012) UN Doc. CLCS/76, at para. 57.

[157] Dodds, 'Our Seabed?', at 539.

The concept of the continental shelf as an internationally binding legal framework originates from the 1958 Convention on the Continental Shelf[158] and was further developed by the 1982 UNCLOS.[159] Codified in Article 76 of UNCLOS, the extent of the continental shelf is defined either by a distance of 200NM or by determining the outer edge of the continental margin, using methods and restrictions outlined in Article 76 and the Statement of Understanding on the Bay of Bengal (SoU).[160] Since UNCLOS came into force in 1994, the legal understanding of the continental shelf has evolved through state practice, judgments by international courts and tribunals, and recommendations from the CLCS.[161] When considering how these proclamations inform a greater totality when seeking a solution *ex aequo et bono*, it is pertinent to briefly dissect how competing Anglo–Argentine claims align with the provisions of the UNCLOS. Particularly, it is important to assess whether a continental shelf 'legal' entitlement takes precedence over one grounded in 'geographical' considerations. And, if neither claim excludes the other, how should delimitation be addressed? While addressing this issue is beyond the scope of this article, it is worth glimpsing into how these questions have been discussed within international courts and tribunals under the prism of UNCLOS with the aim to identify the legal principles at play. For as Judge Owada articulated in the 2012 *Nicaragua v. Colombia* case, 'no state practice has developed, and no jurisprudence exists' on the 'unsettled doctrine of how to effect a maritime delimitation of overlapping areas of continental shelf entitlements between two States claimed on the strength of different legal bases by each Party'.[162]

With advances in technology enabling more extensive resource exploitation and growing knowledge about potential resources, governments have increasingly prioritised asserting their 'right to accumulate' and claim control over the widest possible areas of the waters surrounding and extending beyond their coasts – a dynamic particularly relevant in the contested waters around the Falklands/Malvinas. Under UNCLOS, two distinct bases of entitlement to the continental shelf are recognised. One that grants a coastal State an automatic entitlement to a continental shelf extending up to 200NM from the baselines used to measure

[158] Convention of the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.
[159] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 ('UNCLOS').
[160] 'Final Act of the Third United Nations Conference on the Law of the Sea' (27 October 1982) UN Doc. A/CONF.62/121, at Annex II.
[161] H.J. Woker, 'Challenging the Notion of a "Single Continental Shelf"' (2023) 54(4) Ocean Development and International Law 375–392.
[162] *Nicaragua v. Colombia (Judgment) (Dissenting Opinion of Judge Owada)*, at 728.

the territorial sea, irrespective of any geographical factors. This is commonly referred to as the 'legal' entitlement or 'distance criterion'.[163] The other allows coastal States to claim an extended continental shelf beyond 200NM, reaching the outer edge of the continental margin. Known as a 'geophysical' entitlement, this *extension* must be determined in accordance with Article 76 (4)–(8) of UNCLOS.[164]

The existence of continental shelf entitlement does not depend on any kind of occupation or express proclamation as established in the *North Sea Continental Shelf* case stressing that:

> the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.[165]

While the ICJ was indeed interpreting the 1958 Geneva Convention (Article 2), it concluded that the ad hoc rule stood 'quite independent of it' and as one of custom.[166] Later, that same principle was codified in Article 77(3) of UNCLOS, protecting a State's 'legal' entitlement.[167] Evidently, the same principle extends beyond 200NM. The ITLOS made no distinction when it concluded in *Bay of Bengal* that the entitlement to the continental shelf 'exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present'.[168]

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[163] *Continental Shelf (Libyan Arab Jamahiriya/Malta*) *(Judgment)* [1985] ICJ Rep 13, at 34; *Barbados v. Trinidad and Tobago (Awards on the Merits)* [2006] Permanent Court of Arbitration, CA Case No. 2004-02, at paras 213, 225, 226.

