

THE MALVINAS/FALKLANDS BETWEEN HISTORY AND LAW

REFUTATION OF THE BRITISH PAMPHLET “GETTING IT RIGHT: THE
REAL HISTORY OF THE FALKLANDS/MALVINAS”

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¹ Official Seal of the Political and Military Commandment of the Malvinas and Adjacent Islands used by Luis Vernet during Argentine administration

To Dora Malvina and Olivia Lea

To Santiago

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Introduction

In 2008, Graham Pascoe and Peter Pepper, two British authors who are not academics, published both in English and in Spanish a pamphlet entitled “Getting it Right: the Real History of the Falklands/Malvinas”. Since then, a variety of versions of this pamphlet have been published, some abridged, and some not; the most recent version, officially distributed by the British government in the United Nations Decolonization Committee in June 2015, was pompously entitled: “*False Falklands History at the United Nations. How Argentina misled the UN in 1964 – and still does*”. These pamphlets are widely disseminated on British websites devoted to the Falklands/Malvinas issue. The arguments raised in these texts have been taken up by official British notes in the United Nations, as well as by British petitioners before the UN Decolonisation Committee. In general, it is the first time in the history of this longstanding conflict that these arguments and alleged “facts” have been advanced, and they flagrantly contradict the positions adopted by the colonial power throughout the long decades this dispute has lasted. This simply constitutes an attempt to rewrite history. That is why we believe it is important to rectify the mistakes, misrepresentations and fallacies contained in what has already become an officious British document.

The British pamphlet has a double intention: to attack the solid historical-legal arguments which prove Argentine sovereignty, and to convince the reader that the islands are inhabited by a multinational population entitled to the right of self-determination. Paradoxically, in the attempt to undermine the Argentine thesis, “Getting it right...” recognises a series of facts that official British propaganda has attempted to conceal for decades. Traditionally, for the United Kingdom, the key dates in this dispute were: 1592, the year in which John Davis, a British sailor, allegedly discovered the islands; 1690, when Captain Strong, another sailor, supposedly set foot on the islands for the first time; 1766, year of the British settlement at Port Egmont; and 1833, year of the British occupation (and the consequent eviction of Argentina). In trying to refute Argentina’s arguments, the

authors of the British pamphlet point out that there were “Portuguese” sailors who discovered the islands and that in the 1540 a Spanish ship moored at the islands for several months – many years before the purported British “discovery”. They also admit that the islands were effectively occupied by Spain until 1811, that David Jewett, a representative of the government of Buenos Aires, took control of the islands in 1820, and that the current settlement in the islands was founded by Luis Vernet. Obviously, these admissions are accompanied by a series of inaccuracies and distortions, which the present work shall examine.

In the attempt to justify the new image portrayed by the British government of a “multinational” population in the Falklands/Malvinas , the authors of “Getting it right...” acknowledge that in 1833, at the moment the British occupied Port Luis or Soledad, the population of the Falklands/Malvinas was Argentine, and ruled by Argentine authorities. In reality, never in history had there been the slightest trace of a British presence in Soledad/East Falkland island. The pamphlet’s authors focus their efforts on explaining that only the military garrison was expelled, and not the Argentine inhabitants. This spurious argument will be also examined in detail.

Pascoe and Pepper’s pamphlet also brings to light another point. In attempting to refute the Argentine thesis, they highlight its consistency: Argentina’s position has remained exactly the same since the time of independence. On the contrary, the pamphlet shows up all the contradictions of the British thesis and follows a simplistic reasoning that as the islands “are not Argentine”, then they should be British. It is more than sufficient to compare the arguments Argentina invoked at the time David Jewett took possession of the islands in 1820 and in the 1829 Decree for the creation of the Political and Military Command of the Malvinas Islands and Adjacencies with the arguments it raises at present to prove that they have been consistent throughout: the arguments are simple and always the same. It is instead undeniable that, comparing the arguments submitted by the British government when it first notified Argentina of its claim to sovereignty with the positions it currently maintains, these have changed significantly over time – a telling sign of their legal weakness. Let us briefly recall both positions.

Argentina's position is clear. The islands are Argentine by virtue of its succession to Spain's rights, the concrete display of sovereignty by the new South American nation from the beginning of the process of independence in 1810 until 1833, year of the eviction by Britain, and the lack of Argentine consent to the British occupation since 1833. The succession to Spain's rights is justified by the recognition of Spanish sovereignty by the main European maritime powers, by Spain's continuation of France's right of first occupant (1764), and by its continuous exercise of sovereignty over the islands until 1811 – an exclusive exercise between 1774 and 1811.

On the contrary, the British position has been defective and made in bad faith from the outset. In its protest of November 19th, 1829 against the creation of the Political and Military Command of the Malvinas/Falkland Islands by the government of Buenos Aires, the British government based its claim of sovereignty on discovery, the subsequent occupation of the islands, the restoration of the British settlement at Port Egmont by Spain in 1771 and on the fact that the withdrawal of that settlement in 1774 did not amount to a waiver of its purported rights. In order to justify such a position, the British note dated November 19th, 1829 points out that British insignia were left behind on the islands together with the intention of resuming the occupation in the future. Pascoe and Pepper's pamphlet itself confutes the thesis of British discovery, which, what is more, could not alone constitute a title to sovereignty. The subsequent occupation was not one, as when the British settled at Port Egmont, France had already been occupying the islands for two years. The British government's note of 19 November 1829 hid not only the fact that the return by Spain of Port Egmont in 1771 was effected preserving Spanish sovereignty, but also the lack of any objection to Spain's uninterrupted and exclusive presence on the islands ever since Britain abandoned Port Egmont. It also does not take into account Spain's destruction of buildings and its removal of British insignia from Port Egmont, to which there was no reaction from London.

It is no wonder that in the face of the extreme weakness of the British claim, Pascoe and Pepper's pamphlet seeks out new arguments. The most original of these is Argentina's supposed waiver of its claim by entering into the Southern-Oran Treaty in 1849, thanks to which the British blockade of the Río de la Plata, which affected both Argentina and Uruguay, came to an end. The present work will provide a detailed refutation of this argument. Suffice it to note that from 1850 to 2013, the United Kingdom never invoked such a waiver – despite an abundance of opportunities to do so. Not a word was spoken by the British government in any bilateral diplomatic exchange or in any international setting in which the parties have set out their opposing positions on the question of sovereignty. Not a single internal comment exists by colonial officials or by the Foreign Office bringing attention to this alleged waiver of a claim to sovereignty. For example, the British Embassy's note to the Argentine Minister of Foreign Affairs issued on January 3rd, 1947 explains the British point of view in the following manner:

The Falkland islands have been sustainably under the effective British administration for more than a century. It is true that during that period, from time to time, the Argentine government claimed its sovereignty of the islands and made reservations in that respect. Likewise, during such period, Her Majesty's Government in the United Kingdom in each occasion stated that there had no doubt about Her Majesty's sovereignty rights of these islands.²

This was Britain's position until 2013: it had never before invoked the existence of a treaty through which Argentina gave up its right to sovereignty, something any State would invoke in the face of a claim going against something stipulated in an agreement.

It is also naive to claim that Vernet's settlement of the 1820s was authorised by Britain. This vain attempt to distort history contributes to highlighting an undisputable truth: the first successful effort to bring civilisation to the islands and to inhabit them was made by Argentina. Previous European presence on the islands had an essentially military

² In Dagnino Pastore, Lorenzo, *Territorio actual y división política de la Nación Argentina*, Buenos Aires, UBA, Facultad de Ciencias Económicas, 1948, p. 228 [this is a translation from Spanish].

objective.³ This work will readily show how unfounded this new British argument is – an argument never previously raised throughout the over 180 years this dispute has lasted. This site is composed of six sections which follow, as far as possible, the order of the arguments developed in the British pamphlet “Getting it right...” The responsibility for the contents of this site falls entirely and exclusively to the authors, who received no direction, grant or remuneration whatsoever.

³ The exception to this was Bougainville’s initial plan, which was, however, unsuccessful: as we shall see, his settlement was transferred to Spain as a consequence of France’s recognition of Spanish sovereignty.

Chapter I

Papal bulls and discovery. British recognition of Spanish sovereignty

This first section tackles Pascoe and Pepper's analysis of papal bulls, the Tordesillas Treaty and the discovery of the Falklands/Malvinas Islands.⁴ These are in reality only secondary issues, because the essence of the Spanish, and consequently Argentine, claim is based on other arguments, such as: 1) recognition by maritime powers – including England – that the region, including the islands, belonged to Spain; 2) the right of first occupancy and 3) the continuous, public and peaceful exercise of sovereignty until 1811.

A. Papal Bulls and the Tordesillas Treaty

The grant of pontifical letters, known as papal bulls, was a standard procedure in the European Late Middle Ages in accordance with the public law of the time. On a variety of grounds, Popes had granted titles of sovereignty with some frequency, from the donation of all the islands in the known world made by the Roman Emperor Constantine to the obligation of Christian sovereigns to spread the faith throughout the world. Pascoe and Pepper maintain that the Bull *Inter Caetera* issued by Pope Alexander VI in 1493 (they do not mention the Bull *Dudum si Quidem* nor the Bull *Ea Quae* issued by Pope Julius II) is in violation of the principle of classic Roman law “*nemo dat quod non habet*” (“nobody can give what they do not have”). On the basis of this assertion, they affirm that the Pope did not have the authority to grant something that did not belong to him.⁵ Nevertheless, this was the practice followed by all Christian sovereigns before the schism: in 1155, England benefitted from the Bull issued by Adrian IV, which granted Henry II the dominion of Ireland. It is also worth recalling the grant of Corsica and Sardinia to James II

⁴ Pascoe, Graham and Pepper, Peter, “*Getting it right: the real history of the Falklands/Malvinas*”, 2008, pp. 3-6

⁵ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 4.

in 1297 and the Bulls granted to the kings of Portugal in the second half of the XV century, which secured their conquests in Africa.

The British pamphlet asserts that papal bulls were not accepted by the kings of England and France. However, they fail to point out that, at the moment of their issuance, the kings of those countries were Catholic and recognised the Pope's authority over Christian princes, making the bulls opposable to the kings of Spain and Portugal as well as France and England. Papal intervention in international conflicts and the distribution of territories had become a custom of European public law, and was generally accepted and recognised by those who viewed the Pope as the highest authority in the Christian world.

England's responses to Spanish and Portuguese claims were based on the geographical application of the Bull *Inter Caetera*, and not on its legitimacy. In London's opinion, the Bull did not include North America. This becomes apparent from the Letters Patent granted by Henry VII to Gaboto and the legal justification of the discoveries made in the northern portion of the New Continent.⁶ It took almost a century for Queen Elizabeth of England to contest the papal Bull as a "donation", despite recognising Spain's sovereignty over the regions in which it had established settlements or made discoveries.

The authors of the British pamphlet criticise the Tordesillas Treaty of 1494 between Spain and Portugal for its disregard of the rights of the Incas, Aztecs, Mayas and other peoples existing at the time.⁷ This question clearly has nothing to do with that of the Falkland/Malvinas Islands. The use of this argument to justify a purported British right to the New World is intriguing, considering that Great Britain has proven to be the foremost colonial power of all time, subjugating entire populations in all four corners of the world. The issue of the Falklands/Malvinas itself is evidence of Britain's contempt for the rights of a newly independent nation in South America.

⁶ Cf. Mamadou, Hébié, *Souveraineté territoriale par traité. Une étude des accords entre puissances coloniales et entités politiques locales*, Paris, PUF, 2015, pp. 58-73.

⁷ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 3- 4.

The Tordesillas Treaty was a bilateral agreement which England did not object to at the time of its entry into force, and was endorsed by the Bull *Ea Quae* issued by Pope Julius II in 1506. Its object was to settle disputes which existed between the contracting parties. Therefore, the fact that the South Georgia and South Sandwich Islands are located to the east of the line established by the Tordesillas Treaty is irrelevant in a dispute between Argentina and the United Kingdom.

The British pamphlet unsuccessfully attempts to undermine the importance of Britain's recognition of Spanish sovereignty over the southern regions of the American continent. Spain considered those lands and seas to rest exclusively under its competence, and only authorised other nations to settle or navigate the regions by agreement in conventions. The network of treaties entered into by Spain and England through which the latter recognised the exclusive rights of the Spanish Crown over this portion of the globe, including the Treaty of Madrid (1670), the Treaty of Utrecht (1713), and the Treaty of San Lorenzo del Escorial or Nootka Sound (1790), will be examined below.

B. Pascoe and Pepper acknowledge that England did not discover the Falklands/Malvinas

It is well known that States, and the majority of jurists, in the 18th and 19th centuries did not consider mere discovery sufficient to constitute a title of sovereignty. Nevertheless, the British government made its alleged discovery of the islands into one of its main arguments. This argument was made in protest at Argentina's exercise of sovereignty, and has continued to be raised until the present day. However, discovery only meant an inchoate title, which had to be perfected by effective occupation as long as the region in question was not under the authority of another power.⁸ This argument cannot be invoked by the United Kingdom with respect to the Falklands/Malvinas.

⁸ Arbitral Award in the *Island of Palmas case (Netherlands, USA)*, *United Nations, Reports of International Arbitral Awards*, Vol. II, pp. 829-971

Pascoe and Pepper recognise that the Falklands/Malvinas were not discovered by English sailors. Like another pamphlet published by the so-called (British) Government of the islands,⁹ they merely maintain that the alleged sighting of the islands by John Davis in 1592 was the first to be published. However, they recognise that many decades before, Iberian sailors sighted the islands, with Spanish sailors spending months in the Falklands/Malvinas, and that the islands already appeared on a variety of maps.¹⁰

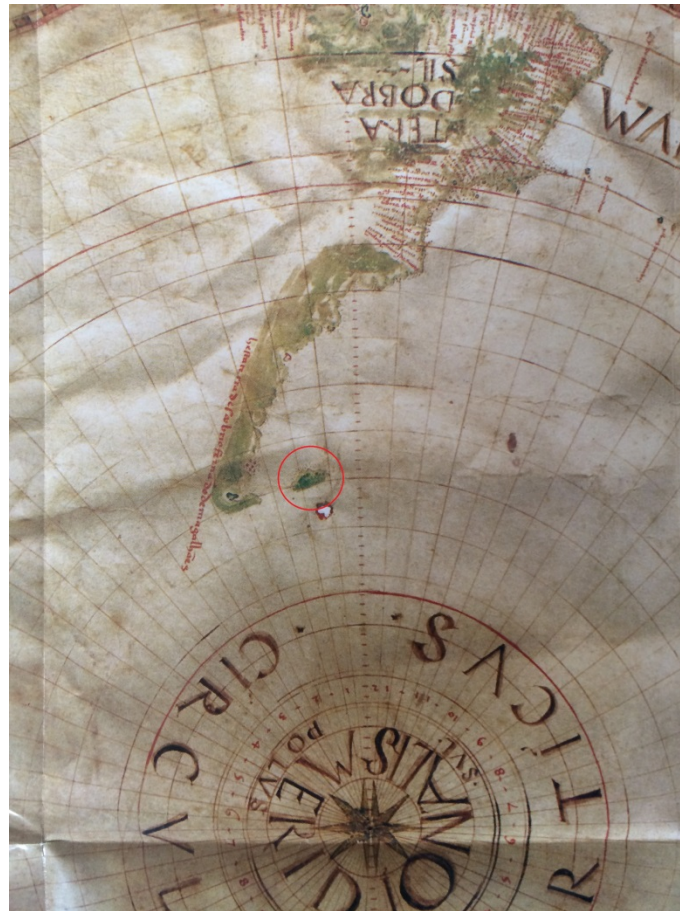


Figure 1 Pedro Reinel's map of the year 1522 where the Islands are observed.

⁹ See section “Our History” and the pamphlet “Our Islands, our Home” on the official website of the “Falkland Islands Government”: <http://www.falklands.gov.fk/our-people/our-history/>

¹⁰ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 3- 4.

The pamphlet issued by the British “Government” of the islands goes even further and continues to maintain that Richard Hawkins was the first to claim the islands for the British Crown. It is worth remembering that Hawkins’ supposed discovery/claim was not published until 1622 (28 years after the alleged event). Let us examine the fantastic “description” Hawkins himself made of his route:

The wind continued good with us, till we came to forty-nine degrees and thirty minutes, where it tooke [took] us westerly. (...) The second of February, about nine of the clocke [clock] in the morning, we discovered [discovered] land, which bare south-west of us, which wee [we] looked not for so timely; and coming nearer and nearer unto it, by the lying, we could not conjecture what land it should be; for we were next of anything in forty-eight degrees. (...) The land is a goodly champion country, and peopled. We saw many fires, but could not come to speake [speak] with the people. It hath [has] great rivers of fresh waters. It is not mountainous, but much of the disposition of England, and as temperate.¹¹

It is simply impossible for this description to correspond to the Falklands/Malvinas, which are located to the east of the continent: Hawkins was heading south-west of San Julián, that is to say, towards the continent. He was at latitude 48° south, and the Falklands/Malvinas are located at 52° south. Finally, the bonfires rule out any remaining possibility. The islands were uninhabited. What Hawkins saw (if he saw anything at all) were not the Falklands/Malvinas.

¹¹ Groussac, Paul, *Les îles Malouines* [1892]. Buenos Aires, Ediciones Argentinas SA, 1982, pp. 81-82.

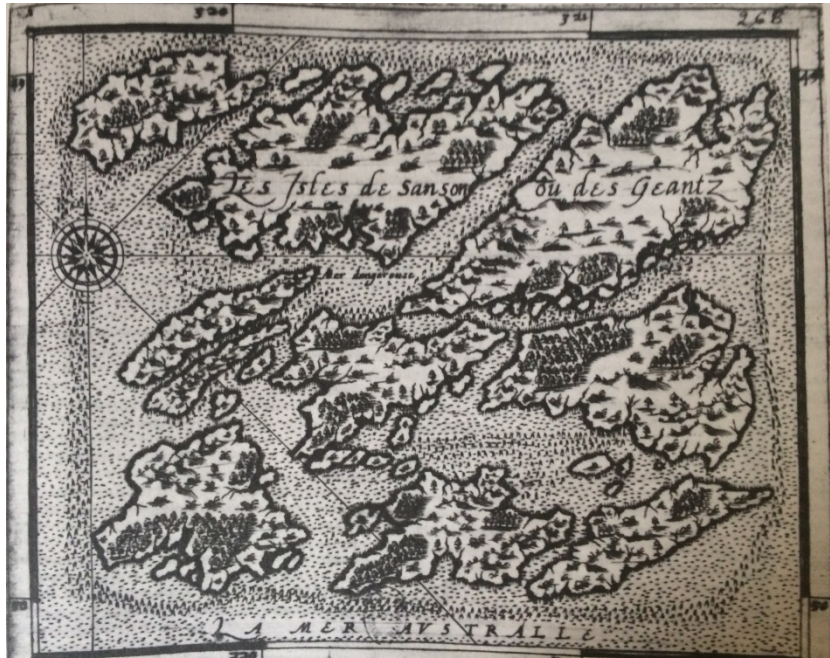


Figure 2 First specific map of the Islands ever made. By Captain Pilot Andrés de San Martín in 1520.

The islands have been included on maps and pilot books since 1502 (among others, the pilot books of Kunstmann II, in 1502; that of Maiollo, in 1504; those of Nicolaus of Caverio, in 1505, Piri Reis in 1513 and Lopo Homen in 1519, and on the map of Pedro Reinel, 1522¹²). It has been established that the first specific map of the islands was made in 1520. This emerges from the French manuscript (1586) *Le Grand Insulaire et pilotage d'André Thevet Angoumois, cosmographe du Roy, dans lequel sont contenus plusieurs plants d'isles habitées et deshitées et description d'icelles*, kept at the National Library of France and now available on the Internet.¹³ This map was drawn by the Captain and Pilot Andrés de San Martín, a member of Magellan's crew, who seems to have travelled to Spain on the ship "San Antonio" (under the command of the pilot Alvaro de Mesquita) as part of Magellan's expedition. This was the first crew to set foot on the Falklands/Malvinas, as proven by the records of Alonso de Santa Cruz published in his work *El Yslario general de*

¹² Arnaud, Vicente Guillermo, *Las islas Malvinas. Descubrimiento, primeros mapas y ocupación. Siglo XVI*, Buenos Aires, Academia Nacional de Geografía, 2000, p. 235.

¹³ <http://gallica.bnf.fr/ark:/12148/btv1b9065835g/f44.image.r=Le%20Grand%20Insulaire%20et%20pilotage%20d%20B4Andr%C3%A9%20Thevet.langFR>.

todas las yslas del mundo, enderecao a la S.C.C. Magestad del Emperador y Rey nuestro Señor, por Alonso de Santa Cruz, su cosmógrafo mayor, where the author describes in detail the stopover of Magellan's ships at Puerto San Julián, and the survey of what at present we know as the Falklands/Malvinas, which he calls "Ysla de Sansón y de Patos", and named "Isles de Sanson ou des Geantz" by Thevet.¹⁴

One reference on the subject, which the authors of the British pamphlet clearly reviewed and used but fail to mention, is the aforementioned book by Dr. Vicente G. Arnaud. This author affirms in his detailed work, that the discovery of the Falklands/Malvinas should be attributed to Amerigo Vespucci in his third journey to America (1501-1502), on April 7th, 1502 (the 16th or 17th according to the Gregorian reform of the calendar) as emerges from the "Lettera" to Soderini dated September 7th, 1504, in which after reaching latitude 52° South, Vespucci himself writes:

(...) on the seventh day of April we sighted new land, about 20 leagues of which we skirted; and we found it all barren coast; and we saw in it neither harbour nor inhabitants. I believe this was because the cold was so great that nobody in the fleet could withstand or endure it.¹⁵

Vespucci then elaborates further in *Quatour Navigations*: "It lasted for five days so terrible storm, where we had to navigate entirely a bare poles, entering into the sea two hundred and fifty leagues".¹⁶ As De Gandía illustrates, if you take a map, look at the parallel of 52° South and then move two hundred and fifty leagues away from the coast, you will undoubtedly find the Falkland/Malvinas islands.¹⁷ *El Grand Insulaire* by André Thevet, the cosmographer of the King of France, also leaves no room for doubt regarding the discovery made by Magellan's expedition.