[164] B. Salas Kantor and C. Valdivia Torres, 'Competing over the Continental Shelf: The Legal Versus the Geophysical Entitlements' (2023) 14(1) Journal of International Dispute Settlement 91–109, at 93; see also K. Baumert, 'The Outer Limits of the Continental Shelf Under Customary International Law' (2017) 111(4) American Journal of International Law 827–872, at 832; T. McDorman, 'The Continental Shelf' in D. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 181–202, at 183; D. Rothwell and T. Stephens, *The International Law of the Sea* (Bloomsbury 2016), at 114–115; R. Churchill, V. Lowe, and A. Sander, *The Law of the Sea* (Manchester University Press 1999), at 142–157.

[165] *North Sea Continental Shelf (Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep. 3, at 22.

[166] Ibid., at 63.

[167] Art. 77 (3) UNCLOS.

[168] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) (Judgment)* [2012] ITLOS Rep. 4 ('*Bangladesh/Myanmar*'), at 34, 107.

In contrast to the 'legal' entitlement, a State must *prove* the existence of an extended continental shelf.[169] This is a factual determination that does not constitute the 'geophysical' entitlement[170] itself but is necessary to make it enforceable against third States.[171] For States party to UNCLOS, the evidentiary burden, which is scientific in nature, must be fulfilled according to the provisions outlined in Articles 76(4)–(8) of UNCLOS.[172] In this respect, the State claiming an extended continental shelf must discharge, at a minimum, a portion of this evidentiary burden to persuade an international tribunal that overlapping entitlements exist, thereby enabling the commencement of delimitation proceedings. As the ICJ noted in the *Somalia v. Kenya* case, 'an essential step in any delimitation is to ascertain the existence of entitlements and determine whether they overlap'.[173] Evidently, there are overlapping entitlements in the longstanding dispute over the Falklands/Malvinas, further complicated by competing legal claims and the intersection of strategic, economic, and geopolitical interests – and more recently, with environmental concerns. The UK's recent unilateral expansion of the Marine Protected Area around the South Georgia and South Sandwich Islands, justified on environmental grounds, undoubtedly adds another layer to the dispute.[174] Argentina has formally objected to this expansion, asserting it constitutes a breach of international agreements, such as the 1976 UN General Assembly resolution banning unilateral decisions in areas of unresolved sovereignty disputes, and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR),[175] which requires consensus among Member States for decisions affecting marine resources.[176] Secretary Guillermo Carmona's statement that 'they

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[169] *Nicaragua v. Colombia (Judgment)*, at 127, 129; M. Lando, 'Delimiting the Continental Shelf Beyond 200 Nautical Miles at the International Court of Justice: *The Nicaragua v. Colombia* Cases' (2017) 16(2) Chinese Journal of International Law 137–173.

[170] Kantor and Torres, 'Competing over the Continental Shelf', at 94; ILA, 'Legal Issues of the Outer Continental Shelf' Berlin Conference 2004, available at <https://www.ila-hq.org/en_GB/documents/conference-report-berlin-2004-11> (accessed 22 November 2024).

[171] *Bangladesh/Myanmar (Judgment)*, at 106–107.

[172] G. Eiriksson, 'The Case of Disagreement Between the Coastal State and the Commission on the Limits of the Continental Shelf' in M. Nordquist, J.N. Moore, and T. Heidar (eds), *Legal and Scientific Aspects of Continental Shelf Limits* (Brill 2004) 251–262, at 258.

[173] *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya) (Judgment)* [2021] ICJ Rep. 206, at 276.

[174] M. Jaureguy, 'British Government Expands Presence in Argentine Sea Near Malvinas' (6 March 2024) Buenos Aires Herald, available at <https://buenosairesherald.com/world/international-relations/british-government-expands-presence-in-argentine-sea-near-malvinas> (accessed 22 November 2024).

[175] Convention on the Conservation of Antarctic Marine Living Resources (entered into force on 7 April 1982), available at <https://documents.un.org/doc/undoc/gen/n12/498/91/pdf/n1249891.pdf> (accessed 22 November 2024) ('CCAMLR').

[176] Jaureguy, 'British Government Expands Presence in Argentine Sea Near Malvinas'.

dress up as environmentalists in the South Georgias, but allow indiscriminate fishing in the Malvinas, looting the resources with a high environmental impact' [177] exemplifies how environmental justifications can serve as a strategic vehicle for asserting dominance over contested maritime areas, further entangling legal determinations of overlapping entitlements in a web of colonial legacies and geopolitical manoeuvring.

5. Reimagining or Rejecting Self-Determination through 'Settler Indigeneity'? Oceanic and Territorial Claims in the Falklands/Malvinas

The UNCLOS framework, when applied to the Argentine claims in the Falklands/Malvinas dispute, highlights the tension between historically-rooted territorial entitlements and the evolving maritime entitlements of postcolonial international law. However, grasping the totality of this situation requires scrutinising British self-determination arguments in a similarly relational capacity. If the UK's claims regarding the Islanders' right to self-determination is to be equitably interpreted via a broad invocation of *ex aequo et bono*, then one major consideration must be centred. In contrast to equity's innate normatively-guided flexibility – a flexibility central to the operation of the law of the sea (especially as it requires good faith dispute resolution via Article 300 of UNCLOS)[178] – self-determination is one of the greatest exemplifications of law's recourse to uncompromising rigidity, as codified in the UN Charter Article 1(2) and famously proclaimed through GA Resolution 1514(XV) (1960).

After all, if purportedly reasonable or equitable considerations are presumptively unbound in their ability to limit or delay the ability of those entitled to the right of self-determination to gain independence, then this right contains very little in the way of substance.[179] While this rigidity enables the UK to stake its claims over the Falklands according to an abstracted logic of 'all or nothing', examining the totality of circumstances in the name of assessing possible solutions *ex aequo et bono* allows for greater engagement with how this situation differs from most applications of the right to self-determination. This is especially

[177] Ibid.
[178] K. O'Brien, 'Article 300: Good Faith and Abuse of Rights' in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck/Hart/Nomos 2017) 1937–1943.
[179] UNGA Res. 1514(XV), 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960), at 3 ('[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence').

important given how the question of who is a 'people' entitled to independence via self-determination is ultimately determined by the will of the international community writ large.[180]

When assessing this point in relation to how the UN has not recognised the Islanders as a 'people' despite the Islands being on its list of non-self-governing territories since 1946, one must consider how British lawyers justified claims to the Falklands prior to their recognition of the right to self-determination.[181] For these lawyers, the principal doctrine regarding title to the Falklands (as well as title to much of the rest of the British Empire) was 'effective occupation' – a claim to land that linked the 'improvements' undertaken by its occupiers to their ability to claim rights over it.[182] Writing in 1948, according to Humphrey Waldock (later President of the ICJ) this doctrine countered Argentine insistence on *uti possidetis* for,

> [i]t is […] very questionable, in view of the insistence on effective occupation in the nineteenth century, whether the doctrine of *uti possidetis* under any interpretation could compensate for the complete failure of Argentina […] to display any form of state activity […] in the period following 1810.[183]

While Argentine rejection of Britain's occupation argument rationale precludes its consideration, this matter raises the question of whether effective occupation enables a settler community to claim status as a 'people' entitled to self-determination. With no provision of international law explicitly barring this prospect – absent situations where a settler population denies the collective right of a territory's preexisting population[184] – the non-recognition of the Falkland Islanders' right to self-determination at the UN ultimately hinges on the strength of

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[180] B. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press 1999), at 201; see also *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12, at 59.

[181] On the Sudan in the 1950s as the genesis of British recognition of self-determination as a 'legal' right, see O. Chasapis Tassinis and S. Nouwen, '"The Consciousness of Duty Done"? British Attitudes Towards Self-Determination and the Case of the Sudan' (2019) British Yearbook of International Law 1–56.

[182] The largest most populous territory ever claimed by 'occupation' occurred through the UK's colonisation of Australia, see J. Rudnicki, 'The Doctrine of Occupation and the Founding of Australia' (2017) 23(2) Fundamina: A Journal of Legal History 81–93.