¹⁴ Arnaud, Vicente, *op. cit.*, p. 191.

¹⁵ Northup, George Tyler, *Letter to Piero Soderini, gonfaloniere. The year 1504*, Princeton, Princeton University Press, 1916, p.39

¹⁶ Arnaud, Vicente, *op. cit.*, p. 191.

¹⁷ De Gandía, Enrique, "Claudio Alejandro Ptolomeo, Colón y la exploración de la India Americana", in *Investigaciones y Ensayos*, Buenos Aires, Academia Nacional de la Historia, 1972, p. 75.

Pascoe and Pepper also admit that a Spanish ship landed in the Falklands/Malvinas and spent several months on the islands in 1540.¹⁸ The vessel was named “Incognita” by Julius Goebel – a renowned American scholar, author of the first in-depth research on the dispute over sovereignty of the Falkland/Malvinas islands – since the vessel’s name had not been recorded.¹⁹ It is surprising that Pascoe and Pepper do not give importance to this fact, instead highlighting the “non-discovery” made by John Davis. The expedition of the “Incognita” was sponsored by the Bishop of Placencia and commanded by Alonso de Camargo. The Falkland/Malvinas islands were sighted on February 4th, 1540, as proven by the ship’s navigation log, which also reads that said Islands “were on the chart” (meaning that they were not unknown). The “Incognita” wintered until December 3rd 1540, that is to say, it spent almost the whole of 1540 moored on the islands. As maintained by Dr. Arnaud, the vessel relied on the map of the “Isles de Sanson ou des Geantz” made by Magellan’s expedition of 1520, as proven by the detailed description of the number of islands and channels made in the navigation log.²⁰

The British pamphlet maintains that it is not true that the islands were discovered by Ferdinand Magellan’s expedition. The above proves otherwise. What is more, the expedition carried out by the Bishop of Placencia’s Fleet and its effective presence in the islands during 1540 definitively debunks the much-lauded British “discovery” of 1592.

C. “Rival” names of the islands

Pascoe and Pepper’s pamphlet makes a brief excursus on the “rival” names of the islands, aiming to conclude that the British name precedes the present-day Spanish denomination by a century.²¹ Obviously, this has no legal relevance for the question of sovereignty at all. There are a number of islands in the world originally named by a navigator of one country, but which belong to another. Were this not the case, the Sebaldine Islands (Jason Islands in English), located at the northwestern tip of the Falkland/Malvinas archipelago, Staten

¹⁸ Pascoe, Graham and Pepper, *Peter*, *op. cit.*, p. 5.

¹⁹ Goebel, Julius (son), *The Struggle for the Falkland Islands*, Yale, University Press, 1827, p. 33

²⁰ Arnaud, Vicente Guillermo, *op. cit.*, p. 231.

²¹ Pascoe, Graham and Pepper, *Peter*, *op. cit.*, p. 5.

Island, or Cape Horn on the Tierra del Fuego archipelago should all be Dutch, as they were named by Dutch sailors.

The real problem here is that, in stating that the Spanish never named the islands, the British authors are distorting history. We saw that the first map made of the islands was Spanish, in which they are referred to as “Sansón o de los Patos”. Later, the Spanish named them “Islas de los Leones”, as the Spanish minister Mr. José de Carbajal pointed out in his response to Benjamin Keene when the British attempted to send an expedition to the Falkland/Malvinas islands.²² It is true that the Spanish name which finally prevailed was a name of French origin, at the very time in which European powers were beginning to settle in the islands. We will see below that France was the first effective occupant of the islands and that its settlement was continued by Spain. Paradoxically, Pascoe and Pepper neglect to mention that the English terminology also changed over time, and at one point the islands were called “Hawking Maidenland”²³

The fact that the name of the same territory or geographic feature may vary in different languages is nothing new. The English, French and Spanish names of the islands have their own heritage and must be equally respected in all three languages. This used to be standard practice. Unfortunately, the persistent dispute over sovereignty has given a political connotation to the use of these names, a meaning that they clearly do not have. This is a minor issue that will be easily solved the day this dispute is finally settled.

D. Bilateral treaties prove that Britain recognised Spanish sovereignty over the region of the Falklands/Malvinas

Pascoe and Pepper analyze the treaties of 1670, 1713 and 1790 superficially and without any discernible method.²⁴ Here, we will review the texts in their context and according to the object and purpose of the treaties, as well as their interpretation and application by the

²² Keene to Bedford, May 21, 1749, cited by Caillet-Bois, Ricardo, *Una tierra argentina. Las islas Malvinas. Ensayo en una nueva y desconocida documentación*, Buenos Aires, Ediciones Peuser, 2a ed., 1952, pp. 46-47.

²³ Groussac, Paul, *op. cit.*, pp. 82-83.

²⁴ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 5-6 and 8.

powers concerned, as required by international law. In the treaties, Great Britain makes a variety of undertakings to abstain from sailing to and trading with the Spanish regions of America.

a)The Treaty of Madrid of 1670

The first of these treaties is the Treaty of Madrid, entered into by Spain and Great Britain on July 18th, 1670. According to its preamble, the agreement had the objective to “settle the differences, repress the piracy, and consolidate the peace between Spain and Great Britain in America”. In Article VII, it is agreed that

*the Most Serene King of Great Britain, his heirs and successors, shall have, hold and possess forever, with full right of sovereignty, ownership and possession, all the lands, regions, islands, colonies, and dominions, situated in the West Indies or in any part of America, that the said King of Great Britain and his subjects at present hold and possess; so that neither on that account nor on any other pretext may or should anything ever be further urged, or any controversy begun in future.*²⁵

Pascoe and Pepper candidly affirm that, the Treaty thereby recognises Britain’s possessions in North America and the Caribbean, but that there is no similar clause for British recognition of Spanish sovereignty over the rest of the Americas.²⁶ Again, the authors “forget” that in the New Continent, Spanish sovereignty was the rule, and British sovereignty the exception. While Spain questioned the latter, Great Britain did not question Spanish sovereignty. It therefore did not make sense to include a provision in the treaty addressing a point that was uncontroversial. Nevertheless, the subsequent article clears up any doubts in that regard. As we shall see, it concerned the prohibition of navigating to or trading with Spanish territories in America. It is evident that it was impossible to for Britain to acquire sovereignty over areas to which they could not even go.

²⁵ Frances Gardiner Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies*, Washington DC, The Lawbook Exchange, Ltd., 2012, p 194.

²⁶ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 5

The British pamphlet considers it “absurd” to claim that there existed a general prohibition of navigation in regions considered to be Spanish unless by consent of the latter. Nevertheless, Article VIII of the Treaty of 1670 is eloquent in this respect. It establishes that “*subjects of the King of Great Britain shall on no account direct their commerce or undertake navigation to the ports or places which the Catholic King holds in the said Indies, nor trade in them.*”²⁷

Contrary to Pascoe and Pepper’s interpretation, Article XV does not establish absolute freedom of navigation. The article reads: “*The present treaty shall detract nothing from any pre-eminence, right, or dominion of either ally in the American seas, straits, and other waters; but they shall have and retain them in as ample a manner as is their rightful due. Moreover, it is always to be understood that the freedom of navigation ought by no means to be interrupted, provided nothing be committed or done contrary to the genuine meaning of these articles.*” In other words, navigation had to respect the provisions of Article VIII; otherwise the article would lose all meaning.

The British pamphlet tries to invoke British possession of Saint Helena as proof that Great Britain was free to navigate in the Southern Atlantic.²⁸ This fact proves nothing; Spain never considered Saint Helena to be in its possession. The island was located in the Portuguese section as established by the Treaty of Tordesillas. The British pamphlet asserts that the treaty “was written with North America and the Caribbean in mind.” As we have seen, this is true with regard to Spanish recognition of British possessions, but the text otherwise clearly refers to “the West Indies” or “America”, terms which leave no doubt regarding the scope of the provisions referring to the navigation and recognition of the sovereignty and pre-eminence of each power in their respective spheres in America.

The treaty of 1670 was part of a network of treaties between the maritime powers of the time, whose objective was the protection of Spain’s exclusive rights over its dominions and its grant of some licenses to other nations. His Catholic Majesty protected his colonies in

²⁷ Frances Gardiner Davenport, *op. cit.*, p 195

²⁸ *Ibid.*

America. Great Britain applied the same criterion in the parts of North America under its possession. This was the object and purpose of the treaty, which is also reflected in the legal instruments which will be analysed next.

b) The 1713 Treaties of Madrid and Utrecht

By virtue of the Treaty of Madrid signed on March 27th, 1713, Spain conceded to Great Britain the slave trade within Spanish America. What matters here is navigation. The slave trade implied a derogation of the prohibition on trading with the Spanish colonies and navigating in the adjacent seas. As provided in Article 14 of the treaty: “*His British Majesty has certainly agreed upon the promulgation of the strictest prohibitions and has subjected all his subjects to the most rigorous penalties in order to prevent any British vessel from crossing to the South Sea or trading in any other area of the Spanish India, except for the company devoted to the slave trade.*”²⁹ The Treaty of Madrid of 1713 confirms our understanding of the Treaty signed in 1670 and refutes the interpretation made by the British authors. There appears an express and unequivocal recognition of the prohibition to navigate the South Seas, except for the British slave trading company.

On July 13th, 1713 Spain and Great Britain signed the Peace Treaty of Utrecht. Its Article VIII confirmed the existing scale of trade and navigation in America, and Spain undertook not to grant American territories to France or any other nation, or to authorise them to sail for trading purposes within Spain’s dominions. Article VIII went on as follows: “*On the contrary, that the Spanish dominions in the West Indies may be preserved whole and entire, the Queen of Great Britain engages, that she will endeavor, and give assistance to the Spaniards, that the ancient limits of their dominions in the West Indies be restored, and settled as they flood in the time of the above-said Catholic King Charles the Second, if it shall appear that they have in any manner, or under any pretence, been broken into, and*

²⁹ Preliminary treaty of friendship and good will between England and Spain., Del Cantillo, Alejandro (comp.), *Tratados, convenios y declaraciones de paz y de comercio que han hecho con las potencias extranjeras los monarcas españoles de la Casa de Borbón desde el año 1700 hasta el día*, Madrid, Impr. Alegría y Charlain, 1843, p. 73.

lessened in any part.”³⁰ This article does not use the expression “territories possessed” by Spain, contrary to what Pascoe and Pepper assert;³¹ it guarantees the integrity of all the possessions of the Spanish Crown. It refers to the “ancient limits of their dominions”. The only “limits” were those laid down by the Tordesillas Treaty, with the exception of those already occupied by other nations.³²

c) A case of treaty application: Spain’s opposition to the British plan of visiting the Falklands/Malvinas in 1749

A clear example of the application of the treaties in force between the two powers directly concerns the issue of the Falklands/Malvinas: British Admiral Anson’s attempt to conduct an expedition to the Falkland/Malvinas islands in 1749. Significantly, the British government notified the aim of the expedition to the Spanish government, explaining that they had no intention of establishing any kind of settlement on the islands. This attitude illustrates two key points: first, that London did not consider itself to be sovereign over the islands in 1749; and second, that on the contrary, the British recognised Spanish sovereignty over the region.

Admiral Anson submitted a plan to the British government to prepare an expedition to the Falkland/Malvinas islands (and also to the non-existent “Peppys” islands!). The plan was discovered by the Spanish Ambassador in London at the time, Ricardo Wall, who immediately protested. Spain described in detail both the islands and Spanish sovereignty over them, stating that there was no reason for Great Britain to make an expedition to the islands. The Spanish note explained that “if the purpose of the trip was to establish settlements in the islands, that would be construed as a hostile act towards Spain, but if the purpose was to satisfy their curiosity, as much news as they wanted could be provided,

³⁰ George Chalmers, *A Collection of Treaties Between Great Britain and Other Powers*, Printed for J. Stockdale, 1790, pp. 81-82.

³¹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 6.

³² Cf. Zorraquín Becú, Ricardo, *Inglaterra prometió abandonar las Malvinas*, Buenos Aires, Ed. Platero, 1975, p. 115.

without the need to incur such expenses merely out of curiosity.”³³ The British Ambassador in Madrid, Benjamin Keen, had to explain that the purpose of the trip was merely the discovery of new territories and not to establish any settlement therein. Following the orders given by the Duke of Bedford, who at the time was in the British Secretariat of State for the Southern Department, he stated that: “As establishing a colony in either of the two islands is not the intention and Her Majesty’s corvettes will not go ashore, they will not even get close to the Spanish coast, the King cannot understand that this plan can provoke resentment on Madrid’s part.”³⁴ The Spanish categorically replied in the negative. Ambassador Keen informed Bedford that the Spanish minister had told him “he adverted to the inutility of pretending to a further examination of them and affirmed they had been long since first discovered and inhabited by the Spaniards; who called them the Islands de Leones from the number of sea lions on their coasts and that in the office books there were ample descriptions of the dimensions, properties, etc. If we did not intend to make any establishment there, what service could this knowledge be to us? We had no possessions in that part of the world, and consequently could want no passages or places to refresh in.”³⁵

Due to fierce Spanish opposition, Great Britain gave up the project. It is apparent from the exchange of notes that: 1) even though Spain was not physically present on the islands, it claimed sovereignty and opposed any British attempt to reach the islands, 2) Great Britain did not make any claim to sovereignty over the islands, nor did it reject the Spanish claim and 3) Great Britain accepted to not send an expedition, as requested by Spain.

This case refers the Falklands/Malvinas themselves, no less, and clearly shows the purpose of the treaties entered into by the two powers over their territories in the American continent. The Falkland/Malvinas islands were Spanish, and Great Britain neither objected to this fact, nor claimed sovereignty over them.

³³ Rodríguez Berrutti, Camilo, *Malvinas, última frontera del colonialismo*, Buenos Aires, Eudeba, 1975, p. 40.

³⁴ Goebel, Julius, *op. cit.*, p. 225

³⁵ Caillet-Bois, Ricardo, *op. cit.*, pp. 46-47.

d) Pascoe and Pepper recognise that the Treaty of San Lorenzo del Escorial or Nootka Sound of 1790 was applicable to the Falklands/Malvinas

The British pamphlet makes a considerable, though unsuccessful, effort to undermine a key treaty for the recognition of Spanish sovereignty over the islands and Britain's obligation to respect it. This is the Treaty of San Lorenzo del Escorial of 1790, also known as the Nootka Sound Convention, signed by Great Britain and Spain at El Escorial on October 28th, 1790. Notwithstanding their efforts, Pascoe and Pepper have no choice but to recognise that the Treaty in question applied to the Falklands/Malvinas and that consequently Great Britain undertook not to occupy the islands.³⁶

The dispute arose in 1789, when a Spanish naval officer, commissioned by the Viceroy of Mexico, apprehended two British ships at Nootka Sound (near Vancouver Island) and ordered the transfer of their captains and crews to San Blas port, in Mexico. Spain claimed that the British subjects had violated the laws of the Spanish Crown, and Great Britain requested a salute to their flag before discussing the substantive issue. In order to find a solution to this incident and avoid similar incidents in future, the two nations concluded the Treaty of 1790.³⁷

Article IV reads: "*His Britannic majesty engages to take the most effectual measure to prevent the navigation and fishery of his subjects, in the Pacific Ocean or in the South-Seas, from being made a pretext for illicit trade with the Spanish settlements; and, with this view, it is moreover expressly stipulated, that British subjects shall no navigate or carry on their fishery, in the said seas, within the space of ten sea-leagues from any part of the coasts already occupied by Spain.*"³⁸ The prohibition is crystal clear, as is the fact that at the moment the Treaty was signed, Spain was in sole possession of the Falklands/Malvinas. By that time, Spain had already appointed the 13th Governor of the Malvinas. The

³⁶ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 8.

³⁷ Ferrer Vieyra, Enrique, *Las islas Malvinas y el Derecho Internacional*, Buenos Aires, Ediciones Depalma, 1984, p. 67.

³⁸ *Comments on the Convention with Spain*, London, printed for T. Axtell, 1790, p.12.

prohibition undoubtedly included the Falkland/Malvinas islands, a fact recognised by Pascoe and Pepper.³⁹

As Julius Goebel asserts, “the terms of the sixth article by inference forbade any landing at the Falklands as they were a place already occupied by Spain.”⁴⁰ This was the Spanish authorities’ understanding when they took all necessary measures to protect their shores. A concrete example that can apply to the islands is the note dated March 4th, 1794 written by the Governor of the Malvinas, Mr Pedro Sanguineto, addressing the Viceroy Nicolás Arredondo and informing him that he had performed a 41-day navigation to carry out patrol and surveillance activities over the archipelago. In the note, he informs the Viceroy of the presence of vessels of different nationalities (some British), which were cautioned and informed of the prohibition of landing and fishing, save in a situation of “wreckage or shortage of water.”⁴¹

Unable to deny the evidence, the British authors attempt to split hairs. In order to do so, they come up with the idea of emphasizing an aspect that not only does not justify the British position, but in fact further bolsters the Spanish/Argentine thesis. It is Article VI, which reads “*It is further agreed, with respect to the Eastern and Western coasts of South-America, and to the islands adjacent, that no settlement shall be formed hereafter, by the respective subjects, in such parts of those coasts as are situated to the South of those parts of the same coasts, and of the islands adjacent, which are already occupied by Spain: provided that the said respective subjects shall retain the liberty of landing on the coasts and islands to situated for the purposes of their fishery, and of erecting thereon huts, and other temporary buildings, serving only for those purposes.*” This clearly not only reaffirms the prohibition of navigation and fishing, but also the prohibition of establishing settlements on the coasts and islands already occupied by Spain.

³⁹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 8

⁴⁰ Goebel, Julius, *op. cit.*, p. 431.

⁴¹ AGN Sala IX 16-9-8.

The British authors endeavour to affirm that by virtue of this section of the Treaty of 1790, British subjects were granted the authorization to disembark and build cabins, etc.⁴² However, this authorization in no way supports the British thesis. It proves three points: 1) that the Falklands/Malvinas were Spanish and that this was recognised by Great Britain; 2) that it was Spain which authorized British subjects to temporarily perform activities of a private nature in its possessions, and that 3) such activities were not in any way connected with the exercise of sovereignty over the Spanish territories.

In this regard, the most eloquent contradiction in the British pamphlet can be found in the analysis of the secret article of the Treaty of 1790. This clause lifted the prohibition on Great Britain to settle south of the coasts and adjacent islands already occupied by Spain, if another nation did so. According to the authors of the pamphlet “*Getting it right...*”, as Argentina occupied the islands “in the late 1820s”, and the islands had been occupied by Spain since 1790, the secret article would apply and Great Britain would be able to settle in the Malvinas islands as “Argentina had become established there”.⁴³ As we will see below, the same British pamphlet which recognises that Vernet’s settlement was an Argentine public settlement tries to prove otherwise only a few pages later, in an attempt to portray the settlement as a private operation carried out with the prior consent of Great Britain!⁴⁴

The pamphlet claims that the secret clause was put forward by the British with the Falkland/Malvinas islands in mind.⁴⁵ In order to prove this, they quote the work of an Argentine author, a collection of three personal letters addressed to the Chilean journalist and diplomat Conrado Ríos Gallardo. This is merely his own speculation. Even if this speculation were proven to be correct, it does not change the clear and concrete impact of the Treaty with respect to the question of sovereignty: Spain was the nation exercising sovereignty over the Falklands/Malvinas in 1790, and Great Britain undertook not to interfere with its possession.

⁴² Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 8.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

Aside from its blatant contradictions, Pascoe and Pepper's reasoning is not pertinent. Following their argument, what Great Britain feared in 1790 was a resettlement of the islands by France, or their control by the new-born United States, since most of the fishermen and hunters operating in the area were citizens of the new American nation. In 1790, the Latin American independence movement had not yet been born. When the independence movements did burst onto the scene, they were considered to be part of a civil war within the Spanish Empire. Great Britain was unable to invoke the secret clause, whether in its own favour or against Spain or Argentina, as explained below.

The key point is that the Treaty of San Lorenzo del Escorial or Nootka Sound of 1790 clearly demonstrates that at the moment the Argentine independence process began in 1810, the Falkland/Malvinas islands belonged to Spain and that Great Britain both recognised this fact and undertook to respect Spanish sovereignty. In spite of the fact that the islands were under Argentine possession in 1833, Great Britain could not possibly ignore the fact that for Spain the islands, as indeed all the territory of the newborn Argentine nation, were still part of its empire of the Indies. There are a variety of reasons why the secret clause could not be invoked against Argentina. Firstly, because Argentina succeeded to Spain's rights over the Falklands/Malvinas; at the moment in which it recognized Argentine independence and the two nations established diplomatic relations and entered into a treaty of amity in 1825, Great Britain had the obligation to respect Argentina's territorial integrity. Secondly, even if the secret clause were in force and opposable to Argentina – which is not the case – because Argentina has succeeded to Spain's rights, there was no settlement established by “subjects of other powers”, but only a continuation of Spain's rights.

British sources concur on the fact that the Treaty of 1790 prevented Great Britain from settling in the Falkland/Malvinas islands. No serious British author, nor the British government itself or its officials considered the secret clause to be applicable after Argentine independence. Professor M. Deas stated in the House of Commons on January

17th, 1983⁴⁶ that “in 1790 the Nootka Sound Convention was signed, by virtue of which, Great Britain waived the right of establishing future settlements in the east and west coasts of South America and in the adjacent islands; and the Royal Navy indifferently informed subsequent Spanish activities in the islands [Malvinas]. Briefly, we set one foot (but there were others) and we left.”⁴⁷ The second is a Memorandum issued by the Foreign Office written by John W. Field and dated February 29th, 1928, which reads “On October 28th, 1790 a Covenant was signed between this country and Spain, the section 6 of such covenant provided that in the future, any of the parties should establish any settlement in the east of west coasts of South America and adjacent islands, to the south of such portions of those same coasts and islands at the time occupied by Spain [...]According to this section becomes evident that Great Britain was banned from occupying any portion of the Falkland Islands. This Treaty was abrogated in October, 1795, when Spain declared war to Great Britain. Nevertheless, it was reinforced by section 1 of the additional sections comprised in the Treaty of Amity and Alliance between Great Britain and Spain of July 5th, 1814, signed in Madrid on August 18th, 1814.”⁴⁸ Even earlier, the Memorandum issued by the Department of History of the Foreign Office dated December 7th, 1910 came to the same conclusion: “By virtue of this section (section 6 of the Treaty of 1790) becomes apparent that Great Britain was banned from occupying any portion of the Malvinas islands”.⁴⁹

In short, the Nootka Sound Convention is the consolidation of Spanish sovereignty over the entire archipelago. Had the British wished to resettle Port Egmont after 1774, they could have done so by invoking the agreement signed in 1771, which will be the topic of the next chapter. From 1790, they undertook not to do so. Article VI prevented Great Britain from contesting Spanish sovereignty and from occupying any part of the coast of the islands. There are similarities to the Permanent Court of International Justice’s interpretation of the “Ihlen declaration” with respect to Eastern Greenland, except that in 1790 there was no

⁴⁶ “Notes on the issue of Falkland Islands sovereignty for House of Commons, Committee on Foreign Affairs”, Great Britain Parliament, House of Commons, Foreign Affairs Committee, sessions 1982-1983, Falkland Islands, Minutes of Evidence, 17/1/83, London, HMSO, 1983 pp. 127-137.

⁴⁷ This refers to the settlement of Port Egmont. Cf. Ferrer Veyra, E., *Las islas Malvinas...*, *op. cit.*, p. 4

⁴⁸ Memorandum Respecting the Falkland Islands and Dependencies, Confidential (13336), by Field, John.W., February 29, 1928 (FO 37/12735).

⁴⁹ Memorandum respecting the Falkland Islands, Confidential (9755), by De Bernhardt, Gaston. Printed for the use of the Foreign Office, January 1911, p. 12.

doubt as to the conventional nature of the obligation undertaken by Great Britain “It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland.”⁵⁰ In 1810, the relevant year for Argentina’s succession to Spain’s rights, the Falkland/Malvinas islands were undoubtedly Spanish. Great Britain was prohibited from occupying and claiming sovereignty over the islands. Argentina’s acts on the islands after independence could in no way affect a British sovereignty that did not exist at all.

⁵⁰ *Legal Status of Eastern Greenland*, 1993, Judgment, PCIJ, series A/B n° 53, pp. 72-74

Chapter II

The first settlements on the islands. The 1771 Agreement and British abandonment. Spanish withdrawal after the beginning of Argentine process of independence

Introduction

This chapter analyses the period of 1764-1811 and the first European settlements on the Falkland/Malvinas Islands in the 18th century; it also deals with the subsequent disputes among France, Spain and Great Britain. It will show that the first occupant of the Falklands/Malvinas was France, which immediately recognised Spain's pre-existing sovereignty and handed over the islands to the legitimate sovereign. It will also show that Britain's occupation of a port on one of the islands of the archipelago was in breach of existing treaties; and that this occupation was belated, precarious, secretive and subsequently abandoned. Besides the treaties analysed in the previous chapter, the 1770 incident, the Hispano-British declaration of 1771, British withdrawal from the site authorised by Spain, and the fact that Spain exercised exclusive possession and sovereignty over the islands for decades, until the beginning of the Argentine process of independence in 1810, prove that Argentina incontestably succeeded to Spain's rights.

A. France, the first occupant

Pascoe and Pepper begin by correctly stating that Louis-Antoine de Bougainville was the first to establish a settlement in the Falklands/Malvinas.⁵¹ The settlement was located on Soledad or East Island and was named "Port Louis", in tribute to the French monarch. The purpose of Bougainville's voyage was to establish a settlement on the *Malouines* islands in

⁵¹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 6.

order to “take control of trade in the South Seas” after France’s colony in Canada was lost to Great Britain. His project was quickly approved by the French authorities. On September 15th, 1763 he set sail with 150 men from Saint-Malo on board the frigate “*L’Aigle*”, together with the corvette “*Le Sphinx*”. Land was made at the beginning of February 1764, and on March 17th, construction work had already started. On April 5th, 1764, once the construction of the fort was finished, Bougainville carried out an official ceremony to take possession of the islands on behalf of King Louis XV, which was confirmed (and made public) by the French monarch on September 12th, 1764.⁵²

B. The clandestine presence of Great Britain

The French had already occupied the Falklands/Malvinas when British commodore John Byron set sail for the West Indies on June 21st, 1764. The purpose of his voyage was kept secret. Upon reaching the coast of Brazil, the true objective of the expedition was revealed: to call at His Majesty’s Islands call’d Falkland’s and Pepys `Islands situate in the Atlantick Ocean near The Streights of Magellan in order to make better surveys thereof, than had yet been made, and to determine a place or places, most proper for a new settlement or settlements thereon.⁵³

Byron sighted land on January 12th, 1765 (that is to say, almost one year after Bougainville officially took possession) and landed on Saunders Island (Isla Trinidad), a small island to the west of Gran Malvina/West Falkland, where he took possession of a location called Port Egmont (“Puerto de la Cruzada” in Spanish) on behalf of King George III, “of that port and all neighboring islands.”⁵⁴

It is worth noting that the directions given to Byron refer to the “Falkland and Peppys” islands. The latter were often believed to be situated in an area near the Falklands/Malvinas,

⁵² Universidad de Buenos Aires, *Colección de documentos relativos a la historia de las Islas Malvinas*, Buenos Aires, Facultad de Filosofía y Letras, Instituto de Historia, 1957, Vol. I, p. 351.

⁵³ Conway to Lords of Admiralty, July 20 1765 (State Papers) in Goebel, Julius, *op. cit.*, p. 231.

⁵⁴ The pamphlet by the British “government” of the islands mentions that Byron disembarked on Gran Malvina (West Falkland), which is incorrect as Isla Saunders/Trinidad is a different island.

but they do not exist. The British government believed they had been “discovered” by His Majesty’s seamen. It gave secret instructions to its sailors in full awareness of the opposition Spain had manifested years before, leading Byron to believe that the islands he was to survey already belonged to the British crown.

However, the orders Byron received made no reference whatsoever to taking possession of the Falkland/Malvinas Islands. His only task was to perform a survey. Pascoe and Pepper give this event a legal significance which it does not have, flagrantly contradicting themselves when comparing their analysis of Byron’s taking of possession with that of Jewett on behalf of Argentina in 1820,. As we shall see, they try to diminish the value of Argentina’s taking possession in 1820 because, they allege that precise instructions given by the government of Buenos Aires directing Jewett to take possession of the Falklands/Malvinas have not been found. Yet at the same time, they characterised Byron’s act as capable of conferring sovereignty on Britain, despite Byron clearly going beyond his instructions, as he had not received any order to take possession of the islands.⁵⁵

Differently to Bougainville’s actions, which consisted in establishing a colony, Byron took possession, left the British flag raised and set sail a few days later (on January 27th) without leaving behind any settlement. A month later, he sent the ship “*Florida*” to Great Britain to bring news. When the “*Florida*” landed on June 21st, 1765, British authorities decided to build a settlement at Port Egmont. News had already been received of France’s establishment.

C. Spanish protests and France’s recognition of sovereignty.

On the Spanish side, news of the French settlement set alarm bells ringing. In September 1765, the Spanish minister of State, the Marquis of Grimaldi, gave instructions to Ambassador Fuentes to submit to Choiseul an official request for France’s withdrawal, on the basis of Spanish sovereignty, as well as legal and political considerations.⁵⁶ After

⁵⁵ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 7.

⁵⁶ Lennox to Shelbourne, September 17, 1766 (RO State Papers, France, 271).

Choiseul's first refusal, Fernando de Magallón, secretary at the Spanish embassy in France, reminded him that Spain had already asserted its rights against England in 1749 when it came to know about Anson's expedition. Only twenty-four hours later, Choiseul met Fuentes and acceded to Spain's request. When Bougainville returned, he was notified of the situation and asked to go to Madrid to iron out the details of the transfer.

D. The secret occupation of Port Egmont

On the British side, on September 26th, 1765, Commander J. McBride received orders to build a fort "in Port Egmont in the Falkland Island."⁵⁷ On January 8th, 1766, he entered the port. McBride's men sighted the French settlement on December 2nd, 1766, and were already in Port Louis on December 4th, setting sail for England in January 1767. Although the sailors declared that the islands belonged to His Majesty, the British government did not lodge any official protest over France's presence in the Falkland/Malvinas Islands. Contrary to the French occupation, and later to Argentina's taking of possession in 1820, no public announcement was given of Britain's settlement at Port Egmont. This point, and the absence of British protest, show that the British government maintained a clandestine occupation of a place in the Falklands/Malvinas, in the knowledge that its settlement was in violation of the treaties concluded with Spain, and that France had been the first to occupy the islands.

E. The transfer of French occupation to Spain

On April 9th, 1766, Bougainville set off for Madrid with information regarding the condition of the colony and the aim of transferring it to Spain. Already in May, a Report written by the French sailor himself was submitted to the Spanish ministers, requesting compensation for the expenses incurred in Port Louis; the document "*Réflexions sur les*

⁵⁷ Universidad de Buenos Aires, *op. cit.*, T. I, pp. 102-103.

moyens de commencer l'établissement des Isles Malouines” set out the objectives Spain had to consider in settling the Falkland/Malvinas Islands.⁵⁸

On September 13th, 1766, the relevant transfer documents were handed over and compensation for the expenses incurred in the colony was agreed. The British pamphlet states that neither France nor Bougainville recognised any preexisting rights to Spain.⁵⁹ Bougainville’s text proves quite the opposite. On October 4th, Bougainville handed over the receipt for the amount paid as compensation for expenses. The document read as follows: *Monsieur Louis de Bougainville colonel of his Most Christian Majesty's Army. I have received six hundred and eighteen thousand one hundred and eight livres thirteen sols and eleven deniers being the amount of an estimate that I have given in of the expenses incurred by the St. Malo Company in equipment for founding their intrusive establishments in the Malvinas Islands belonging to his Catholic Majesty. (...) In consideration of these payments as well as in obedience to his Most Christian Majesty's orders I am bound to deliver up in due formality to the court of Spain those establishments along with the families, houses, works, timber and shipping built there, and employed in the expedition, and finally everything therein belonging to the St. Malo Company as included in the accounts, which are so settled and to his Most Christian Majesty by this voluntary cession making void forever all claims that the company or any person interested therein may have or might produce upon the treasury of his Most Catholic Majesty nor can they henceforth demand more pecuniary or any other compensation whatsoever.*⁶⁰ Bougainville’s formal recognition that the settlement had been established in Spanish territory, and that its cession had been voluntary, was both express and manifest.

⁵⁸ Caillet-Bois, Ricardo, *op. cit.* p. 102

⁵⁹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 7. The pamphlet by the British “government” of the islands asserts that Spain “bought” the islands.

⁶⁰ Philip Parker King, *Charles Darwin; Proceedings of the second expedition, 1831-1836, under the command of Captain Robert Fitz-Roy*, London, Henry Colburn, 1839, pp. 149-150. Original in AGN Sala X 3-4-5

In his famed *Voyage autour du monde*, Bougainville describes the situation in a manner that also leaves no room for doubt: *France having acknowledged the Catholic King's right to the Malouines, he, by a principle of the law of nations, owed no reimbursement to these costs. However, as his majesty took all the ships, boats, goods, arms, ammunition, and provisions that belonged to our settlement, he being equally just and generous, desired that we should be reimbursed for what we had laid out; and the above sum was remitted to us by his treasurers; part at Paris, and the rest at Buenos Ayres.*⁶¹

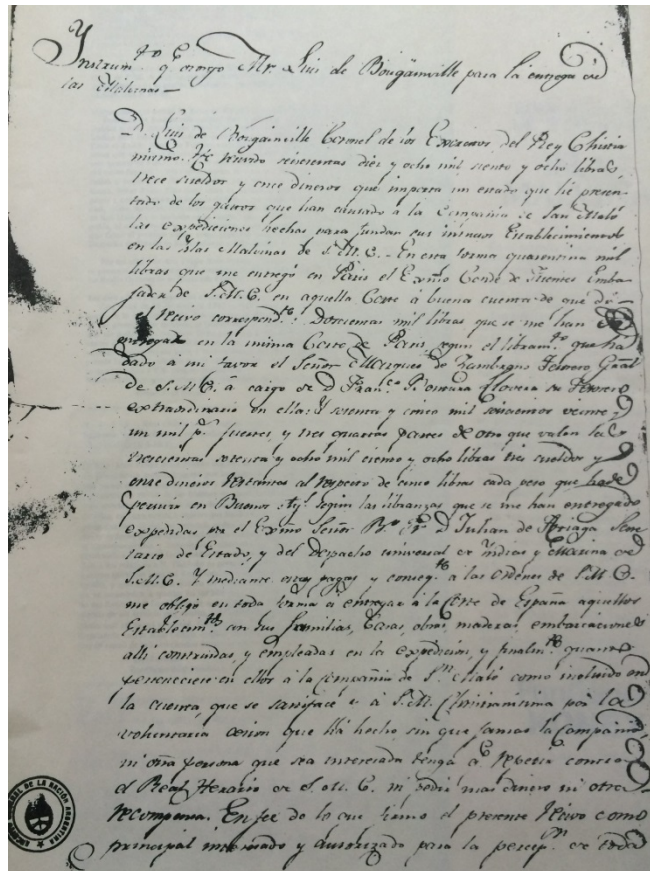


Figure 3 Receipt note of Louis-Antoine de Bougainville for the transfer of the colony to Spain recognizing its right. A.G.N. Sala X 3-4-5

Furthermore, Choiseul's comments to the British Ambassador in Paris⁶² demonstrate that not only did France recognise Spain's pre-existing sovereignty, but that it also informed the British government of it. Again, the British government did not raise any claim of

⁶¹ Bougainville, Louis-Antoine, *Voyage autour du monde* [1771], Paris, Presses Universitaires de Paris-Sorbonne, 2001, ch. III, p. 86.

⁶² Lennox to Shelbourne, September 17, 1766 (RO State Papers, France, 271).

sovereignty in the circumstances, which proves it either did not consider itself sovereign, or if it did, it was abandoning its claim against third States.

On that same occasion, Spanish Navy Captain Mr Felipe Ruiz Puente received the order to take over the colony as Governor, and was notified that the islands' authorities would be under the command of the Governor and General Captain of Buenos Aires Province,⁶³ Mr Francisco de Paula Bucarelli, whose orders he had to obey. That is to say, from the administrative point of view, the government of the Falklands/Malvinas was part of the Captaincy General of Buenos Aires.

On April 1st, 1767, the Spanish governor and Louis-Antoine de Bougainville landed at the Falklands/Malvinas Islands. The official transfer of the colony to the Spanish Crown was performed, and the name Port Louis changed to Puerto de la Soledad.

Bougainville expressly refers to the transfer of all the Falkland/Malvinas Islands and not, as some British authors argued, only Port Louis. In this connection, suffice it to recall the words of the renowned French sailor: In February 1764, France began to make a settlement on the Iles Malouines. *Spain reclaimed these isles as belonging to the continent of South America; and her right to them having been acknowledged by the King, I received orders to deliver our settlement to the Spaniards, and to proceed to the East Indies by crossing the South Seas between the tropics.*⁶⁴

⁶³ AGN Sala X 8-10-3

⁶⁴ Bougainville, Louis-Antoine, *op. cit.* p. 61.

F. The legal point of view

By the year 1767, three powers had established themselves in the Falkland/Malvinas Islands, with varying degrees of lawfulness. France can claim the right of first occupant, despite recognising, when faced with Spanish protests, that the islands belonged to Spain. This was consistent with recognition by the powers of the time that the region was considered to be Spanish.

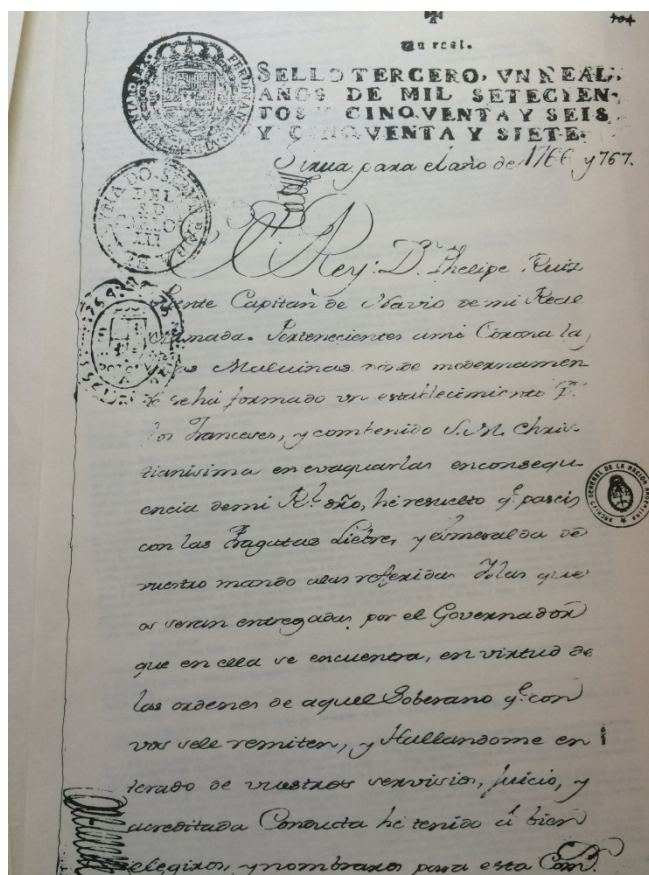


Figure 4 Royal Order by which is named Don Felipe Ruiz Puente as the Governor of the Falklands/Malvinas islands and that the islands will depend on the General Capitanía of the Province of Buenos Aires - A.G.N. Sala X 8-10-3

Byron's declaration lacks any legal effect. It was a merely symbolic act performed at a moment in which another nation was already effectively occupying the archipelago, and furthermore in a region that Great Britain had recognised as being Spanish. The settlement

established by McBride years later suffers the same defects: occupation does not establish sovereignty over a territory that is not *terra nullius* (land belonging to nobody), either because the occupying State recognises that the territory belongs to another nation (Spain), or because the territory was previously occupied (by France). In international law, occupation of the main island constitutes occupation of the archipelago as a whole, as long as no other nation is present in any other area of the archipelago, as Judge Levi Carneiro explained in the *Minquiers and Ecrehos* case before the International Court of Justice.⁶⁵ This was the situation of the Falkland/Malvinas Islands when they were occupied by France.

The system of treaties binding Spain and Great Britain analysed in the prior section made it impossible for the latter to sail or trade in the American seas and territories belonging to the Spanish Crown. The Falkland/Malvinas Islands were among those possessions, as demonstrated by Spain's reaction to the expedition proposed by Lord Anson in 1749. The settlement of Port Egmont was a flagrant violation of those agreements and, therefore, a violation of the basic principle of the international law known as *pacta sunt servanda*, by virtue of which treaties must be respected.

What is more, the founding of Port Egmont in the Falklands/Malvinas did not even comply with the minimum requirements for an effective occupation capable of giving rise to sovereignty, even if, at the time, the Falklands/Malvinas were a *terra nullius* – which was not the case. As we have seen, unlike that of France, British occupation was undertaken in the greatest secret in accordance with the orders given by Lord Egmont.⁶⁶ The reasons for this are clear: the British government knew that the territory was in Spain's zone of influence. An act that was voluntarily kept secret could not be opposed to other nations. Not even the British Parliament was aware of the existence of the settlement. Its existence

⁶⁵ “[...] Just as a State which has occupied the coast or an important part of an island is deemed to have occupied the island as a whole, the occupation of the principal islands of an archipelago must also be deemed to include the occupation of islets and rocks in the same archipelago, which have not been actually occupied by another State”; individual opinion of Judge Levi Carneiro, *Minquiers and Ecrehos case* (France/United Kingdom), ICJ Reports 1953, p. 99

⁶⁶ Egmont to the Duke of Grafton, July 20th, 1765, Records of the Admiralty. State Papers, Foreign, Spain, Supplementary, Miscellaneous Papers, 1761-1770, in Ferrer Vieyra, Enrique, *Segunda Cronología Legal Anotada sobre las Islas Malvinas (Falkland Islands)*, Córdoba, EGB, 1993, p. 364.

was not therefore submitted to Parliament for approval, and as such, the Falklands/Malvinas was never legally a domain of the British Crown.⁶⁷ As the French ambassador to London said to the British Prime Minister, Lord North, the “covert” settlement established by the British, being unrecognized by Spain was not cause enough for Spain’s loss of rights; North agreed with the correctness of the principle.⁶⁸

The British settlement was clearly established in bad faith. Great Britain knew about France’s settlement, Spain’s protests and the subsequent cession, which was relayed by Choiseul on September 17th, 1766. The British government did not raise any objection.