[183] C.H.M. Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) 25(1) British Yearbook of International Law 311–353, at 326.

[184] Examples include Rhodesia and Apartheid South Africa, see Roth, *Governmental Illegitimacy in International Law*, at 234–250; see UNGA, 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States' (24 October 1970) UN Doc. A/8018 ('Every State […] [must be] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour').

Argentina's underlying claim of territorial integrity via *uti possidetis*.[185] This of course invites inquiry into the questionable status of Argentine claims, which, as detailed above, only become more convoluted if viewed from the perspective of the law of the sea and UNCLOS provisions regarding continental shelves, namely Article 76.

How might approaching this matter *ex aequo et bono* offer an escape from this persistent circularity? Here, if adopting an equitable lens in light of the uniqueness of this situation can decentre self-determination's rigid application, then what must be considered is the substance of the Islanders' British-backed claims and how a particular concept of spatiality both produces and is produced by this legal formulation. On this point, the connected, yet distinguished, dynamics of land and sea are vital. From the British perspective, the fact that the Islanders have maintained being British despite being separated from Britain for so long is a testament to their unique character as a 'people'.[186] However, despite the presumption of maritime distance embedded in this view, to claim the Islanders are entitled to self-determination on this basis involves transposing terrestrial logics onto vast swarths of ocean, a transference heavily complicated by the ocean's distinct legal character under UNCLOS.[187]

In effectuating this process of spatial transference, the Islanders' long histories of land-based 'improvement' through settlement retrospectively justified their right to self-determination.[188] Then, once this right was realised through continued association with the UK as a British Overseas Territory, this justified the seaward extension of an EEZ as guaranteed under UNCLOS Part V (Articles 55–76). With this maritime extension, an economy that was long-centred on sheep herding turned to commercial fishing with the prospect of oil exploration presenting an ever-present hope for greater prosperity.[189] Paradoxically, this extraction of resources is paired with an ethos of conservation and the facilitation of marine science research whereby local identification with the Falkland Islands' pristine natural environment is taken as

[185] J. Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge University Press 2018), at 241.
[186] In the characterisation of A.D. Parsons, the British Security Council Representative in 1982, '[T]he people speak English and have their own, British-style culture. They are not Argentine and have expressed the wish not to be subject to alien domination'. 'Document S/14988: Letter Dated 20 April 1998 from the Representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council' in *Security Council Official Records: The Thirty-Seven Year Supplement for April, May, and June 1982* (United Nations 1984), at 34.
[187] See generally UNCLOS Part VII on High Seas Freedoms.
[188] Blair, *Salvaging Empire*, at 58–71.
[189] Ibid., at 105–110.

further evidence of the Islanders' realisation of their right to self-determination.[190] Highly consequential to the dispute with Argentina, even data collected from tracking penguin migration in this context of scientific research can potentially bolster rival territorial assertions – especially if one considers the prospects of information acquisition regarding claims to the Continental Shelf.[191] In taking an aggregate view of this situation, for James Blair, by coupling the exploration of presumptively boundless resource/knowledge frontiers with an irreducibly localised sensibility, the condition of the Falkland Islanders is one of 'settler indigeneity'.[192] As a matter of international legal consequence, British recognition of this 'settler indigeneity' generates the argument that any interference with territorial entitlement in the Falklands – including the all-important EEZ – in the name of a settlement with Argentina would constitute a non-consensual partition in violation of the Islanders' right to self-determination – a right entrusted to British guardianship and protected under both UNGA Resolution 2625 and customary international law.

Taking a broad view of the situation in the name of a wide-spanning equitable appraisal can certainly expose how 'settler indigeneity' notions substantively produce the UK's self-determination arguments. Conversely, through this same equitable lens we can enquire as to how, from another perspective, 'settler indigeneity' can be viewed as an afront to the very idea of self-determination. Once again, it is vital to centre social constructions of space towards this end. Returning to the doctrine of effective occupation, what for Britain and other colonial empires was the grand harbinger of progress as it concerned the improvement of space, was, for those whose societies did not conform to Eurocentric ideals of 'progress', a justification for their dispossession and subalternity within the international legal order.[193] On this basis, as Henan Hu has argued, given how title by occupation occurred through State recognition of individual rights to accumulate 'unowned' lands in the context of imperial expansion, this individual-focused doctrine cannot be sustained within a system of international law premised on the exclusive rights of States.[194] It was this latter system of State exclusivity that became universalised as decolonisation via the right of nations to self-determination and ended

[190] Ibid., at 152–154.
[191] Ibid., at 164.
[192] Ibid., at 193–195.
[193] R. Smandych, 'Colonialism, Settler Colonialism, and Law: Settler Revolutions and the Dispossession of Indigenous Peoples Through Law in the Long Nineteenth Century' (2013) 3(1) Settler Colonial Studies 82–101. On debates/contestations in this context, see A. Fitzmaurice, *Sovereignty, Property, and Empire, 1500–2000* (Cambridge University Press 2015), at 232–242, 246–255.
[194] H. Hu, 'The Doctrine of Occupation: An Analysis of Its Invalidity Under the Framework of International Legal Positivism' (2016) 15(1) Chinese Journal of International Law 75–138.

Europe's overseas empires. From here arises a paradox regarding the Falkland Islanders' claims to self-determination and the UK's support thereof – how can the doctrine of occupation, which historically denied non-European agency, ever provide the right of self-determination (the great repudiation of colonisation) to European-descended beneficiaries of imperial expansion?

This paradox is even more relevant if one considers how the UK's mechanism for realising the Islanders' self-determination is the British Overseas system. As Hakim Yusuf and Tanzil Chowdhury have shown, when viewed in its totality, this system maintains numerous features of colonial constitutionalism – including numerous provisions of overarching executive prerogative capable of vitiating local decision making.[195] While this on its own would complicate British claims regarding the sacrosanct character of the Islanders' self-determination, there remains the additional complication of how the UK has deployed the British Overseas Territory system in capacities at odds with self-determination on multiple levels.[196] Infamously, there was the situation of the Chagos Islands that were separated from Mauritius in 1965 as a precondition for the latter's independence, and then rendered a British Overseas Territory whose inhabitants were forcibly removed to make way for Britain's lease of the new British Indian Ocean Territory to the US for its Diego Garcia Airbase.[197]

The contrast of this situation to the Falkland Islands is twofold. On one level, as the ICJ ruled in its 2019 Advisory Opinion, by separating the Chagos Islands as an independence precondition, they violated the right to self-determination held by Mauritius indivisibly and were thus obligated to return the Islands.[198] In effectuating this separation, the British did in the Indian Ocean something they would likely consider an unlawful act of partition if undertaken in relation to the Falkland Islands and/or the surrounding waters they declared as its EEZ.[199] On another level, the expulsion of the Chagossians invited comparison with the

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[195] H. Yusuf and T. Chowdhury, 'The Persistence of Colonial Constitutionalism in British Overseas Territories' (2019) 8(1) Global Constitutionalism 157–190.
[196] See A.J.G. Knox, 'Self-Determination for Small Islanders: Britain's Handling of the Rights of Falklanders, Diego Garcians and Banabans in the Atlantic, Indian and Pacific Oceans' (1986) 11(21) Canadian Journal of Latin American and Caribbean Studies 71–92.
[197] T. Chowdhury, '"Executive Robbery": UK Public Law, Race, and "Regimes of Dispossession" in the Chagos Archipelago' (2024) 51(1) Journal of Law and Society 57–81.
[198] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep. 95, at 138–139; see also V. Kattan, 'Self-Determination During the Cold War: UN General Assembly Resolution 1514 (1960), the Prohibition of Partition, and the Establishment of the British Indian Ocean Territory (1965)' (2019) 23(1) Max Planck Yearbook of United Nations Law 161–183.
[199] Interestingly, in the ICJ submissions, the 'separation' of the Chagos Islands was only referred to as a 'partition' by the Netherlands. Kattan, 'The Persistence of Partition', at 2.