It is possible to conclude with the description made by Bougainville himself, who after describing the islands, correctly summarizes the legal situation in the following manner: “Such was the state of the Malouines, when we put them into the hands of the Spaniards, whose prior right was thus enforced by that which we possessed by making the first settlement.”⁶⁹

G. Spain evicts the English fort

In 1766 the Prince of Masseran, Spain’s ambassador to London, upon learning that the British fleet had been sent to the South Atlantic, immediately informed Madrid. When Charles III realised that the British were in a region of Spanish dominion, he directed Masseran to submit a request for information about the facts in question.

London’s reply initially went from ignoring the fact to refusing to take a stance on the substance of the matter. The talks stalled, and in December 1766 the Governor of Buenos Aires, Mr. Francisco de Paula Bucarelli, was ordered to explore the Falkland/Malvinas islands and the coasts of Patagonia and Tierra del Fuego up to Cape Horn in order to gather information about the location of the British settlement.⁷⁰

⁶⁷ Zorraquín Becú, Ricardo, *op. cit.*, 1975, p. 130.

⁶⁸ Frances to Choiseul, December 22, 1770, AECF, Angleterre, v.494, f. 418 in Ferrer Vieyra, *Segunda Cronología...*, *op. cit.*, p. 327.

⁶⁹ Bougainville, Louis-Antoine de, *op. cit.*, p. 92.

⁷⁰ Royal Order of December 29th, 1766, in Zorraquín Becú, Ricardo, *op. cit.*, p. 38.

Fearing that England might settle indefinitely in its dominions, Spain hardened its position. The Secretary of the Indies, Mr. Julián de Arriaga, ordered Bucarelli: “no English settlement whatsoever is allowed, and to expel by force any already formed if warnings according to law are not enough: and without the need for further orders or instructions.”⁷¹ On the basis of this order, on October 15th, 1768 a fleet under the command of the Navy Chief of Staff, Juan Ignacio de Madariaga, set sail from Cadiz.

Only in the second half of November 1769 was the British settlement finally discovered by a Spanish schooner. Governor Ruiz Puente immediately sent Infantry Lieutenant Mario Plata to order the eviction of the intruders, since their stay in the area “is entirely opposed to the faithful and religious observance of the Treaties of Peace.”⁷² The British captain Anthony Hunt answered on December 10th, stating that the islands belonged to His Britannic Majesty and that he ordered the Spanish to leave Port Soledad within six months. In May 1770, having sent a fleet in February to survey the British settlement and having protested against the British “intruding in an alien domain”,⁷³ the governor of Buenos Aires dispatched Chief of Staff Madariaga with four frigates and two small ships with the aim of evicting the intruders. Between June 7th and 9th, both parties fruitlessly exchanged requests and threats. On June 10th, Madariaga considered that the situation had become unsustainable, and ordered the takeover of the settlement. At the first volley of cannon fire, the British surrendered and 156 men laid down their weapons. Port Egmont was free from invaders.

H. Negotiations to avoid war

In September 1770, the British Crown discovered what had happened in the Falklands/Malvinas and protested to Spain. The Spanish and French prepared to begin new negotiations to avoid, or at least put off, the outbreak of an armed conflict. It is not within the scope of this work to go further into the long and difficult diplomatic negotiations. The

⁷¹ Royal Order of February 25th, 1768 in id., p. 40.

⁷² Ruiz Puente to Hunt, November 30th, 1769 in Zorraquín Becú, Ricardo, *op. cit.*, p. 41.

⁷³ Note from Rubalcava to Hunt, February 20th, 1770 in Hidalgo Nieto, Manuel, *La cuestión de las Malvinas, contribución al estudio de las relaciones hispano-inglesas en el siglo XVIII*, Madrid, CSIC, 1947, pp. 645-646.

stances of both parties can be easily summarised as follows: the British sought unconditional compensation and the resettlement of Port Egmont, while Spain offered to express disapproval of Bucarelli's actions and the reestablishment of the settlement at Port Egmont, in exchange for His Britannic Majesty's disapproval of the requests and threats made by Captain Hunt, as well as an express backing of Spanish sovereignty over the archipelago.

Several proposals were discussed and discarded until an impasse was reached. While the negotiations were being conducted, both powers had speeded up the readying of their armed forces. When all signs pointed to the only way out being war, some changes took place which allowed a peaceful solution to be reached. One of those changes was the verbal promise made by the English minister, who said that if Spain granted the British what they had requested, they would leave Port Egmont. This point will be discussed in depth below. In order to convince Spain to reach a new agreement and to avoid a new war at all costs, the French King Louis XV presented to the Spanish King Charles III the thesis according to which simple possession could not be stripped by force, notwithstanding its legal defects: "The British have established a settlement in the *Maluinas* islands, and I am certain that no title has authorised them to do so, but they were in possession when they were evicted by His Majesty's weapons. Conversely to all the laws according to which a dispossessed tenant must be re-established before discussing the substance of their requests. This is what the British are demanding to His Majesty by means of a statement."⁷⁴ It should be noted, en passant, that Great Britain took a completely opposing attitude towards Argentina in 1833, when they used force to deprive Argentina of its possession on the basis of unfounded arguments of sovereignty.

An agreement was reached on January 22nd, 1771 with a statement by Prince Masseran and its acceptance by the British government. The relevant statement read as follows: "(...) the Prince of Masseran declares, that his Catholic Majesty engages to give immediate orders, that things shall be restored in the Great Malouine at the port called Egmont, precisely to the state in which they were before the 10th of June, 1770. For which purpose his Catholic

⁷⁴ Luis XV to Carlos III, December 20th, 1770, in AHN, Estado, leg. 2850

Majesty will give orders to one of his Officers, to deliver up to the Officer authorized by his Britannic Majesty the port and fort called Egmont, with all the artillery, stores, and effects of his Britannic Majesty and his subjects which were at that place (...) The Prince of Masseran declares, at the same time, in the name of the King his master, that the engagement of his said Catholic Majesty, to restore to his British Majesty the possession of the port and fort called Egmont, cannot nor ought any wise to affect the question of the prior right of sovereignty of the *Malouine* islands, otherwise called Falkland Islands.”⁷⁵

The British pamphlet claims that Argentina uses a false translation of Masseran’s declaration, and that the reservation of sovereignty is applicable to both countries.⁷⁶ Both assertions are wrong. The quote appearing above is the same that appears in Pascoe and Pepper’s pamphlet, and does not support the thesis of a “mutual” reservation of sovereignty in any way. British acceptance was limited to the declaration of the Spanish Crown and to consider it as “*compensation for the offence caused to the British Crown*”.⁷⁷

Pascoe and Pepper highlight a proposal made during the negotiations to explicitly recognise Spanish sovereignty, which was not accepted by the British government. The proposal would have been considered an unacceptable humiliation by British public opinion, which had closely followed news of the eviction from the fort in Port Egmont. However, the fact that no explicit recognition of Spanish sovereignty was given in the declaration did not mean that Spain had abandoned its position and implicitly accepted that of the other party. In the final text, only one party formulated a reservation of sovereignty: Spain. The other failed to do so. One of the parties returned exclusive possession of a fort, affirming that this restitution in no way affected the question of sovereignty. What sovereignty could this

⁷⁵ Text reproduced in a number of works. See ie. Goebel, Julius, *op. cit.*, p. 400, AGS, State, file 6980, annex to letter No2042; De Martens, Geo. Fred., *Recueil de traites d’alliance, de paix, de trêve, de neutralité, de commerce, de limites, d’échange etc.... des puissances et états de l’Europe ...depuis 1761 jusqu’à présent, Tome 1 (1771-1779)*, Gottingen, 2a ed., Librairie Dieterich, 1817, pp. 1-2; Parry, G., *The Consolidated Treaty Series (1767-1772), Vol. 44*, Nueva York, Oceana Publication Inc., 1969, pp. 425-426; Del Cantillo, Alejandro, *Tratados, op. cit.*, pp. 519-520; Almon, J., *A Collection of All the Treaties of Peace, Alliance and Commerce, between Great-Britain and Other Powers: From the Revolution in 1688 to the Present Time*, London, Vol. II, Opposite Burlington, 1772, pp. 328-330; British and Foreign State Papers 1833-1834, Vol. 22, London, 1847, pp. 1387-1388.

⁷⁶ Pascoe y Pepper, *op. cit.*, p. 8 and from the same authors: “*False Falklands History at the United Nations. How Argentina misled the UN in 1964 – and still does*”, 2012, p. 3

⁷⁷ AGS, Estado, Legajo 6980, annex to letter No2042; in Zorraquín Becú, Ricardo, *op. cit.*, pp. 199-200.

possibly be but Spain's? It would be absurd for a State that claims sovereignty to reserve the alleged sovereignty of the other, as the British pamphlet naively claims.

Furthermore, Masseran's declaration mentions no legal compensation or reestablishment of rights of sovereignty; it only refers to the return of possession, not the restitution of the archipelago as a whole, not of Isla Trinidad/Saunders Island (where the British settlement was established) or nearby Gran Malvina/West Falkland, but only "the port and the fort named Egmont". It merely concerns the physical restitution of British possession of the port and fort. British acceptance is also expressed in the same manner, and does not clarify or modify the geographical position, but merely makes express reference to the "port and fort named Egmont."⁷⁸ Neither does it refer to any reinstatement of sovereignty rights, but simply to the return of a factual *status quo*, and last but not least, does not mention the reservation of sovereignty rights made by Spain in the final paragraph of its declaration – which amounts to an implicit acceptance of the reservation. The French representative in London highlighted this issue when asserting that: "Upon receiving this reservation and not protesting, England tacitly recognises the rights of Spain, which (...) acquire a renewed vigor through the silence of England".⁷⁹

William Pitt also had the same understanding, when stating in the British Parliament, on January 25th, that the Masseran Declaration "appeared to be an ignominious compromise. It was no satisfaction; no reparation. The right was not secured, and even the restitution was incomplete; that Port Egmont alone is restored, not Falkland's Island".⁸⁰

The British pamphlet makes the unsupported claim that Dr Samuel Johnson, a renowned English intellectual of the time, "confirmed" its interpretation, that is to say, that both countries reserved their position regarding sovereignty. This does not transpire from Dr Johnson's publication on the Port Egmont conflict - quite the contrary. The renowned British author stated in his pamphlet: This reserve [that of the Spanish sovereignty] has

⁷⁸ Ibid.

⁷⁹ Frances to La Vrilliere, January 22nd, 1771, in AACP, Angleterre, vol. 495, fols. 79 a 81; cit. in Zorraquín Becú, Ricardo, *op. cit.*, p. 86.

⁸⁰ *The Parliamentary History of England from the earliest period to the year 1803. Vol. XVI. A.D. 1765-1771.* London, Hansard, 1813, p. 1339.

supplied matter for much clamour, and, perhaps the English ministry would have been better pleased had the declaration been without it. But when we have obtained all that was asked, why should we complain that we have not more?⁸¹ All the British had demanded was the restitution of Port Egmont and compensation for the offence they had suffered. The same author wrote that: To have inquired whether our settlement at port Egmont was any violation of the Spanish rights, had been to enter upon a discussion, which the pertinacity of political disputants might have continued without end. We, therefore, called for restitution, not as a confession of right, but as a reparation of honour.⁸² Dr. Johnson's analysis does not in any way support the forced and unjustified interpretation made by the British pamphlet. In summary: Spain only returned possession of Port Egmont and reserved its rights of sovereignty over the Falklands/Malvinas and the archipelago as a whole. The British government was happy to accept this as satisfaction for the stain on its honour caused by the forceful eviction, without seeking to make any claim with respect to their alleged sovereignty.

I. Britain's secret promise to evacuate Port Egmont

From the moment the 1771 agreement was concluded, much has been said and written about the existence of a secret promise by which, once British honour had been restored by the restitution of Port Egmont, the port would eventually be abandoned. For reasons of internal politics and public opinion, the promise could not be made in writing. Pascoe and Pepper venture to claim that such a promise never existed. The only argument they put forward is that in 1829, when for the first time in almost half a century the British government showed some interest in the Falkland/Malvinas Islands, Sir Herbert Jenner, the King's Lawyer, affirmed that he could not find any documents supporting that promise.⁸³ This is evidently a weak argument, especially because it is well known that Jenner was looking for arguments in support of Britain's purported sovereignty over the islands.

⁸¹ Johnson, Samuel, *Thoughts on the Late Transactions Respecting the Falkland's Islands*, 2nd ed., London, Cadell, 1771, p. 36.

⁸² Ibid., p. 64.

⁸³ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 8.

Even though no written document containing the promise has been found, there is ample evidence as to the existence of a verbal promise and its content. The exchange of letters between the Spanish and the French ambassadors in London, British diplomatic notes, and debates in Parliament and in British newspapers are strong indications that such a promise did in fact exist.

It is apparent from the notes of Masseran and Francés, respectively representing Spain and France in London, that on different occasions Lord North not only asked them to trust Britain, but also pointed out that if their requests were satisfied, the British would abandon the islands.⁸⁴ In the same vein, Lord Rochford stated that “they did not have the intention of keeping the Falkland Islands”.⁸⁵

Despite Masseran’s doubts about Great Britain’s good faith, he advised on December 9th that the ministers of His Britannic Majesty “should wait for return of Mail in order to see if the King supports this latest project and wishes to trust the good faith of this Ministry, when it insinuates that it will abandon Gran Malvina once we grant the satisfaction it requests.”⁸⁶ This is solid proof of the existence of the promise. At the end of the month, Masseran again reported that, “North insisted on us trusting them and compensating them as requested, without any hesitation, [...] The Minister does not wish it to be said that it is he who proposed [the agreement], nor do the Secretaries of State wish to get involved in the matter, as they have the intention of stating in the House of Lords that they have never strayed from the unconditional request for satisfaction from the start: they maintain that in this way from now on, they will be more entitled to deal with questions of law or to abandon an Island that not only the Navy Officers, but also the People perceive as onerous; they state that they cannot agree to this in an agreement, because Parliament would assume

⁸⁴ Letter from Masseran to Grimaldi, November 28th, 1770 No2003, en AHN, Estado, leg. 4274 (1), p. 7. Letter from Masseran a Grimaldi, December 3rd, 1770, No2008, in AHN, Estado, leg. 6980..

⁸⁵ Letter from Frances to Choiseul, November 29th, 1770, in AECF, Angleterre, vol. 494, fols. 259-263.

⁸⁶ Letter from Masseran to Grimaldi, December 9th, 1770 in AGS, Estado, leg. 6980, letter No2011.

they had sold themselves to Spain, and that they did not know how to uphold England's rights, which would cost them not only their jobs, but also their heads.”⁸⁷

These letters, in addition to the request by the French King to make all sacrifices necessary to keep the peace, resulted in the orders Grimaldi gave to Masseran, on January 2nd, 1771, which read as follows: “As [the British] do not wish to hear of stipulating [the] evacuation of [the] island, in case satisfaction, being conditional, is threatened, but they assure us that they will afterwards abandon Falkland [island], and that we should trust their word; the King is determined to reconfigure his Project, to save honour, and to leave the negotiation about evacuation of the Island for later, accepting the offer, though it is only made by word. Your Excellency must try to obtain this in the best possible way.”⁸⁸

Similar British evidence abounds. A few days after the Masseran Declaration, the British representative in Madrid reported that “They also report that we have given a verbal assurance to evacuate Falkland Island in the space of two months.”⁸⁹

Colonel Isaac Barré, member of the House of Commons, wrote to William Pitt, stating that: “*I take up the pen in a hurry to acquaint your Lordship, that I am just returned from the House of Commons, where Lord North informed us, that Prince Masseran had this morning presented a declaration, signed by the King of Spain, which his Majesty had accepted of, and which would be laid before the House on Friday next. The terms, as I am informed, are not very honourable- the island to be put into our possession; and it is whispered, that there is a secret article to save the rights and pretensions in that country of the crown of Spain; which seems to promise our abandoning the spot silently, upon some future day.*”⁹⁰

⁸⁷ Letter from Masseran to Grimaldi, December 31st, 1770, AGS, Estado, leg. 6980, letter No2020.

⁸⁸ Grimaldi to Masseran, January 2nd, 1771, in AHN, Estado, leg. 4261 (2).

⁸⁹ Harris to Rochford, February 14th, 1771 (Record Office, State Papers, Spain, 186, No80).

⁹⁰ “*Correspondence of William Pitt, Earl of Chatham*”, Vol. IV, edited by William Stanhope Taylor, Esq, and Captain John Henry Pringle, London, A. Spottiswoode, 1840, p. 71.



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Figure 5 Satyric image in relation to the Hispanic-British negotiations where Lord North is inclined before Masseran who is stepping on the British flag, giving it a paper in which is read "Falkland Island"

Thomas Pownall's statement in the British Parliament, on March 5th, 1771, is equally clear: "whatever may be the present ostensible form of the convention, mark well the end: It will end on our part either in the actual cession of the island or in a gradual direliction of it. Without some such idea as this; namely that as soon as reparation is made to our honour for the violent and hostile manner in which we were driven off that island, and as soon as we were put in a situation to evacuate it of our own motion, its tacitly understood we are to cede it. Without some such idea as this; the whole of the negotiation is inexplicable and

⁹¹ Courtesy of the John Carter Brown Library, Brown University, Providence, U.S.A

unintelligible. But taking this line, as going to a matter mutually understood, the whole is plain, definite and but of one construction.”⁹²

Lord Chatham’s speech is categorical: “*it appeared to be an ignominious compromise. It was no satisfaction, no reparation. The right was not secured, and even the restitution was incomplete; Port Egmont alone was restored, not Falkland Island*”.⁹³

Lord Chatham further makes a compelling analysis: “*While Lord Rochford was negotiating with Prince Masseran, Mr. Stuart Mackenzie was negotiating with Mons. Francois. At length, about an hour before the meeting of Parliament, on the twenty second of January 1771, a declaration was signed by the Spanish Ambassador, under French orders, and a French indemnification, for the restitution of Falkland's Islands to his Britannic Majesty; but the important condition, upon which this declaration was obtained, was not mentioned in the declaration. This condition was, that the British forces should evacuate Falkland's Islands as soon as convenient after they were put in possession of Port and Fort Egmont*”⁹⁴

Similar criticisms were expressed by the famed writer or journalist going by the pen name “Junius” in his letters to the *Public Advertiser*, such as the one dated January 30th where he stated that in the Masseran Declaration, Port Egmont is described, “*not as a part of the King's territory or proper dominion, but merely as a possession, a word expressly chosen in contradistinction to and exclusion of the idea of right and to prepare us for a future surrender both of the right and of the possession. (...) It seemed to promise that whatever might be given up by secret stipulation some care would be taken to save appearances to the public.*”⁹⁵ Junius came to the charge again with another letter dated February 13th in which, referring to the Masseran Declaration, he affirmed: “*(...) when that stipulation carries along with it also a private insinuation or encouragement to the Catholic King to hope, and most probably, not to say certainly, an express assurance, that not only Port*

⁹² Hansard, XXVI, 1385-1402.

⁹³ “Correspondence of William Pitt, Earl of Chatham”, Vol. IV, *op. cit.*, p. 87.

⁹⁴ *Anecdotes of the Right Honourable William Pitt, Earl of Chatham*, vol. III, ch. 39.

⁹⁵ *Junius: including letters by the same writer under other signatures; to which are added his confidential correspondence with Mr. Wilkes, and his private letters to Mr. H.S. Woodfall; a new and enlarged edition...*, by John Wade, 2 vols., London, 1884. Letter XLII, II, 318-319.

*Egmont now restored to us, but the whole island, shall in due time, as soon as they dare, be surrendered to the crown of Spain.”*⁹⁶

On its part, the *Public Advertiser* affirmed: “... *the Convention with Spain contains several secret chapters in which we shamefully waive our claim to the Falklands*”.⁹⁷

This ample documentation is simply ignored by the British pamphlet. The evidence concerning the secret promise made by Great Britain to abandon Port Egmont – and with it any fanciful claim of sovereignty – is conclusive. It comes from those having directly participated in the negotiations, and the officials involved. Further facts support this evidence: England left Port Egmont in 1774, and despite leaving behind a plaque and a flag, no official act of possession, no act of authority, nor any protest was made again, despite Spain’s presence in the archipelago and particularly the destruction of the fort and the removal of the British symbols by the Spanish authorities in the Falklands/Malvinas. Although not formally concluded, the promise was binding: *pacta sunt servanda*. In any case, even if the promise had not existed, Great Britain left Port Egmont and, as we shall see, did not reserve its rights of sovereignty as against Spain.

J. London begins to gradually withdraw upon the restitution of fort Egmont

On September 16th, 1771, the Spanish official Francisco de Orduña, sent by the Spanish Governor of the Falkland/Malvinas Islands, Felipe Ruiz Puente, officially handed over Port Egmont to the British Captain John Stott.⁹⁸ The British authors appear to neglect an unavoidable conclusion: if the islands were British, then Great Britain should have been the one to authorise Spanish presence on the islands. Instead, quite the opposite happened. In the entire course of events, not a single British note exists protesting against Spain’s presence on the islands.

⁹⁶ Ibid., II, 343-344.

⁹⁷ AGS, Estado, leg. 6980.

⁹⁸ Caillet-Bois, Ricardo, *op. cit.* p. 148.