Falkland Islanders that the UK went to great lengths to protect – a divergence not lost on Argentina.[200] British authorities claimed that due to being transient plantation labourers – despite their multigenerational presence – the Chagossians could not constitute a 'people' the way the Falkland Islanders did.[201] Beyond explicit racial hierarchy, justifying this distinction could likely only be done through implicit recourse to a construction of 'settler indigeneity'. Here, as property owners capable of 'improving' the land through 'effective occupation', the Falkland Islanders were able to acquire a 'peoplehood' foreclosed to the Chagossians in a manner inseparable from racialised colonial domination.

Given these details, it is very difficult for many in the postcolonial world to accept the self-determination arguments advanced by the UK on behalf of the Falkland Islanders. This was the case in 1982 as Argentina – despite its violent settler colonial heritage, influences of European fascism, rule by a repressive anti-communist/pro-free market dictatorship, and close links with the sworn enemies of Third Worldism in the form of Israel and Apartheid South Africa[202] – was able to attain no small degree of success in presenting itself as a champion of anticolonialism.[203] What was true in 1982 is arguably even more true today, given how UNCLOS has been invoked following the war via the declaration of an EEZ around the Islands. This vastly increased the scale of the Islanders' performance of their 'settler indigeneity'. Here, much like with self-determination, a legal regime once hailed as a substantial victory for a Global South seeking to equitably reshape a post-imperial world was – following an imperial nostalgia-mobilising war – retooled by a victorious former imperial power in the form of the UK. This is compounded by the fact that this same onetime empire defined itself by violently promoting freedom of the seas in the name of liberal superiority,[204] but now seeks to enclose remotely located maritime space through selectively invoking self-determination, a universal

[200] C.R.G. Murray and T. Frost, 'The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism' in S. Allen and C. Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018) 147–174, at 152.
[201] Ibid., at 153–154.
[202] See F. Finchelstein, *The Ideological Origins of the Dirty War: Fascism, Populism, and Dictatorship in Twentieth Century Argentina* (Oxford University Press 2014); B. Bahbah, 'Israel's Military Relationship with Ecuador and Argentina' (1986) 15(2) Journal of Palestine Studies 76–101, at 86–91; D. Tothill, 'In Argentina at the Time of the Falklands War' (2001) 12(3) Diplomacy and Statecraft 1–38.
[203] M. Paranzino, 'Anti-Colonialism Versus Self-Determination: International Alliance Dynamics in the 1982 Falklands/Malvinas War' (2023) 43(1) International Journal of Military History and Historiography 108–136; S.P. Krepp, 'Between the Cold War and the Global South: Argentina and Third World Solidarity in the Falklands/Malvinas Crisis' (2017) 30(60) Estudos Históricos 141–160.
[204] See B. Semmel, *Liberalism and Naval Strategy: Ideology, Interest, and Seapower During the Pax Britannica* (Allen and Unwin 1986).

principle that the British have a long record of disregarding. The question of oil exploration in these contested waters threatens whatever coexistence was once possible. To quote Grace Livingstone:

> [f]rom an Argentine perspective, Britain is a former colonial power staking claim to hundreds of miles of distant ocean and exhausting natural resources within it. Latin American nations since colonial times have been suppliers of primary commodities to richer nations, so the question of resource extraction has particular historical sensitivity.[205]

While only marginally reflected in the framing of the Falklands/Malvinas dispute as a terracentric clash of territorial integrity versus self-determination claims, such maritime realities would have to be at the heart of any possible effort to resolve the dispute *ex aequo et bono*.

6. Equity Against Extractivism

Thus far we have mapped international law's inadequacy when making the case for *ex aequo et bono*'s relevance to the Falklands/Malvinas dispute. But what would a solution on this equitable basis actually look like? Were a more flexible approach adopted towards the principles of territorial integrity and self-determination – both of which are strongly asserted by Argentina and Britain – numerous possibilities could emerge. One option would be the adoption of an equitable treaty arrangement for distributing maritime boundaries and natural resource entitlements, akin to what occurred between Australia and East Timor.[206] Such a measure, as it would restructure the Anglo–Argentine relationship in the region, could draw inspiration from the practice of bilateral investment treaties (BITs), which are increasingly seen as mechanisms for balancing state sovereignty with equitable resource-sharing.[207] In this context, the creation of cooperative measures could be the grounding for an amicable solution regarding the contentious issue of sovereignty, a solution that would, if *ex aequo et bono* were allowed to operate, present an alternative reality to the status quo of entrenched geopolitical claims. A second possibility would be a return to sovereignty leaseback proposals presented in earlier Anglo–Argentine negotiations whereby sovereignty would be transferred to Argentina

[205] Livingstone, 'Oil and the Falklands/Malvinas', at 98.
[206] D. Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement' (2020) 31(1) European Journal of International Law 321–344.
[207] M. Benatar, 'Applying International Investment Law to Disputed Maritime Zones: A Case Study of the Falklands (Malvinas)' (2015) 28(1) Hague Yearbook of International Law 65–93.

with the administration of the Islands leased to the UK in perpetuity.[208] A third, related option would be one of condominium whereby the UK and Argentina would exercise joint sovereignty over the Islands.[209] This concept mirrors examples of independent sovereign States stemming from former hierarchical imperial structures, as seen in Andorra,[210] Sudan,[211] and Vanuatu.[212] For small islands, which often possess reduced State infrastructure, such as the Falklands/Malvinas, a condominium model may offer a pragmatic and balanced alternative.

However, if the equitable approach undertaken here is to be a radical one – and this is precisely what *ex aequo et bono* allows for – the resolution need not be confined to the State-centric logics embedded within the above-highlighted proposals. Rather, from a more radical perspective, the situation can be framed in a manner where, contrary to the assumptions of international law, it is not sovereignty that is the 'reality behind reality', but rather the material conditions of the environment itself that, in the Falklands/Malvinas, reveal the indispensability of connections between land and sea. When viewed through this lens, a common cause emerges between the Argentinians, who see the British as a neo-imperial force of extractivism and the Islanders dedicated to preserving the 'Falkland Island way of life'. Here it must be implored what large-scale for-profit offshore oil exploration/production might do to the greater South Atlantic – whether enabled by Britain, Argentina, or the two States in cooperation. After all, though the Islanders have long been captivated by the prospect of benefiting from oil extraction according to a 'Norwegian model' of social welfare investment, ideals in this domain clash with the reality that this would require labour and infrastructure that simply exceeds the Islands' current capacity.[213]

On this point, through a radically equitable lens, we might consider the track record of powerful oil companies devastating local ways of being throughout the world in the name of

[208] Livingstone, 'Oil and the Falklands/Malvinas', at 93.
[209] See V. Bantz, 'The International Legal Status of Condominia' (1998) 12(1) Florida Journal of International Law 77–152.
[210] See T.C. Perkins, 'Edification from the Andorran Model: A Brief Exploration into the Condominium Solution on the International Stage and Its Potential Application to Current Land Disputes' (2014) 21(2) Indiana Journal of Global Legal Studies 643–666.
[211] Bantz, 'The International Legal Status of Condominia', at 118.
[212] After gaining independence in 1980, the country underwent a name change and is now known as Vanuatu. See J. Jupp and M. Sawer, 'The New Hebrides: From Condominium to Independence' (1979) 33(1) Australian Outlook 15–26; Bantz, 'The International Legal Status of Condominia', at 150.
[213] Blair, *Salvaging Empire*, at 110–113, 121–125.