The British government began taking action to reduce Port Egmont's garrison to the bare minimum already in early 1772, a move supported by the Admiralty. By the middle of the same year, at the moment of the handover, Britain's presence was reduced to 50 men and a small ship. This reduction of forces was communicated to the British Ambassador in Madrid so that he could pass the information on to the Spanish government.⁹⁹ On February 10th, 1774, Lord Rochford informed the Spanish Ambassador in London that Britain was determined to withdraw its garrison from the Falklands/Malvinas due to the effects of "an economic system", and that as he had said to Masseran in the past, if Spain insisted on the abandonment of the islands, Britain would not abandon them; but if left free do as they pleased, they would carry out the withdrawal when least expected.¹⁰⁰ The following day, Rochford wrote to the British ambassador in Madrid that "with the purpose of reducing the naval force in the western Indies" the troops deployed in the Falklands/Malvinas would be repatriated, and that he was "*inclined to think from what passed formerly on this Subject that they will be rather pleased at this Event*".¹⁰¹ It is interesting to highlight the British note sent to Spain. If Great Britain considered itself sovereign over the islands, there would be no reason to notify Spain. Yet the note existed. And, if a note existed, its aim must have been the preservation of sovereignty - especially when the power abandoning the territory knows that the other will remain on the territory. There was no such note reserving sovereignty. Nor was there any request for Spain to withdraw, and less still any "authorisation" for Spain to remain on the territory. The reasons invoked are less than credible. What economic influence could be wielded by 50 men, who were relieved once a year and could in any case be put to use elsewhere, within the British Empire's military budget? If the purpose of the withdrawal was to reduce the naval forces in the Indies, why only repatriate the garrison at Port Egmont?

In short, in 1771, Great Britain, one of the greatest military powers of the time, was determined to go to war over Port Egmont, but the following year it considerably reduced the troops deployed in that port and only 2 years later ordered the abandonment of a 50-man garrison "for economic reasons". It is not difficult to see that the reason for the

⁹⁹ Rochford to Grantham, March 6th, 1772, British and Foreign State Papers, vol. 22, p. 1393.

¹⁰⁰ Francisco de Escarano to Grimaldi, February 11th, 1774, in Hidalgo Nieto, Manuel, *op. cit.*, p. 261.

¹⁰¹ Rochford to Grantham, February 11th, 1774, in Goebel, Julius, *op. cit.*, p. 456.

abandonment of Port Egmont was something more important than a mere budgetary readjustment.

The unavoidable truth is that the only wish the British government had in 1771-1774 was to save face. And as we shall see, if they were not in a condition to maintain their position at Port Egmont, the simple fact of leaving behind British insignia was not sufficient to retain any title over the territory.

K. The British abandonment of Port Egmont in 1774 and the exclusive presence of Spain in the archipelago

Whatever the reason for the abandonment, it was carried out in mid-May 1774, leaving behind a leaden plaque stating that the islands belonged to the King of Great Britain. As we already saw in the case of discovery, a merely symbolic act (such as installing a cross or a plaque) was not enough to establish a right of sovereignty – much less could a symbolic act of this nature be sufficient to retain sovereignty over time. But that is not all.

Even before the British effectively left, the Spanish government in Madrid was already giving orders to the Governor of Malvinas to ensure that the British would not return to the islands. A note dated April 9th, 1774 written by Julián de Arriaga, Secretary of the State of the Indies, read as follows:

*“Being offered by the Court of London to abandon the settlement built in Gran Malvina, withdrawing the few troops deployed there, and some inhabitants, the King wishes to inform you of this fact, in order to consequently observe prudently and carefully whether the British do in fact abandon said settlement, without reestablishing a new one in the vicinity, and that once you have verified the fact in the terms agreed upon, from time to time, take the necessary precautions to ensure that the British do not return to the area, and inform me in the greatest detail about everything that happens there, both now and henceforth.”*¹⁰²

¹⁰² AGN Sala VII, Fondo Biblioteca Nacional, T.189.

This note is particularly important for a variety of reasons: 1) because it clearly shows that the Spanish government understood Britain's withdrawal as a relinquishment 2) because it explicitly stated the intention to exercise sovereignty over the port which had up to that moment been in Great Britain's hands, 3) because it clearly states the intention of preventing the British from returning, which implies the will to exercise sovereignty and exclusive possession over the archipelago as a whole and 4) because both British conduct and the Spanish note support the thesis of the British promise to abandon Port Egmont once it had been returned.

These orders were carried out first in November 1774 and then in February 1775. At the turn of 1775, Captain Juan de la Peña confirmed that nobody was living in or travelling to the British settlement. On January 24th, 1776, pilot Juan Pascual Callexas withdrew the plaque affixed by the British and sent it to Buenos Aires.¹⁰³

On June 30th, 1777, José Gálvez, Minister of the Indies, sent a Royal Order to the Viceroy of the Río de la Plata for him to “proceed to burn the buildings of all types that may be completed or started, doing the same with the materials that are gathered”¹⁰⁴ This order was fulfilled at the beginning of 1780 by an expedition under the command of Callexas, thus erasing any sign of Britain's presence in the Falkland/Malvinas Islands (see Figure 6).

Many conclusions may be drawn from this important order and its execution, namely: Spain maintained control over the whole archipelago, the order was issued in a time of peace with Great Britain (that is to say, it was not a mere act of war nor an act carried out by reason of a war) and last but not least, the order was issued to (and executed by) the official in control of the Governorate of the Malvinas (under whose authority the islands lay), that is, the Viceroy of the Río de la Plata.

¹⁰³ Caillet-Bois, Ricardo, op. cit. p. 152.

¹⁰⁴ Royal Order dated June 30th, 1777, in AGI, leg. Buenos Aires, 413

Great Britain abandoned Port Egmont in 1774 and since then, for 55 years, there was no official British presence on the islands, nor any official acts relating to them, and less still any effective acts of sovereignty over the islands or in relation to them. On the contrary, there was no official reaction to the destruction of the settlement at Port Egmont carried out by Spain and nothing was said about the continuous and exclusive presence of Spain in the islands, with 32 governors that reported to Buenos Aires.

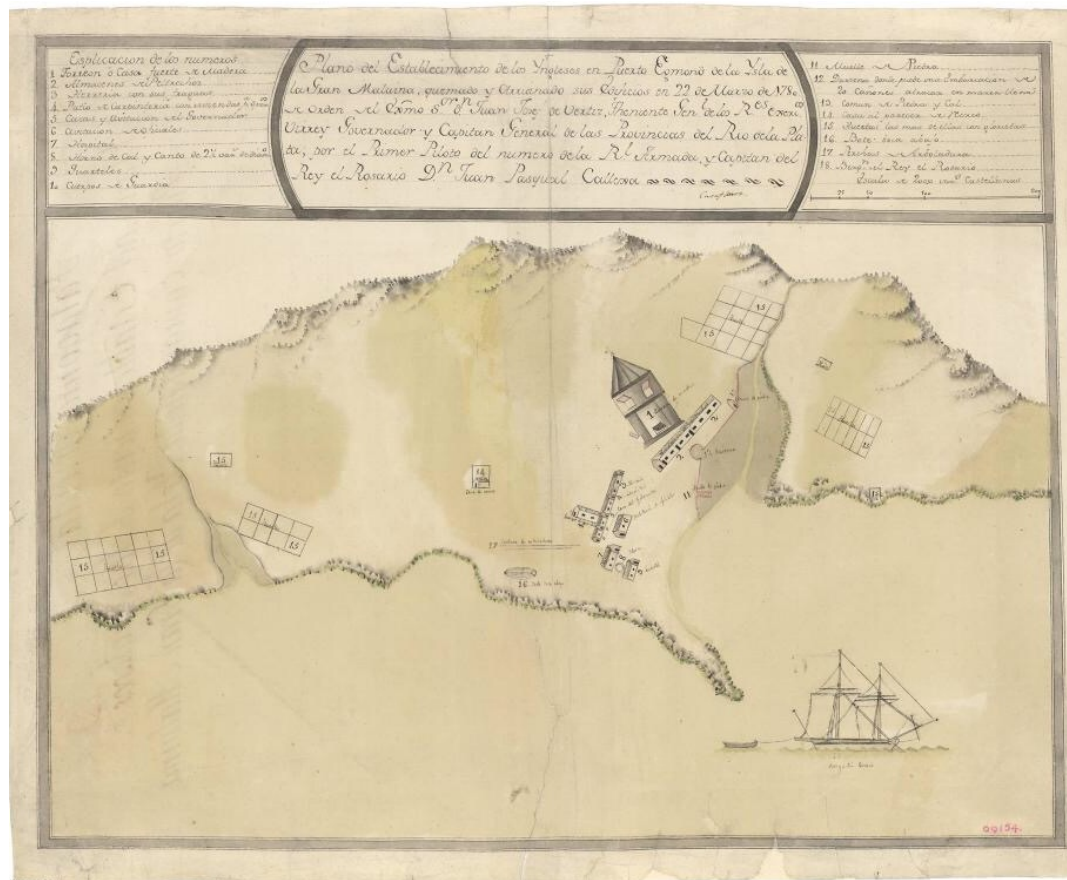


Figure 6 Drawing of Port Egmont destroyed by the Spaniards; the legend reads: "Drawing of the establishment of the Englishmen in Port Egmont of the Island of the Great Malvina, burned and demolished its buildings on March 22, 1780 by order of Excmo. Sr. Dn Juan Jose de Vertiz, General of the Royal Armies Viceroy Governor and Captain General of the Provinces of the Rio de la Plata, by the First Pilot of the Number of the Royal Navy and Captain of the King the Rosario Dn Juan Pasqual Callexa"

Britain said nothing at the time it signed the convention of Nootka Sound, which by virtue of its Article VI prevented Britain from settling the Falkland/Malvinas Islands. Not a word was said when in 1806-1807 British officials invaded Buenos Aires and found the leaden

plaque left behind in the once-British settlement. Another relevant question is why Great Britain, when attempting to conquer the Viceroyalty of the Río de la Plata, did not take any action against Spain's presence in the only territory that supposedly was British. If the question had not been settled in 1771, here was an excellent opportunity to settle it in their favour. On Spain's part, the removal of the plaque left at Port Egmont was a clear sign of its will to repudiate any pretention of British sovereignty. Even leaving aside the lack of British reaction to the Spanish authorities' control over Port Egmont, including its subsequent destruction, it is worth pointing out that the British found the plaque the Spanish had removed in Buenos Aires, between 1806 and 1807. There was no official reaction by Great Britain in regard to acts of enforcement performed by Spain against the sailors of the British Crown visiting the islands, as we will see later. Nor was there any reaction by Britain to the various acts of sovereignty carried out by the new-born Argentine government between 1810 and 1829.

The abandonment of 1774 was not a simple physical withdrawal from Port Egmont, but it meant the total relinquishment by Great Britain of any kind of claim over the Falkland/Malvinas Islands. A period of 55 years with no British presence or official acts as against a nearly four-decade-long Spanish presence, as well as the Argentine acts that took place from the beginning of the process of independence until 1829 clearly show not only the absence of British *corpus possessionis*, but also the absence of any intention of having sovereignty.¹⁰⁵

L. The continuous and exclusive presence of Spain in the Falklands/Malvinas until 1811

During the period under discussion, Spain had a continuous presence in the Falkland/Malvinas Islands from April 1st, 1767, when Louis-Antoine de Bougainville transferred the French settlement founded in 1764 to the Spanish authorities, until February 13th, 1811, when Spanish troops were withdrawn from Port Soledad. Spain was present “à

¹⁰⁵ On the requirement of both elements, objective (intention to act as a sovereign) and subjective (performance of acts of sovereignty), see *Legal Status of Eastern Greenland*, 1993, judgment, PCIJ, series A/B n° 53, pp. 45-46.

titre de souverain”, as is proven by the appointment of Mr. Felipe Ruiz Puente as Governor of the Malvinas, and the proclamation of the islands as a dependency of the General Captaincy of Buenos Aires made by King Charles II on October 4th, 1766. Official Spanish presence was permanent, and its authorities succeed one another on a continuous basis for the entire period (32 Governors and Commandants were appointed by the Viceroy of Buenos Aires); by order of the King of Spain, they were to be relieved annually, between mid December and mid January.¹⁰⁶ The Commandants relied upon a minister of the Royal Treasury and periodically formed governing boards (*juntas de gobierno*) which also included the Commander of the main ship anchored at Port Soledad.¹⁰⁷ The islands were inhabited by a military detachment, prisoners, settlers and Catholic priests. The Church of Nuestra Señora de la Soledad operated on Soledad Island, and construction of the stone church was completed on November 4th, 1801.¹⁰⁸

British sources refer to the Spanish settlement as a prison; this probably arises from the translation of the word “*presidio*” and its current meaning of “prison”. However, in Spanish America, “*presidios*” were not prisons. The term was used to refer to settlements situated at the outermost points of Spain’s dominions that worked as protection against the frequent attacks of privateers and pirates, as well as being a means of protecting Spanish sovereignty by preventing other nations from settling in the area. Regardless, even if the only Spanish presence had been a prison, it would still have been sufficient to constitute an effective act of government authority.

The Governors of the islands were mostly preoccupied with maintaining Spanish presence in the southernmost territories of the Empire, and to control the activities of other nations in the region. This was an official and public presence that no other maritime power ignored or could ignore, which was in charge of policing and law enforcement in and around the islands of the entire archipelago. Frequent journeys were made around the archipelago and

¹⁰⁶ Notification issued by Ship Captain of the Royal Navy and Chief Commander of the Naval Base of Montevideo, José María Salazar of January 4th, 1811. Archivo General de Marina Don Álvaro de Bazán. In *El Viso del Marqués* (Ciudad Real) Expediciones de Indias Nr. 524. Pages 10, 11 and 12.

¹⁰⁷ See, for example, the government agreement of April 18th, 1800 in Gómez Langenheim, A., *op. cit.*, T. I, pp. 178-179. At the end of the period, the Commandant of the Falklands/Malvinas was also the commander of the main ship anchored at the islands.

¹⁰⁸ AGN Sala IX 16-9-8

along the Patagonian coasts. Spanish authorities on the islands also kept a detailed record of the cattle present on the islands, which was considered to belong to the Royal Treasury, and carried out maintenance of military facilities, as proven by the periodical reports on both matters sent by the Commandants to Buenos Aires.

There are hundreds of examples of the control exercised by the Spanish authorities, but suffice it to cite the following: a note dated August 17th, 1790, requesting the payment of expenses incurred for the transfer and rations of the “British individuals” found fishing illegally in the Falkland/Malvinas Islands on the corvette *Sta. Elena*.¹⁰⁹ Another example is Communication No. 239 dated February 26th, 1806 in the Malvinas, by which Commandant of the Malvinas Antonio Leal de Ibarra “Communicate[s] the seizure of the English brig *St. Agustin* (alias) *El Talquino*, its cargo and subsequent events, giving some news of the privateers who are in the South Seas”. The vessel in question was a Spanish ship that had been captured by English privateers. The note addressed to Viceroy Sobremonte in Buenos Aires gives an idea of the patrols of the coasts and seas of the region carried out from Port Soledad: “Having sent six armed men for reconnaissance of the Southern coast of this island to guard myself against the surprise of Enemies, which have been repeatedly sighted with hostile aims....” The note affirms that the enemies were found on the sections of coast named Puerto de los Leones and de los Pájaros, and that the brig captured by the Spanish was anchored at the nearby island of Santa Isabel”. Captain Andrés Jonson [according to the original spelling] and his five-man crew were taken prisoner – all of them British.¹¹⁰ A similar example can be found in Pedro Sanguineto’s report addressed to Viceroy Nicolás de Arredondo, dated March 4th, 1794 in the Malvinas, by which he reports to have warned French, American and British fishing vessels devoted to “whale fishing” operating in the areas surrounding the islands.¹¹¹ Another example is the report dated January 15th, 1810, by which the Commandant of the Malvinas, Gerardo Bordas, informs Viceroy Cisneros of Buenos Aires: Having ignored up to the 18th of the current [sic] the unfortunate events occurred in our Peninsula, of which the second pilot of the Royal Navy, Mr. Pablo Guillén who entered this port commanding the *Zumaca Carlota* to relieve me informed me ex

¹⁰⁹ AGN Sala IX 16-9-8.

¹¹⁰ AGN Sala IX 17-1-3

¹¹¹ See supra. Chap I, fn 38

officio [...] Being this Colony, the only spot of the Monarchy, that ignoring the occurrences due to its location; and consequently the only territory where due obedience to our King and natural lord was not sworn; I immediately thought to carry out this act, which took place on the 14th of the current (*sic*) between 8 and 9 a.m. in the church yard, as solemnly as possible and to the acclaim of the crowd.¹¹²

As we can see, no other State made any kind of claim, nor carried out any act of public power over any part of the archipelago, nor made any protest against the countless and continuous manifestations of Spanish public authority. As the *Foreign and Commonwealth Office* affirms in answering a question raised by the *Committee of Foreign Affairs of the House of Commons*: “Spanish occupation from 1774 to 1811 was undisturbed by any other power”.¹¹³ Various internal Foreign Office memoranda express similar views on the Falkland/Malvinas Islands. Two of these (dated 1911 and 1928) read as follows: “No objection appears to have been made at any time on the part of Great Britain to the possession of Soledad by the Spaniards, who continued in undisturbed exercise of all the rights of sovereignty, not only over the East Falkland Island, but over the whole group, until, according to R. Greenhow, about the year 1808. They, however, appear, according to other writers, to have exercised these rights until a later period, for G. A. Thompson, in his “Geographical and Historical Dictionary of America and the West Indies”, published in 1812, states that: “The Spaniards now send criminals to these inhospitable shores (of the Falkland Islands) for their settlements in America; and Dr. G. Hassel, in his “*Geographisch-Statistisches Handwörterbuch*”, published in 1817, says: “Die Spanier aber besitzen noch ein geringes Dorf auf der grössen Insel bei Port Soledad”. Of the extent of the Spanish Settlement at Soledad during this period we have no distinct accounts. The remains of the town show that though small it was tolerably well-built and provided with a Government House, church, store-houses and forts, all of stone. It was under the superintendence of an officer entitled “Commandant of the Malvinas”, who was dependent on the Viceroy of La Plata; and vessels of war were from time to time sent from Buenos Aires to cruise among the islands and to warn all vessels of other nations against

¹¹² AGN Sala X 2-3-15.

¹¹³ Question No 3, House of Commons, Foreign Affairs Committee, Session 1982-1983. Falkland Islands, Minutes of Evidence, Monday 17 January 1983.

trespassing on the coasts (...) Spain abandoned the Falkland Islands in the first quarter of the nineteenth century, and has not since that year directly claim to them. The party appearing to represent Spain in her title to those islands was the Government of Buenos Aires.”¹¹⁴

The preliminary Memorandum dated September 17, 1946 drafted by the *Research Department of the Foreign Office*, is also revealing.¹¹⁵ The subtitle leaves no room for doubt: “*Spanish Sovereignty 1774-1811*”. It recognises that after Britain’s withdrawal from Port Egmont, the Spanish Governor of the Malvinas was instructed to ensure that the English did not return and that their facilities were destroyed, and that nine governors succeeded one another in Port Soledad, placing the date of Spanish withdrawal between 1811 and 1813.

Taken together, these documents show that the British had no doubt about Spain’s sovereignty over the archipelago. This is not an isolated assertion, but a series of concurring opinions given over more than thirty years, among which that of Foreign Secretary Anthony Eden, and three memoranda that are working documents of the Foreign Office, as well as an internal research document on the matter.

Unsurprisingly, the British pamphlet tends to minimize Spanish presence in the islands using arguments that have nothing to do with the question of sovereignty. Instead of analyzing the legal impact of the period of total and exclusive Spanish possession of the Falklands/Malvinas, all Pascoe and Pepper affirm is that: “Spain maintained a garrison and penal colony there. The presence of women was soon prohibited, and the islands remained a hated hardship post for their Spanish commandants and their men, to say nothing of the criminals banished there. British and American ships continued to use the Falklands,

¹¹⁴ Memorandum respecting the Falkland Islands. Confidential (9755), by De Bernhardt, Gaston. Printed for the use of the Foreign Office, January 1911, pp. 13-15 (FO 881/9755); Memorandum Respecting the Falkland Islands and Dependencies. Confidential (13336), by Field, John W., Foreign Office, February 29, 1928, pp. 7-8, par. 51-57 (FO 371/12735). As is already known, what Spain claimed was sovereignty over the entirety of its colonial empire in America, in the context of the war of independence being fought in its ex-colonies.

¹¹⁵ Research Department, Foreign Office, Preliminary Memorandum on the Falkland Islands. Secret (17111), September 17th, 1946 (FO AS 5728/311/2), p. 6.

ignoring the Spaniards.”¹¹⁶ Obviously, it is completely irrelevant whether the persons sent to the islands would have preferred to be there or in a less inhospitable location. As to the fact that English and American ships continued to use the islands “ignoring” Spain’s presence, we have already seen that the Spanish tried to enforce respect for their laws. In any case, not being government ships, their actions were irrelevant as far as the question of sovereignty is concerned.