building profit-generating extraction capacities.[214] As such, this prospect of developing oil-extraction capacity through existing practices of corporate capitalism does not bode well for the Islanders who have made environmental stewardship central to their self-determination claims.[215] This is to say nothing of how an offshore oil disaster could prove devastating not only for the Islands, but also for the Argentine mainland in a manner that would threaten any ongoing Anglo–Argentine relationship. The fact that these realities have not yet manifested is due in part to the reluctance of large oil companies to involve themselves in the region given the uncertainties of the ongoing sovereignty dispute.[216] While this de facto limitation on extraction might be a blessing for some, so long as sovereignty is contested, this situation is nevertheless precarious. After all, a major extractive operation willing to risk operating under conditions of contested sovereignty might be similarly willing to risk grave ecological harm. Only with a comprehensive settlement can these many considerations of extraction be considered in equitable terms.

While the material realities detailed above should be prominent in any comprehensively equitable resolution, we have thus far dealt with the 'what' and 'why' regarding *ex aequo et bono* as a means of channelling a radical approach to equity in this situation. It makes sense to conclude by considering 'who' might be positioned to craft such a resolution. Here, it is worth revisiting a statement made by Kenya's Ambassador Charles Maina during the UN debates on the 1982 war. In addition to deeming Argentina's anticolonial rhetoric hypocritical, especially given its non-support for the then ongoing struggle against Apartheid in South Africa, Maina stated that '[w]hatever claims Argentina might have had against the British based on history and the imperialism of the past may be settled without treating the people of the Falkland Islands like chattel in real estate'.[217] While perhaps motivated by the fact that Somalia was lodging historical title claims against Kenya,[218] Maina's words are nevertheless extraordinary given his representation of a nation that had suffered immensely under British colonialism.[219]

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[214] See M. Watts, 'A Tale of Two Gulfs: Life, Death, and Dispossession Along Two Oil Frontiers' (2012) 64(3) American Quarterly 437–467; A. Hanieh, *Crude Capitalism: Oil, Corporate Power, and the Making of the World Market* (Verso 2024).
[215] Blair, *Salvaging Empire*, at 196–197.
[216] Livingstone, 'Oil and the Falklands/Malvinas', at 100–101.
[217] Quoted in T. Franck, 'The Strategic Role of Legal Principles' in A. Coll and A. Arend (eds), *The Falklands War: Lessons for Strategy, Diplomacy, and International Law* (Routledge 1985) 22–34, at 26.
[218] Ibid., at 26.
[219] C. Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (Pimlico 2005).

Through revisiting Maina's statement, it becomes clear that equitable perspectives on the Falklands/Malvinas are possible should one step beyond the rival projects of Argentine and British settler colonialism that sustain contention in the South Atlantic. This is to say nothing of how rival desires for resource extraction in the region might be reframed by those who have experienced firsthand the so-called 'resource curse'.[220] Given these circumstances, however difficult it may be to imagine the UK and Argentina agreeing to submit their dispute to a third party (let alone one rendering a decision *ex aequo et bono*), there is nevertheless value in imagining what it might look like if they did. In concluding his 1986 'anti-textbook' on international law (a totalising critique of the field's core presumptions) with a study of the Falklands/Malvinas, Anthony Carty stated that, when considering possible futures 'the international lawyer, as a writer, does not have to remain silent simply because no tribunal has spoken or because, if one were to, it could not invent "compelling" reasons where none otherwise existed'.[221] As we have sought to show throughout this piece, there are indeed compelling reasons to revisit the Falklands/Malvinas dispute, particularly in light of how existing international legal understandings – relying on questionable assumptions of territorial integrity and questionable assertions of self-determination – durably reproduce underlying contentions. The ability to equitably consider marginalised matters of time, space, and identity through a broad invocation of *ex aequo et bono* is perhaps as good a means as any when thinking beyond the present impasse in the South Atlantic.

[220] See R.A. Badeeb, H.H. Lean, and J. Clark, 'The Evolution of the Natural Resource Curse Thesis: A Critical Literature Survey' (2017) 51(1) Resources Policy 123–134.
[221] Carty, *The Decay of International Law*, at 176.