In the face of such indisputable evidence of Spain’s exclusive possession, some British online commentators who, like the authors of the pamphlet, lack academic qualifications, attempt to prove that Spain only controlled the eastern island (Soledad). The base their assertion on some isolated references, such as Bernardo Bonavía’s note when taking over leadership: “*On this date I was given the command and government of the Island of Soledad in the Malvinas...*”.¹¹⁷ Many other documents refer to the archipelago in general terms and therefore use the plural. We have already seen some of them, as well as Spain’s concrete actions in the whole of the archipelago, including in Port Egmont. Francisco Xavier de Viana introduces himself as the “Governor of these Malvinas Islands” in the government agreement concluded in Soledad de Malvinas, on April 18th, 1800.¹¹⁸ Antonio Leal de Ibarra signs the letter notifying the capture of the English brig “San Agustín” as “Commandant of the Malvinas”¹¹⁹ The aforementioned facts, as well as the destruction of the British fort at Port Egmont and regular visits to ensure the British had not returned, as well as the exercise of authority over foreign ships located on other islands of the archipelago, clearly show that Spanish sovereignty extended to the archipelago as a whole. The instructions issued directly by the King of Spain to verify, once a year, that the English had not reestablished themselves at Port Egmont/de la Cruzada were crystal clear.¹²⁰ This

¹¹⁶ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 7.

¹¹⁷ A.G.N. Sala IX 17-1-3. Letter from Bernardo Bonavía to Viceroy Sobremonte. Document N° 43. Document N° 44 contains Note N° 293, by which Navy Lieutenant Antonio Leal de Ibarra informs that he had handed over the station on March 21st.

¹¹⁸ Gómez Langenheim, A., *op. cit.*, T. I, pp. 178-179.

¹¹⁹ See *supra*, fn 58.

¹²⁰ See for example the Royal Order dated April 9th, 1774 issued by the governor of Buenos Aires, the note of the governor of the Malvinas Ramón de Carassa to Viceroy Cevallos dated June 18th, 1778 and the note written by the Governor of the Malvinas Salvador de Medina to Viceroy Vértiz dated March 4th, 1780. The first reads: “By the attached copy Your Majesty is informed of the same that the Governor of Malvinas has been warned of on this date, relating to the English having to abandon the settlement of Gran Maluina; of which I am notifying Your Excellency to verify that this request is complied with”. The second reads: “Sir.

conclusion is supported by the fact that the decision to withdraw the settlement at Port Soledad in 1811 established that “annually a ship must be sent for reconnaissance, verifying the same also for other [settlements] in the Islands so that no other Power may establish itself or take possession of them.”¹²¹ The importance of this last assertion lies in its being the last decision to have been taken before Spain’s withdrawal. It is clear proof of Spain’s *animus domini* over the whole archipelago.

Taking into account the territory’s insular nature, its geographical location and the absence of possession by any third State, there is no doubt that its continuous presence on Isla Soledad and its regular activities along the coasts and surrounding seas grant Spain sovereignty over the entirety of the archipelago. In fact, as seen above, archipelagos are geographical units par excellence.

M. The presence of British fishing boats and Spanish exercise of authority

Some British online commentators consider the activities of British fishermen during this period to be acts of sovereignty. The activities of private persons are not manifestations of sovereignty. International jurisprudence is absolutely clear in this regard: for example, the arbitrator in the case of Isla de Aves considered that the activities of the inhabitants of the San Eustaquio y de Saba Islands, who would visit the disputed island to fish for turtles and gather eggs, to be irrelevant.¹²² If the activities of fishermen and hunters should be considered sovereign acts, the United States and France must also be considered to have performed sovereign acts over the Falklands/Malvinas, which is absurd, especially when the Spanish government carried out enforcement actions over these activities in the entirety of the archipelago.

There not having come any Ship from the Province, at an appropriate time to conduct a patrol of Port Egmont as Your Majesty required every year...” Finally, the third affirms: “in the Notification dated October 22nd, Your Excellency requested me to destroy everything that exists at Port Egmont in carrying out reconnaissance of the territory...” (Gómez Langenheim, A., *op. cit.*, T. I, pp. 92, 98 and 100).

¹²¹ Archivo General de Marina Don Álvaro de Bazán. El Viso del Marqués (Ciudad Real). Expediciones de Indias No524. Pages 10, 11 and 12

¹²² La Pradelle-Politis, *Recueil des arbitrages internationaux*, 2nd ed. Paris, ed. A. Pedone, 1957, Book II, pp. 414-415. See also the arbitral award *Dubai/Sharjah*, International Law Reports, 1993, Vol. 91, p. 606, and the following judgment of the International Court of Justice: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* C.I.J. Recueil 1992, p. 400, par. 66 et p. 419, par. 97.

Great Britain itself did not consider the activities of fishing vessels under the authority of His Majesty to be official acts. In response to the protest of the Spanish ambassador in London regarding the presence of British vessels on the islands, the British minister guaranteed the abandonment of the islands and expressed his suspicions that the ships belonged to the American colonies. Madrid informed Buenos Aires about this fact in February 1776,¹²³ pointing out that in case Englishmen were found in Port Egmont, they should be warned to leave. A Royal Order dated August 9th of the same year related, in the same vein of the order issued in 1774, that the Court of London had already verified Britain's withdrawal, and accordingly, it was to be ensured that the English did not return to Port Egmont.¹²⁴

Even more distrust existed after new hostilities broke out between Spain and Great Britain in 1796. The Governor of the Malvinas, in an order dated August 1798, is instructed how to act in case American or British ships are found at Port Egmont or the surrounding areas. The instructions establish that in case any ship of those nations is found at anchor in the port "preparation for combat will immediately be made" and "licenses and logs will be registered" and "if they are proven to be American, Your Excellency will prudently and civilly order them to retire from the port belonging to His Catholic Majesty within 24 hours [...] If any British fishing vessel were anchored [...] you shall request their surrender and if they do not abide by the His Majesty's order, you will position yourself suitably [...] [and] you will open fire."¹²⁵ Once again, the fact that Spain considered itself sovereign over the whole archipelago, including Port Egmont, is well documented. This note is also useful to show the difference between the treatment of official British ships and private vessels, and how the latter could not be considered to be performing acts of public authority.

N. The peace of Amiens and French attempts to return to the Falklands/Malvinas

¹²³ AGN Sala IX 27-3-10.

¹²⁴ AGN Sala IX 24-2-3.

¹²⁵ AGN Sala IX 16-9-10.

The British pamphlet refers to the negotiations of the “Peace of Amiens” of 1801-1802 between France and its allies on the one hand and Great Britain on the other.¹²⁶ It refers to a request to Napoleon made by Bougainville, the French representative at the Peace, to include a French claim over the Falklands/Malvinas in the negotiations. One British bloggers go even further, claiming that in Amiens, France had recognized purported British sovereignty over the Falkland/Malvinas Islands, by requesting British permission to establish a settlement, and that the refusal to accede to such a claim was an act of sovereignty by the British government. This is completely incorrect.

The facts occurred as follows: Louis-Antoine de Bougainville never did get over the failure of his attempted expedition and the cession of his settlement to Spain, even though this had occurred in accordance with the law and ratified by his monarch. He complained about the Spanish having used the Falklands/Malvinas as a “prison” instead of following his plan of colonization. He even spoke of a plan to bring 30.000 inhabitants to the islands. Once Napoleon Bonaparte was in power, the French sailor returned with his old idea, and on March 19th, 1801, he sent a *Mémoire du général Bougainville sur un projet d'établissement dans l'île Malouine*¹²⁷ which extolled the virtues of a settlement in the Falkland/Malvinas Islands. Bougainville described them as unassailable and a gate to the “big ocean” and the East Indies. He considered the islands to be essential for fishing, taking into account that Terra Nova and Canada belonged to the British, and pointed out that they were located 500 miles from any other settlement of a European power. He also declared Spain’s invoked rights to be imaginary, and that France could enforce “its sacred title of first occupant.” He believed that the moment was ripe to request Spain give up its right in France’s favour, and that England would support such an action.¹²⁸

It clearly transpires from his memoirs that Bougainville considered the islands to belong to Spain and not to Great Britain. He obviously regretted the fact that at his time, the French monarch had recognised Spanish sovereignty over the islands due to their location within

¹²⁶ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 7.

¹²⁷ Martin-Allanic, Jean-Etienne, *Bougainville navigateur et les découvertes de son temps*, Paris, PUF, 1964, T. II, p. 1543.

¹²⁸ “Mémoire du général Bougainville sur un projet d'établissement dans l'île Malouine”, in Martin-Allanic, *op. cit.*, T. II, p. 1543.

an area that was recognised as being Spanish – a fact which, according to him, was “imaginary”. This assertion contradicts his own conduct: Bougainville himself transferred his settlement in the Falklands/Malvinas to the Spanish authorities. The attitude he took in 1801 may be understood as a wish to re-colonise the islands. The French sailor did not consider the Falkland/Malvinas Islands to be British, which explains why he expressly distinguishes Canada and Newfoundland as British possessions. Likewise, his consideration that the Spanish settlement was located 500 miles away from the presence of any other European power clearly shows his awareness of the abandonment and destruction of Port Egmont and the inexistence of any British settlement on the islands. And finally, he is absolutely clear in indicating that Spain is the nation that has to give up its right, demonstrating his awareness that the Spanish Crown was the only power to exercise full sovereignty over the archipelago. He only considered that Britain should consent to the transfer of rights to France in the context of the peace agreement being discussed by European powers at the time, Great Britain being the maritime power par excellence, and in full knowledge of the fact that these were seas in which British (as well as American) fishermen hunted whales.

However, on March 21st, 1801, a few days before Bougainville’s memorandum, Spain and France signed the Treaty of Aranjuez, by virtue of which the Spanish Crown, among other things, ceded Louisiana to the French Republic. Bougainville was too late with his request.

From April that year, negotiations began between France and Great Britain over preliminary agreements in view of signing a treaty of peace in Amiens. The French Minister of Foreign Affairs, Charles Maurice de Talleyrand, saw the opportunity to put the issue of fishing on the table. He was not satisfied with how this activity was carried out in general, and particularly in Newfoundland, as a result of the 1783 Anglo-French treaty. He therefore ordered Louis Guillaume Otto, the French representative in London, to raise this issue during the negotiations. On September 7th, 1801, a conference took place between the parties, where the issue was discussed. The British minister, Lord Hawkesbury, stated that the discussion on such articles would take too much time and that he saw no problem in

addressing these “merely commercial” issues in a separate future treaty.¹²⁹ He certainly considered the treaty of 1783 sufficient to settle the fishing issue since no fisherman from either nation had brought any complaints. This answer did not suit the French representative, which was why the debate was put off until a later date. Realising this, Talleyrand sent a note to Otto whose content, he informed him, reflected the “the exact sentiments of the French Government.”¹³⁰ The note made no reference to the issue of fishing, and less still to the Falkland/Malvinas Islands.

The preliminary articles were signed in London, on October 1st, 1801, incorporating matters relating to fishing in Article XIII, *maintaining the status quo ante bellum*, that is, what had been agreed upon in the 1783 treaty, as suggested by the British representative in the negotiations. The question of sovereignty over the Falklands/Malvinas was completely external to the negotiation.

British bloggers maintain that in these negotiations, the French government made its first request for the Falklands/Malvinas. This assertion is not consistent with official French documents,¹³¹ Napoleon Bonaparte’s correspondence,¹³² nor French parliamentary records,¹³³ which make no reference to the Falkland/Malvinas Islands.

Negotiations based on the preliminary agreement began in November 1801, aiming to reach a definitive treaty of peace among all the powers involved. The Spanish representatives arrived late, and the French decided not to wait to start negotiations with the British, including on subjects that directly affected Spanish interests. Taking into account Bougainville’s memorandum, Talleyrand decided to address the issue of fishing from

¹²⁹ Stockdale, J., *The Whole Correspondence Between the Governments of Great Britain and France, Prior to the Signature of the Definitive Treaty of Peace, Together with the Consular Manifesto, &c. &c. Complete. To which are Added, The Orders of Council for Letters of Marque and Reprisals; with the Republican Comments Thereon. Translated from the Latest Publication of the French Government*, London, Picadilly, 1803, pp. 58-60.&c. &c

¹³⁰ *Ibid.*, p. 61.

¹³¹ Chez Garnery, *Pièces officielles relatives aux préliminaires de Londres et au traité d’Amiens*. Paris, Imprimerie de la République, 1803.

¹³² *Imprimerie Imperiale, Correspondance de Napoléon Ier; publiée par ordre de l’Empereur Napoléon III*, vol.7, Paris, Imprimerie Imperiale, 1861.

¹³³ Centre National de la Recherche Scientifique, *Archives parlementaires: de 1787 à 1860: Recueil complet des débats législatifs et politiques des Chambres Françaises, Vol. 5*, Paris, Libr. P. Dupont, 1865.

another perspective. Knowing that a great number of English fishermen hunted whales in the South Seas, which were far more fruitful than the Northern Ocean, gave instructions to José Bonaparte, who was to be in charge of negotiating the definitive peace treaty, to modify Article 13 of the preliminary agreement, offering to relinquish Saint Pierre and Miquelon as well as France's rights under by the Treaty of 1783, in exchange for sovereignty over the coast of Newfoundland and neighbouring islands. He was likewise to insist on the freedom of whale fishing in the North Seas, Greenland, Iceland, in the seas of Germany and the Dodger Bank, and to achieve an agreement to establish a French settlement for whale fishing in the Falklands/Malvinas.¹³⁴

These requests were included in the counter-project that J. Bonaparte submitted to the British representative, Lord Cornwallis, in December 1801. Cornwallis sent it to Hawkesbury, who on January 1st, 1802 answered that the issues of the Falklands/Malvinas and fishing had already been discussed in the preliminary negotiations, and therefore could not be raised again in the definitive treaty.¹³⁵ In the preliminary negotiations, the issue of sovereignty over the Falklands/Malvinas was never proposed and, therefore, never discussed.

In the conference of January 19th, 1802, J. Bonaparte insisted once more upon the exchange of sovereignty over Saint Pierre and Miquelon for sovereignty over Newfoundland, a settlement for fishing purposes in the Falkland/Malvinas Islands (the only time the islands are mentioned in official French documentation) and the neutrality of fishing in wartime. Again, the question of sovereignty over the Falklands/Malvinas does not arise. Cornwallis' reply was as Hawkesbury had ordered: the issues had already been discussed in the preliminary negotiations.¹³⁶ That is to say, both of them considered these issues as a whole and having only one purpose: fishing.

¹³⁴ Baron Du Casse, Albert Pierre Emmanuel, *Histoire des négociations diplomatiques relatives aux traités de Mortfontaine, de Lunéville et d'Amiens, précédée de la correspondance inédite de l'empereur Napoléon 1er avec le cardinal Fesch*, Paris, Palais Royal - Galerie d'Orleans, 1855, Vol. 3, pp. 11-12.

¹³⁵ Murray, John, *Correspondence of Charles, First Marquis of Cornwallis*, London, William Clowes and Sons, 1859, Vol. 3, pp. 426-427.

¹³⁶ Chez Garnery, *op. cit.*, p. 193.

The above suggests that at no time did France consider Britain to be sovereign over the Falkland/Malvinas Islands. It was simply attempting to take advantage of a negotiation in which Spain had to participate in order to obtain a French settlement in the Falkland/Malvinas Islands for whale hunting and fishing purposes.

At no time did Britain defend its alleged sovereignty over the Falkland/Malvinas Islands. If Great Britain did consider itself sovereign over the islands, the Peace of Amiens was a new opportunity to invoke its sovereignty (or at least, to use the argument in the negotiations to “trade” territory, in the same way it did with other areas of the globe.) As had happened a decade before during negotiations over the Treaty of San Lorenzo or Nootka Sound, Great Britain did absolutely nothing. For the rest, negotiations between France and Great Britain over fishing and whale hunting took place behind the back of the effective sovereign, Spain. The Spanish Crown did not sign the preliminary articles, and its representative, the Count of Azara, came to sign the definitive treaty one month after France’s last request, in February 1802. The negotiations were not published among official French documents, nor was the French parliament informed about them. Spain’s effective presence in the Falkland/Malvinas Islands, and its exercise of sovereignty in 1801-1802, show that the new interpretation made by the authors of the pamphlet and bloggers cannot be taken seriously.

Conclusion

In short, until 1811 Spanish possession was effective, exclusive, continuous, peaceful, public and in good faith.¹³⁷ These characteristics leave no doubt about the fact that at the moment of Argentine independence, Spain had sovereignty over the Falkland/Malvinas Islands and it was the Viceroyalty of the Rio de la Plata that administered them. Between 1774 and 1811, there is no trace of any act of the British state, nor any form of British claim of sovereignty over the Falklands/Malvinas – or even over Port Egmont. We may wonder why, if a British territory existed in the South Atlantic, the British naval station in

¹³⁷ See for example the arbitral awards in the *Island of Palmas case* (“continuous and peaceful display of territorial sovereignty”, United Nations RIAA vol. II p.839) and *Dubai/Sharjah* (“International law also requires demonstrations of sovereignty to be both peaceful and public [and] the exercise of authority by the State claiming the territory to be continuous and of a certain duration”, International Law Reports, 1993, vol. 91, p. 624).

South America established from 1808 was not situated there, but in a foreign territory (Rio de Janeiro) and was not even tasked with visiting the Falkland/Malvinas Islands regularly.¹³⁸ The British naval station was well aware of the Spanish presence in the Falklands/Malvinas: the chief of the station sent a note on February 24th, 1809 in which he referred to an uprising in Buenos Aires and said that it had been controlled and “that the unruly leaders of the Cabildo were detained and put onboard a vessel for the Maloinas [sic], or Falkland islands”.¹³⁹ The answer to these questions is simple: during the period in question, the Falkland/Malvinas Islands were not considered to be a British territory, whether by the Spanish, the British themselves, or any other power.

As the International Court of Justice said in the *Temple of Preah Vihear* case, we are faced here with countless situations in which “the circumstances were such as called for some reaction, within a reasonable period, on the part of the authorities.”¹⁴⁰ The British authorities had four decades to react to Spanish sovereignty over the Falklands/Malvinas. They did not, which undoubtedly implies the acceptance of Spain’s sovereignty. What the Hague Court states in the following paragraph regarding Siam’s absence of reaction to Prince Damrong’s visit to the Temple is applicable to Great Britain in relation to each and every exercise of Spanish public power in the Falkland/Malvinas Islands. It is a tacit acknowledgement (...) through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title (...) or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map.¹⁴¹

¹³⁸ The limits of the South American naval Station were the coasts and waters of South America to the south of the Equator and to the west of the meridian of 30o west, as well as the eastern coasts of the Pacific Ocean. . GOUGH, Barry M., *Sea Power and South America: The 'Brazils' or South American Station of the Royal Navy 1808-1837*". Salem, The American Neptune, 1990, vol. 50, No1, p. 29, cites as a source: Admiralty Minute, 18 December 1816, Adm. 3/88, Public Record Office, Kew.

¹³⁹ Smith a Pole, February 24th, 1809, Graham, Gerald & Humphreys, R.A. (eds.), *The Navy and South America 1807-1823. Correspondence of the Commanders-in-Chief on the South American Station*, London, Navy Records Society, 1962, p. 24.

¹⁴⁰ ICJ Reports 1962, p. 23.

¹⁴¹ Ibid., p. 31.

Every British claim of sovereignty over the Trinidad/Saunders Island, over Gran Malvina/West Falkland or over the archipelago as a whole cannot compete with the continuous and unchallenged acts of public power carried out by Spain for four decades. The British pamphlet simply chose to ignore this essential part of history and legal analysis.

Chapter III

Argentine succession to Spain's rights (*uti possidetis*)

Introduction

Pascoe and Pepper's pamphlet does not say much about the basic rule for the succession of new States to the territory of old colonial powers.¹⁴² This rule, also known as the principle of *uti possidetis iuris*, is widely accepted in international practice and jurisprudence, and those British authors seem to accept the rule of succession to Spain's rights. Still, this rule is questioned by British bloggers who nevertheless scrupulously follow Pascoe and Pepper's pamphlet. This chapter will prove the pertinence of the rule, its opposability to Great Britain, and the latter's acceptance of it, as well as Argentina's succession to Spain's rights over the Falklands/Malvinas.

A. A widely recognised rule: *uti possidetis iuris* or the succession of States to territory.

Uti possidetis iuris of 1810 is a rule relating to the succession of States to territory followed by the States of Spanish South America. The relevant date for South America does not match the dates of proclamation of independence in the various South American countries for the reason that, from 1810 onwards, these ceased to recognise the colonial authorities – although formal proclamations of independence would only come later. The new states inherited the territory belonging to the Spanish Crown, on the basis of the administrative divisions existing in 1810.

Uti possidetis is a general rule of customary law applicable to the territories of new States. This was set out by the International Court of Justice in the case of the Frontier Dispute between Burkina Faso and Mali in the following manner "(...) it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America.

¹⁴² Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 4

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.”¹⁴³

The principle also reaffirmed that no *terrae nullius* existed in Latin America as a consequence of the process of independence. In other words, the scope of territorial sovereignty recognised to Spain and Portugal had to be equally recognised to the new Latin American States. The main political objective of the principle was to put a stop to any neocolonialist ambitions of other nations of the time. The Chamber of the International Court of Justice in the Land, Island and Maritime Frontier Dispute case (El Salvador/Honduras, Nicaragua intervening) also applied *uti possidetis iuris*, with the date of independence of the States of Central America being 1821. It clearly states "*The Chamber has no doubt that the starting-point for the determination of sovereignty over the islands must be the uti possidetis juris of 1821. The islands of the Gulf of Fonseca were discovered in 1522 by Spain, and remained under the sovereignty of the Spanish Crown for three centuries. When the Central American States became independent in 1821, none of the islands were terra nullius; sovereignty over the islands could not therefore be acquired by occupation of territory*".¹⁴⁴ The same analysis perfectly fits the case of the Falklands/Malvinas, with the difference that Spanish title to the islands was not only based on discovery, but also the effective occupation of the archipelago until 1811 and recognition by other powers.

B. Opposability of *uti possidetis iuris* to Great Britain

The attitude of His Britannic Majesty's government shows that *uti possidetis* was opposable to Britain, since the Falkland/Malvinas Islands were subject to Spanish sovereignty. European powers did not react to the assertion that no *terrae nullius* existed in

¹⁴³ *Frontier Dispute* (Burkina Faso/Republic of Mali), judgment, I.C.J. Reports 1986, p. 565, par. 20 (see also *ibid.*, p. 566, par. 23)

¹⁴⁴ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) I.C.J. Reports 1992, p. 416, par. 333. It may also be mentioned that in the 19th Century Great Britain wanted to take El Tigre Island, one of the islands in the Fonseca Gulf, in a new and flagrant violation of international law.

Latin America.¹⁴⁵ The analysis of international practice and jurisprudence in cases of territorial disputes between a Latin American State and an extra-continental power leads to the conclusion that *uti possidetis* was applicable to the extra-continental States.

In the Isla de Aves case, which opposed Venezuela and the Netherlands in the 19th century, the arbitral award issued by Isabel II, Queen of Spain, found in favour of the South American state. The main basis of the decision is that the island in dispute belonged to the *Audiencia* of Caracas during the colonial period and that “*upon becoming an independent nation, Venezuela was constituted on the territory of the Captaincy-General of the same name [...] by which it could consider the Isla de Aves to be part of the Spanish province of Venezuela [...] the Venezuelan government was the first to establish its armed forces and to carry out acts of sovereignty, thus confirming the dominion it had acquired by general title it derived from Spain.*”¹⁴⁶ Acts of sovereignty are therefore considered to confirm a pre-existing title of succession. An identical analysis can be made in regard to Argentina’s takeover of the Falklands/Malvinas in 1820.

The case of the island of Trindade is even more interesting when considering the Falklands/Malvinas, as it directly involves the United Kingdom. The Brazilian island was uninhabited when, in 1895, one of Her Britannic Majesty’s ships took possession of it. The dispute was finally settled thanks to the mediation of the Portuguese government, who found in favour of Brazil. The United Kingdom accepted the mediator’s point of view. The Portuguese proposal unequivocally asserted: “*When, under the Treaty of Rio de Janeiro of the 29th August, 1825, Portugal proclaimed the independence of its ancient Colony, the Island of Trinidad was transferred to Brazil, together with the group to which it belongs, for formal possession by the new Empire. There could be no doubt in the mind of His Majesty's Government on that point, although no special mention of this transfer is made in*

¹⁴⁵ See, for example: Decencière-Ferrandière, André, “Essai historique et critique sur l’occupation comme mode d’acquérir les territoires en droit international”, *Revue de droit international et de législation comparée*, 1937, vol. 64, pp. 388-390. According to this author, practice at the time proves the exclusion of effective occupation as a way to obtain sovereignty in Latin America, both for third states and among Latin American nations.

¹⁴⁶ Spanish Text in Gros Espiell, Héctor, *España y la solución pacífica de los conflictos limítrofes en Hispano-América*, Madrid, Civitas, 1984, pp. 128-129 and the comments of the author quoted at pages 47-52.

the Treaty referred to, the island being, as it was annexed for administrative purposes to the Province of Espiritu Santo, a dependency of the Captaincy Major of Rio de Janeiro"¹⁴⁷

Any doubts regarding the territorial extension of the new States of Latin America were dissipated by the Foreign Secretary, George Canning, during the mediation between Argentina and Brazil in the dispute over the *Banda Oriental* (now Uruguay). The instructions given by Lord Canning to the British Minister Lord Ponsonby on March 18th, 1826, read "(...) Your Lordship will observe to the Brazilian Ministers, that unless by a general tacit agreement, the States of the New World be admitted to stand towards each other, in respect to geographical rights and limits, exactly as they stood when Colonies, questions of the utmost perplexity will infallibly arise out of their rival and conflicting pretensions; and the whole Continent of America, whether Spanish or Portuguese, will ultimately be laid open to the designs of any enterprising adventurers, who may think fit to carve out for themselves new dominions."¹⁴⁸ This text unequivocally recognizes that Latin American States succeed to Spain and Portugal within the borders existing during the colonial period. Subsequent practice supports Britain's point of view about Latin America's legal situation.

Even if *uti possidetis* is set aside, being considered the applicable customary rule unless otherwise agreed by the parties involved, the same conclusion can be reached, in a different manner. One example is the analysis of the consequences flowing from the status of belligerent and the fact that the South American provinces eventually separated from the Spanish Empire. Due to the state of rebellion in the South American provinces, the international legal situation in Spanish America was comparable to that of a civil war. The rebels could not invoke a right of independence from Spain: they had to gain independence. Third States had to adopt a policy of neutrality –which they did. This means that they could not take advantage of the situation to take possession of the territories of the rebel

¹⁴⁷ Marston, Geoffrey, "The Anglo-Brazilian Dispute over the Island of Trindade", *British Year Book of International Law*, Oxford, 1983, Vol. LIV, p. 238.

¹⁴⁸ *Ibid.*, p. 375.

provinces.¹⁴⁹ The existence of a civil war or rebellion did not turn the territories of the States involved into vast *terrae nullius*, requiring occupation by one side or the other to avoid foreign occupation.

The British position was clearly described by George Canning on March 4th, 1823: "*In the year 1818, the Contest between Spain and her Colonies then raging with extraordinary violence, an Application was made by the Court of Spain to the British Government to interdict the Service of British Subjects in the Armies of the Insurgent Colonies - An Act of Parliament was passed for this purpose, but it was felt that in making such Concession to Spain, it would be right that the Mother Country and her Colonies should be placed by this Country upon that footing which the Neutral Position of Great Britain between the two Belligerent Parties prescribed; the prohibition therefore against serving in the Armies of South America, was extended to those of Spain*"¹⁵⁰

The fact that British *de iure* recognition of Argentina occurred after 1820 does not change this conclusion in any way. In 1818, Great Britain recognized the South American provinces as belligerents, as is apparent from George Canning's note.

For our purposes, the acts in exercise of State authority carried out both by Royalist and South American authorities must be considered together. Both authorities were effectively fighting for power over the same territory. According to a well-established rule of international law, the acts of rebels or insurgents are attributable to a State from the moment they take over the effective government of the State or establish a new one.¹⁵¹ This means that whatever the legal approach followed, whether the *uti possidetis iuris* of 1810 or the rules relating to civil war and secession, the territory in question does not become *res*

¹⁴⁹ On December 7th, 1819, in his message to the Congress of the United States, President Monroe asserted: "*In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality*" (Moore, John Bassett, *A Digest of International Law*, Washington, Government Printing Office, 1906, Vol. I, p. 83). *In his message delivered on March 8th, 1822, the same president would say: "As soon as the [revolutionary] movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to them"* (Ibid., p. 174).

¹⁵⁰ Smith, Herbert Arthur, *Great Britain and the Law of Nations*, London, King & Son, 1932, Vol. I, p. 280.

¹⁵¹ See Article 10 of the Articles on State responsibility, adopted by the International Law Commission, (Annex to Resolution 56/83 of the General Assembly of the United Nations).

nullius. In regard to the Falklands/Malvinas, if the *uti possidetis iuris* of 1810 is discarded in favour of the theory requiring effective possession in case of secession, the conclusion would be that the islands were Spanish until 1820, when the government of the Provincias Unidas (United Provinces) took possession of them.

The Swiss Federal Council set out a point of key importance on this matter in the arbitral award in regard to the border dispute between Colombia and Venezuela, on March 24th, 1922: "... [it was an] absolute rule that in old Spanish America, from the legal point of view, there was no territory belonging to no one; those regions unexplored or unoccupied by the Spanish were considered to legally belong to each of the Republics that succeeded to the Spanish province to which those territories were attached by virtue of the old royal orders of the Spanish motherland."¹⁵²

We will now turn to British sources on the topic. Professor M. Akehurst assertively states that "Argentina succeeded to Spain's title. It is a rule of international law that a newly independent State which was formerly a colony succeeds to all the territory within the former colonial boundaries."¹⁵³ Gaston de Bernhardt in his Foreign Office Memorandum dated December 7th, 1910, stated that "Of the extent of the Spanish Settlement at Soledad (...) It was under the superintendence of an officer entitled "Commandant of the Malvinas" who was dependent on the Viceroy of la Plata. (...)The party appearing to represent Spain in her title to those islands is the Government of Buenos Ayres. On the overthrow of the Spanish supremacy in the Vice-Royalty of La Plata, those territories, with the exception of Paraguay, were converted into a Republic under the name of the "United Provinces of Rio de la Plata" and Buenos Ayres, the capital of the Vice- Royalty, became the seat of Government of the Republic."¹⁵⁴ In the same vein, Ronald H. Campbell of the Foreign Office, summarised the weaknesses in Britain's title in his minutes of July 18th, 1911, and referred to the same point, saying that "(...)they were soon afterwards (in 1820) claimed,

¹⁵² Colombia v. Venezuela (1922), Reports of International Arbitral Awards, vol. 1, p. 228.

¹⁵³ Ferrer Vieyra, E., "An annotated legal...", *op. cit.*, p. 130.

¹⁵⁴ Gaston de Bernhardt's Memorandum of December 7th, 1910 (FO 881/9755), pp. 11-12.

*and a year or two later occupied, by the United Provinces of Buenos Ayres, as the successors in title of Spain from whom the colony had just won its Independence”.*¹⁵⁵

Great Britain’s Counter-memorial in the recent *Chagos Marine Protected Area* (Mauritius v. United Kingdom) arbitration leaves no room for doubt in regard to its position on *uti possidetis* "It is trite law that the territory of a newly independent State is established at the moment of independence. This is reflected in the *uti possidetis juris* principle, which applies in particular to cases of decolonization, but is not limited to such cases"¹⁵⁶

In short, the principle according to which a new State succeeds to the territorial sovereignty of its old metropolis at the moment of independence, in the framework of boundaries existing at that time, is indisputable.

C. Who inherited the Falklands/Malvinas?

Unable to avoid the application of the principle of *uti possidetis iuris* or succession of States to the Falklands/Malvinas, Pascoe and Pepper make an argument that is not advanced by any State. According to the authors, the fact that the Viceroyalty of the Rio de la Plata included the territories of the present-day republics of Uruguay, Paraguay, Bolivia, and – according to them – portions of Chile and Peru creates a problem over “the identity of the heir”.¹⁵⁷ This is an untenable argument. During colonial times, the Falkland/Malvinas Islands were under the direct authority of the Captaincy- General of Buenos Aires¹⁵⁸ and subsequently, upon its creation by virtue of the Royal Charter dated August 1st, 1776, under the authority of the Viceroyalty of the Rio de la Plata.¹⁵⁹ The seat of the Viceroy was Buenos Aires. The other existing administrative divisions, (*audiencias*, governorates, *intendencias*) had a limited autonomy and depended on the authority of the Viceroy. According to the Royal Ordinance of *Intendentes* dated 1782, the Superintendence of

¹⁵⁵ Minutes by Ronald H. Campbell, 18th July 1811, National Archives, FO 371/1258, pp. 221-222 (Spanish text in Ferrer Vieyra, E., “Segunda Cronología...”, *op. cit.*..., p. 413).

¹⁵⁶ *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Counter-Memorial of the United Kingdom, July 15, 2013, p. 189, par. 7,8.

¹⁵⁷ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 4.

¹⁵⁸ AGN Sala IX 8-10-3.

¹⁵⁹ AGN Sala IX 8-10-4.

Buenos Aires comprised the district of the Buenos Aires Bishopric, which included the coastal cities and their respective jurisdictions, the Governorate of Montevideo, the Governorate of Malvinas, the eastern area of Patagonia, Tierra del Fuego and other territories which formed part of the old Governorate of the Río de la Plata, with the exception of the thirteen missions founded along the Parana river, which had been incorporated in the diocese of Asunción.¹⁶⁰ Consequently, none of the administrative divisions that subsequently became independent States (Paraguay in 1811, Bolivia and Uruguay in 1825) had jurisdiction over the Falklands/Malvinas in 1810. Furthermore, their independence is an instance of separation from the United Provinces of the Río de la Plata.

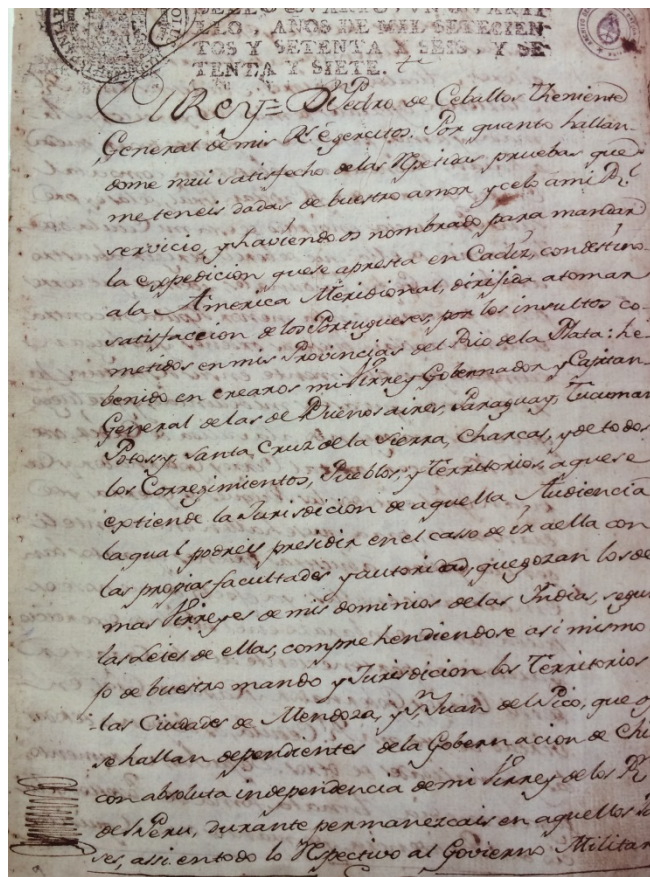


Figure 7 Royal Decree by which the Viceroyalty of Río de la Plata is created - A.G.N. Sala IX 8-10-4

¹⁶⁰ San Martino de Dromi, María Laura, *Intendencias y provincias en la historia argentina*, Buenos Aires, Ed. Ciencias de la Administración, 1992, pp. 44-45. Cited source: “Real Ordenanza para el Establecimiento e Instrucción de Intendentes de Ejército y provincias en el Virreinato de Buenos Aires. Año de 1782. De orden de su Magestad”, Madrid, Imprenta Real, 1782, in AGI, L.A., s. XVIII (sig. ant. H-18).

The control exercised by the Royalist authorities from Montevideo after the revolution that took place in Buenos Aires in May 1810 is not relevant, as this colonial authority was repudiated from the moment of the revolution. Royalist authorities took up office in Montevideo as they had lost control over the Viceroyal seat of Buenos Aires. Furthermore, Uruguay never claimed to be the successor State to Spanish sovereignty over the Falklands/Malvinas. On the contrary, the official position of the Eastern Republic of Uruguay is recognition of Argentina's sovereignty. One of the most renowned Uruguayan specialists of international law, the judge and ambassador Héctor Gros Espiell, completely rejects the argument according to which the Falkland/Malvinas Islands would belong to Uruguay because of the Spanish retreating to Montevideo from the islands in 1811, at the time the forces of Buenos Aires and Uruguay were besieging the city, which was under Royalist power. According to Gros Espiell: The argument is misleading since Argentina inherited Spain's rights over the territories belonging to the viceroyalty of the Río de la Plata, except for those that expressly and specifically became new States detached from the viceroyalty (Bolivia, Paraguay and Uruguay).¹⁶¹

It is worth recalling that the American government, with Andrew Jackson as president, addressed the Spanish government through its representative in Madrid, with the aim of knowing if the Falkland/Malvinas Islands had been part of the Viceroyalty of the Río de la Plata. Don Martín Fernández de Navarrete, the renowned Spanish historian, was in charge of answering the president. His reply was delivered on October 15th, 1833, and is extremely important: "Navy captain Mr. Felipe Ruiz Puente proceeded to take possession of said islands, on behalf of His Catholic Majesty and in his capacity of governor, and on April 1st, 1767 the Spanish flag was raised at Soledad bay. Since then, the peaceful possession of the Malvinas was not disturbed again, as possessions of the Spanish Crown and its viceroyalty of Buenos Aires. [...] It can be concluded from this that the Malvinas islands, as possessions of the viceroyalty of Buenos Aires before the insurrection, lawfully belong to

¹⁶¹ Gros Espiell, Héctor, "La soberanía en Malvinas. Un antecedente de interés", *Revista Internacional y Diplomática*, México, 383, October 1982, p. 33; reproduced in J. Ramiro Podetti (ed.), *Visiones uruguayas sobre Malvinas*, Montevideo, Fin de Siglo, 2013, p. 135.

Spain like all the countries of that portion of America, until such a time as His Majesty determines their future fate.”¹⁶²

D. No Spanish cession was necessary

Uti possidetis iuris means that the territory belonging to the old colonial administration is transferred to the newly independent State. No express cession of sovereignty is required by the colonial power. The new State inherits the same territory by virtue of its existence as a State. The fact that Spain had not formally recognised Argentina, and only signed a Treaty of Recognition, Peace and Friendship on September 21st, 1863, is absolutely irrelevant for the sovereignty dispute. Moreover, by virtue of this treaty, Spain recognised the Argentine Republic or Confederation as a free, sovereign and independent Nation, made up of all the provinces appearing in its Federal constitution in force, besides the territories that legally belong or will belong in future to that Nation.¹⁶³ Article 4 further recognises the 25th of May, 1810 as the date of Argentine succession to Spain’s rights and obligations.¹⁶⁴

Conclusion

The prior section has shown Spain’s unquestionable sovereignty and possession of the Falkland/Malvinas Islands at the time of the beginning of the Argentine process of independence: May 25th, 1810. International law recognises the succession of new States to the territorial sovereignty existing at the moment of independence. Based on the above, the State which succeeded to Spain’s sovereignty over the Falklands/Malvinas is the State known by the name of the United Provinces of the Río de la Plata, and later as the Argentine Republic.

¹⁶² AGS, Leg. 6915, in Quesada, Vicente, *Recuerdos de mi vida diplomática, misión en Estados Unidos (1885- 1892)*, Buenos Aires, Lib. Menéndez, 1904, pp. 200-202.

¹⁶³ Article 1. A copy of the original can be found at <http://tratados.cancilleria.gob.ar/busqueda.php?consulta=si&modo=c>

¹⁶⁴ *Ibid.*

Chapter IV

Argentine administration, 1810-1833

This chapter covers the period spanning from the 1810 May Revolution in Buenos Aires to the British eviction of Argentina of 1833. The authors of the British pamphlet make a brief reference to this period that is plagued with misrepresentations. No reference is made to key events, and the authors strive to minimize the significance of the taking of possession of November 6th, 1820. Finally, in what is perhaps the most egregious historical falsification, the authors invent an alleged British authorisation for Luis Vernet to settle in the Falklands/Malvinas.

A. The first Argentine administrative act concerning the Falklands/Malvinas five days after the constitution of the First Patriotic Government in 1810

In 1810, the process of independence began in the Spanish colonies of South America. The starting point in the Río de la Plata was the Revolution that took place on May 25th, 1810. The Viceroyal authority was replaced by a “*Creole*” Governing Junta. Upon losing control over the capital of the Viceroyalty, the Spanish forces concentrated in Montevideo, where Gaspar Vigodet was Governor, and appointed Francisco Javier de Elío to act as the new Viceroy. Shortly after, Gaspar Vigodet was to succeed the latter in directing the royalist forces. The Governing Junta of Buenos Aires and the Viceroy in Montevideo each considered themselves to be the only legitimate authority for the entire territory of the Viceroyalty of the Río de la Plata. They were to continue fighting until Vigodet’s surrender in 1814.

It should be highlighted that one of the first acts of the Governing Junta of Buenos Aires concerned the administration of the Falklands/Malvinas. Upon arriving in Montevideo from the islands, the penultimate Commander of the Malvinas, Gerardo Bordas, had requested the payment of salaries and rewards corresponding to his position, which were equivalent to those of the Navy captain of a ship at sail. It fell to the Governing Junta that replaced the

Viceroyal authority to deal with the matter.¹⁶⁵ The Buenos Aires Junta notified the “Navy Commander of this Station” of the order dated December 13th, 1806 by virtue of which "for the matter of expenses and payments, the settlement in the Malvinas be regarded henceforth as a ship at sail, and all employees in that location as dependents of the same ship" and, “taking into account that requests for certain payments by the Royal Treasury have been made and some of these have even been paid in this City, such as the rewards for the commander and ministers, armory wages, and some other payments: I have determined, that from now on, all salaries, rewards, wages and other expenses incurred for these premises or locations belonging to them, are paid by the Minister of the Navy of this Station, [...] I am submitting this information to you for your intelligence and I have forwarded it to the Minister of this Station, advising him that on this date I am notifying the General Treasury of the Army and the Royal Treasury to issue certified copies of the Royal Orders kept in the same General Treasury regarding allowances or some other issues of the Malvinas islands.”¹⁶⁶

The key importance of this public act of the first national government, only five days after its constitution lies in the evidence of governmental continuity in regard to the Falklands/Malvinas. The previous decisions of the Viceroyal authorities, concerning the remuneration of staff assigned to the Falklands/Malvinas, were taken over by the new authorities, who ordered the payment of the rewards owed to the former Commandant of the Malvinas, Gerardo Bordas. It is little wonder that Pascoe and Pepper do not even mention this public act, which is widely known and referred to in a number of publications – including some which they have cited.

B. Spanish withdrawal from the Falklands/Malvinas on February 13th, 1811

At the beginning of the fight for independence, the Spanish forces under Vigodet’s command controlled the Rio de la Plata and the adjacent maritime areas. With the aim of

¹⁶⁵ Fitte, Ernesto J., *Crónicas del Atlántico Sur*, Buenos Aires, Emecé, 1974, p. 129-144 (“La Junta de Mayo y su autoridad sobre las Malvinas”).

¹⁶⁶ AGN Sala X 10-2-10 (Documentos 1810-1833 No1).

joining the entirety of navy forces to fight the patriots¹⁶⁷, a Spanish war council meeting in Montevideo decided on Spain's withdrawal from the Falklands/Malvinas on January 8th, 1811. The decision states that "this Port [of Isla de Soledad de Malvinas] is to be abandoned, by sending a ship to said port [...] with the aim that all belongings, both of Artillery and any other nature, found there are collected and brought to this City, as well as the Church ornaments, leaving all buildings well sealed and placing the King's Coat of Arms to demonstrate ownership, and that in the meanwhile said abandoned Port remain, that annually a ship is sent for reconnaissance of the port, verifying that in it or in any other port of said Islands no other Power has established any kind of settlement."¹⁶⁸ The brig "Gálvez" fulfilled this order on February 13th, 1811.¹⁶⁹ On March 30th, 1812, the Courts of Cadiz approved the decision adopted in Montevideo, "thinking that when circumstances change, the Regency would take care to ensure that the islands would be occupied as before".¹⁷⁰ The only mention made by Pascoe and Pepper of this point is a subtitle indicating "Spain abandons the islands in 1811". As the above-cited document shows, Spain did not relinquish its sovereignty.

The Spanish withdrawal of 1811 is notably different from the British withdrawal from Port Egmont in 1774. Great Britain only left behind a plaque, fully aware that at that very moment the Spanish maintained their presence on the islands through their settlement at Puerto Soledad. At the very least, they lacked the will to ensure exclusivity, one of the characteristics of territorial sovereignty. This is unsurprising, taking into account the fact that the British never had an exclusive presence on the islands. On the contrary, at the moment of Spain's withdrawal, there was no foreign settlement in the islands, and Spain envisaged the necessary measures to ensure there would not be any in future. The British

¹⁶⁷ The expression "patriot", used to designate the South Americans, was not only used by the latter. As we shall see, this is how Weddell qualifies the frigate "Heroine" under the command of Colonel Jewett (Weddell, James, *A Voyage towards the South Pole Performed in the Years 1822-24 Containing an Examination of the Antarctic Sea. Fascimile edition of the 2nd edition published in 1827, with an introduction by Sir Vivian Fuchs*, Devon, David & Charles Reprints, 1970, cap. II, 1.12).

¹⁶⁸ Archivo General de Marina Don Álvaro de Bazán. El Viso del Marqués (Ciudad Real). Expediciones de Indias No524. Pages 10, 11 and 12.

¹⁶⁹ Ibid., page 4.

¹⁷⁰ Fernández Duro, *Armada Española desde la unión de los reinos de Castilla y de Aragón*, Madrid, Suc. de Rivadeneira, 1901, T. VII, IX, p. 95, who cites as a reference: Archivo del Ministerio de Marina de España, Expediciones de Indias, 1811, May 11 to July 12, and Indiferente, 1812, March 30. Quoted in Torre Revello, José, *Bibliografía de las Islas Malvinas*. Buenos Aires, University Press, 1953, p. 169.

did not make any similar announcement nor take any precaution to secure the abandoned premises at Port Egmont. We have seen that in the face of Britain's withdrawal, Spain exercised sovereignty throughout the entire archipelago, including the destruction of the fort at Port Egmont (or Puerto de la Cruzada). The same did not occur when the Spanish withdrew their garrison: the islands were left without the permanent presence of any nation. No power attempted to exercise any act of sovereignty. The only destruction suffered by Spanish property was merely that caused by the actions of time.

In any case, a possible abandonment by Spain in 1811 would not be opposable to the United Provinces, by virtue of the principle of *uti possidetis* of 1810. As we have already seen, from that year on (May 25th, 1810 as far as the Viceroyalty of the Rio de la Plata is concerned), South American nations did not recognise the authority of the acts performed by the peninsular government or its colonial representatives in America. 1810 is the critical date to establish which Spanish territory the new South American States succeeded to.

C. 1811-1820: Displays of Argentine sovereignty and the absence of any British claim

The 1811-1820 period proves that, even though the islands were uninhabited after Spain's withdrawal, the new government exercised acts of sovereignty in relation to the Falklands/Malvinas. Despite having had opportunities to do so, the British government did nothing to assert its sovereignty (if it had any in the first place).

a) The conduct of British whale and seal hunters.

Less than a year after the May Revolution, a prominent leader of the independence process, Manuel Belgrano, mentioned the constant presence of British fishermen in the area of Patagonia and the Falkland/Malvinas Islands, and explained the seamen's perception of the land in question. The issue of March 2nd, 1811 of the newspaper *Correo de Comercio*, of which he was editor, read: "The British, with the aim of fishing whales, which abound in these seas, constantly circulate along these coasts. One of the coastguards of the Spanish

frigate S. Gil asked a British vessel why they were navigating in those seas, the coasts of Patagonia and the Malvinas islands, and he was answered that those seas belonged to everybody.”¹⁷¹

The British sailors never invoked any alleged British sovereignty over the Falkland/Malvinas Islands.

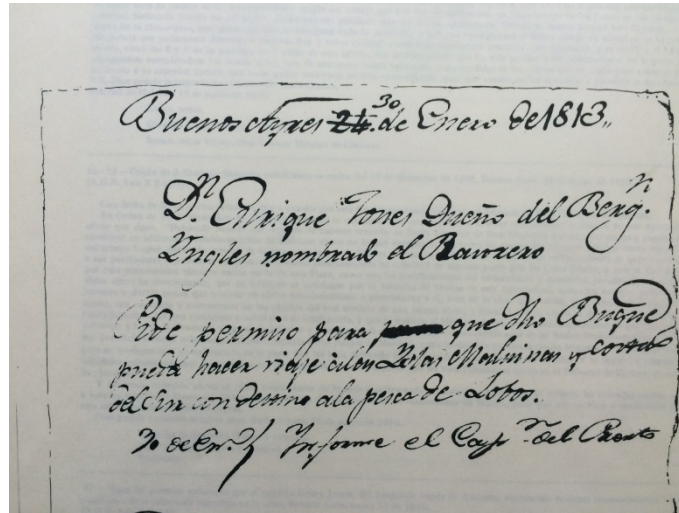


Figure 8 Permission requested by Enrique (Henry) Jones to seal in the Falklands/Malvinas Islands - A.G.N. 7-4-5

On January 30th, 1813, Henry Jones, owner of an English brig, requested an authorisation from the authorities of Buenos Aires "so that the vessel may travel to the Malvinas Islands and the South coasts for seal."¹⁷² This act unquestionably shows the perception a British subject had regarding the sovereignty of the United Provinces of the Rio de la Plata in the Falklands/Malvinas. Besides, the request to the government in Buenos Aires is made at a time when the Spanish authorities were still present in Montevideo. This fact could not have been ignored by captain Peter Heywood, commander of the “*Nereus*” and head of the British ships navigating the Rio de la Plata. Their presence was specifically meant to protect British commercial activities in the region.

¹⁷¹ Belgrano, Manuel, *Correo de Comercio de Buenos Aires*, March 2 1811.

¹⁷² AGN, Sala X 7-4-5 (Documento 2 of the period 1810-1833) Ricardo R. Caillet-Bois quotes another reference of the AGN: División Colonia, Sección Gobierno, Tesoro, 1813, S. V, C. X, A. 4, No6 (*Una Tierra Argentina. Las Islas Malvinas*, 3rd ed. Buenos Aires, Academia Nacional de la Historia, 1982, p. 180, note 6).

To show the lack of seriousness of the British pamphlet's statements regarding this period the following paragraph deserves to be quoted: "After 1811, the Falklands had no resident population, though they were still visited by many British and American ships, whose crews sometimes spent long periods ashore on the islands, built stone houses and huts, and even grew vegetables. The language spoken in and around the Falklands from 1811 onwards was English, as it had been since the 1770s with the exception of Puerto Soledad."¹⁷³

None of this, whether correct or not, (even if it were true) can be taken as a basis for a British claim of sovereignty. The fact that British and American vessels visited the islands proves nothing. Besides, ships from France and other nations also arrived at the islands, including Argentine ships such as "*Espiritu Santo*" and "*San Juan Nepomuceno*", which made regular trips to the South Atlantic between 1817 and 1820, as did the ship "*25 de Mayo*". The "*Espiritu Santo*" is known to have been in the Falkland/Malvinas Islands in 1819.¹⁷⁴ Making a point about the language spoken in a deserted territory is comical – and the suggestion that this could be of some relevance in regard to the question of sovereignty even more so. Such an assertion could be compared to an argument stating that until now, English is the only language spoken on the Moon!

b) General San Martín and the Falklands/Malvinas

Three years later, General José de San Martín, at the time Governor of the Province of Cuyo, sent a letter from Mendoza dated August 14th, 1816 to the Lieutenant Governor of San Juan informing him of a note of the Minister of War proposing that criminals "that are imprisoned in the jurisdiction of your command sentenced to the prisons of Patagones, Malvinas, or others, are sent to this capital".¹⁷⁵ It is clear beyond doubt that in the eyes of the officials who wrote the note (and those that dispatched it) that the Falkland/Malvinas Islands were part of Argentine territory.

¹⁷³ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 9.

¹⁷⁴ Puig, Juan Carlos, *La Antártida Argentina ante el Derecho*. Buenos Aires, Depalma, 1960, p. 133; Montarcé Lastra, Antonio, *Redención de la soberanía. Las Malvinas y el Diario de Doña María Sáez de Vernet*, Buenos Aires, Padilla and Contreras, 1946, p. 28.

¹⁷⁵ The original is currently in the Malvinas Museum in Buenos Aires.

c) The shipwreck of the “Isabella”

If the authors wished to refer to human presence on the islands, they could have mentioned the case of the shipwreck of the “*Isabella*”, which offers interesting elements that again prove the total absence of any British claim, the fact that foreign sailors knew that sovereignty over the islands belonged to Spain or the new-born Argentina and the fact that their presence could be considered illegal.

The facts are as follows. On February 9th, 1813, the British merchant vessel “*Isabella*”, having set sail from Australia and heading to London, wrecked at Eagle Island. The American captain Charles H. Barnard, commanding the brig “*Nanina*”, had been in the archipelago since September 7th, 1812, hunting amphibians. After assisting the British survivors, the latter captured the “*Nanina*” and fled with it, leaving Captain Barnard and his crew behind on the island. It is interesting to reproduce Captain Barnard’s narration of the encounter with the survivors upon sighting smoke: *“I suspected that they arose from the fires of Spaniards, possibly from Buenos Ayres, on one of the Anacans, as I had often heard that the Spanish government was in the habit of sending out every year a Guarda Costa, to examine their harbours and passes for foreign vessels, and if any were found, to order them off immediately: and so apprehensive were they that the subjects of a foreign power might form even a temporary settlement, for the purpose of procuring seal skins and sea-elephant's oil, that they often set fire to the bushes, and thus destroyed the harbours of the seal, to prevent them as much as possible from resorting to these islands. I have almost resolved to go to the Anacans for seal, but as I could not banish the apprehension of falling into the hands of the Spaniards, I determined to remain at our present station until I should ascertain by whom these fires had been kindled. (...) As the columns of smoke continued to ascend in the same direction, I began to conjecture a variety of causes. Might they not proceed from hordes of the enemy, who might possibly use it as a decoy to secure us in their power? Did they arise from daring adventurers like us, whom were either preparing their food, or trying out the oil that they had collected? But such a supposition was*

*improbable, as it is very rare that vessels touch at the Anacans. (...) The fires then were possibly lighted by some unfortunate shipwrecked mariners as signals of distress.”*¹⁷⁶

Upon sighting the survivors, Barnard says: "*I saw with pleasure one or two who wore the uniform of British marines. As this immediately banished all apprehensions of their being Spaniards, I began to devise the most effectual means of aiding those unfortunates*".¹⁷⁷ This is a remarkable assertion, taking into account that on January 3rd, he had found an American ship which informed him of the declaration of war by the United States against Great Britain, the reason why Barnard decided to take his brig to a port less visited by the British seal-hunters.¹⁷⁸ This shows his fear of encountering Spanish vessels, knowing that his activity on the islands was illegal.

Captain Barnard's account is particularly important coming from a direct witness and contemporary who knew the region and the activities of whale and amphibian hunting. This quote proves that those who were dedicated to fishing and hunting in the region were considered to be poachers and were well aware of Spanish efforts to repress their activities. It is also proof that they considered the archipelago to be a Spanish possession. Barnard preferred an encounter with enemy soldiers to coming across the Spanish in the Falklands/Malvinas.

Meanwhile, the survivors of the shipwreck had decided to send the "Isabella's" largest boat, which they had managed to save, to seek help. On February 22nd, 1813, it set sail with seven people on board, among whom were Lieutenant Richard Lundin from the 73rd

¹⁷⁶ Barnard, Charles H., *A Narrative of the sufferings and adventures of Capt. Charles H. Barnard, in a voyage round the world, during the years 1812, 1813, 1814, 1815, & 1816; embracing an account of the seizure of his vessel at the Falkland Islands, by an English crew whom he had rescued from the horrors of a shipwreck; and of their abandoning him on an uninhabited island, where he resided nearly two years.* New York, J. Lindon, 1829. Reproduced with an introduction by Bertha S. Dodge under the title *Marooned. Being a Narrative of the Sufferings and Adventures of Captain Charles H. Barnard, Embracing an Account of the Seizure of His Vessel at the Falkland Islands &c., 1812-1816.* Syracuse, University Press, 1986, pp. 50-51. The word "Spaniards" or the adjective "Spanish" was used in the English lexicon of the time, when referring to people or to qualify acts or things coming from South America, indistinctly indicating both what was Spanish and what was South American. The islands called, at the time, Anacán are the Eagle islands in present-day terminology, at the south-western tip of Soledad Island /East Falkland.

¹⁷⁷ Barnard, Charles, *op. cit.*, p. 53. Fourteen British marines were passengers on the Isabella, and were travelling to London on leave.

¹⁷⁸ *Ibid.*, pp. 47-48.

regiment of His Britannic Majesty and a marine. They had the intention of heading to the Spanish settlement, which they believed to be at Port Egmont. On March 6th, according to their description, unbeknownst to them, they arrived at Puerto Soledad. The settlement was deserted. In the church, they found the Spanish coat of arms and the plaque affixed in February 1811. Upon ascertaining that the islands were uninhabited, they decided to set sail towards the continent, with the aim of reaching Montevideo, in the belief that the Portuguese (!) would be more cooperative than the “Spanish” in Buenos Aires. Upon their arrival on the eastern coast of the Rio de la Plata, they encountered the patriotic army that was encircling the royalist forces concentrated in Montevideo. General Rondeau, of the patriotic forces, offered to open them a passage to Montevideo if they so wished, but they were informed that a British frigate was anchored at Buenos Aires and it would be ready to help them.¹⁷⁹

Bernardo Bonavía, the Commander of Puerto Ensenada (on the western coast of the Rio de la Plata)(who had also been Commander of the Falklands/Malvinas), reported to the Buenos Aires government on March 29th, 1813 that a sloop coming from the English frigate “*Isabella*” had arrived at that port; that the frigate had got lost in the Falkland/Malvinas Islands and that she had come to ask for help from the commander at the Buenos Aires berth, and that she had a “passport” (a kind of *laissez passer*) issued by General Rondeau. The sloop was offered the necessary aid but said it did not need any help. It headed immediately towards the berth, located near Buenos Aires, where the British war frigate was anchored.¹⁸⁰ Captain Heywood, commander of the Frigate “*Nereus*”, ordered to send the ship “*Nancy*” to help the shipwreck survivors. Their instructions read: “*having discovered them [the wreck survivors] you will without delay rescue the whole of them with their personal effects and wearing apparel on board His Majesty's Armed Brig Nancy and bearing them as Supernumeraries for victuals return without a moment's loss of time to this anchorage.*”¹⁸¹

¹⁷⁹ Report of Lieutenant Richard Lundin of the 73rd Regiment of His Majesty in *Ibid.*, annex D, pp. 239-241, and of Miller, David, *The Wreck of the Isabella*. London, Leo Cooper, 1995, pp. 92-104, based on Lieutenant Lundin’s narration published in *Edinburgh Review* in 1846.

¹⁸⁰ AGN, Sala X, 4-9-6.

¹⁸¹ Miller, David, *op. cit.*, p. 107.

Neither the survivors nor the British marines behaved as if the Falkland/Malvinas Islands were part of the British Empire. On the contrary, the survivors' reaction was to look for the Spanish settlement. The British commander staying at Rio de la Plata had an extraordinary opportunity to assert British sovereignty in sending a war ship to the Falklands/Malvinas to repatriate his subjects, especially when the survivors had found Puerto Soledad uninhabited, and an inscription left there by the Spanish in 1811. Instead, he limited himself to helping the shipwreck survivors, without performing any acts of sovereignty, and ordered his subordinate to return immediately.

*

* *

The fact is that during the period 1811-1820, when there was no permanent State presence on the islands, there are examples of acts of sovereignty carried out by Argentine authorities, but not by Britain, despite there being no lack of opportunities. The understanding of the mariners who navigated in the area is further proof that the islands were considered to belong to Spain or to its successor in Buenos Aires.

D. The official taking of possession of the islands by Argentina in 1820

The Falklands/Malvinas by Argentina in 1820 and the absence of any British reaction. The facts are as follows. On January 15th, 1820, David Jewett, in his capacity of Commander of the State war frigate "*La Heroína*", was appointed Colonel of the Army at the service of the National Navy by the Supreme Director of the United Provinces.¹⁸² He set sail from the Rio de la Plata at the end of March of that year, and after overcoming many hardships, he reached the vicinity of Puerto Soledad on October 27th, 1820. He took official possession of the Falkland/Malvinas Islands in November 1820 and reported this by circular to all the ships present in the neighbouring areas, including some British vessels.

¹⁸² AGN, Sala X 5-1-3.



Figure 9 Appointment of David Jewett as Colonel of the Army at the service of the National Navy by the Director of the United Provinces - A.G.N. Sala X 5-1-

3

The British Captain, James Weddell, who at that time was at Puerto Salvador on Isla Soledad, received the following notification, as he narrates in his chronicles: “National Frigate Heroína at Puerto Soledad, November 2nd, 1820. Sir, I have the honour to inform you of the circumstance of my arrival at this port; I have been commissioned by the supreme government of the United Provinces of South America to take possession of these islands in the name of the country to which they naturally appertain. In the performance of this duty, it is my desire to act towards all friendly flags with the most distinguished justice and politeness. A principal object is to prevent wanton destruction of the sources of supply to those whose necessities compel or invite them to visit the islands, and to aid and assist such as require it to obtain a supply with the least trouble and expense. As your views do

not enter into contravention or competition with these orders, and as I think mutual advantage may result from a personal interview, I invite you to pay me a visit on board my ship, where I shall be happy to accommodate you during your pleasure. I would also beg you, so far as comes within your sphere, to communicate this information to other British subjects in this vicinity. I have the honour to be, Sir, Your most obedient humble Servant, Jewett, Colonel of the marine of the United Provinces of South America, and commander of the frigate Heroína."¹⁸³

The ceremony of taking possession was carried out on November 6th, 1820 in the presence of Weddell and the captains of other American and British ships present.¹⁸⁴

James Weddell was Master of the Royal Navy and had retired from service in 1816, that is to say, four years before the facts being narrated took place. In that capacity, and with his knowledge and experience of the region, he could not ignore – if it did exist – the British claim of sovereignty over the Falklands/Malvinas. A reaction on his part was to be expected. When describing the taking of possession by Jewett in his travel journal, published in 1827, he did not even mention alleged British sovereignty over the islands. On the contrary, he confines himself to complaining about the Spanish having prohibited the French from staying at Port Louis (Soledad).¹⁸⁵

Three days after the taking of possession, Colonel Jewett circulated the following note to the captains of the ships present in the region: "*National Frigate, Heroína, Port Soledad,*

¹⁸³ Weddell, James, *op. cit.*, pp. 103-104. Spanish translation in Caillet-Bois, Teodoro, "El capitán Weddell", *Boletín del Centro Naval*, T. XLVIII, No484, p. 325.

¹⁸⁴ Weddell describes the ceremony as follows: "*In a few days, he took formal possession of these islands for the patriot government of Buenos Ayres, read a declaration under their colours, planted on a port in ruins, and fires a salute of twenty-one guns. On this occasion the officers were all in full uniform, being exactly that of our navy, which but ill accorded with the dilapidated state of the ship; but he was wise enough to calculate the effect of such parade, upon the minds of the masters of ships who were in the islands*" (Weddell, J., *Ibid.*, p. 111; Spanish version in Caillet-Bois, T., *Ibid.*, pp. 325-326).

¹⁸⁵ "*These hard-working and pioneering people [Saint Malo's French immigrants], after having made a considerable progress in fertilizing the land, were evicted by the Spanish, who claimed the islands. Nevertheless, they neglected the improvement of the territory and then they have entirely abandoned it, partly due to political reasons, since it could not be so important as to become a source of discord with other nations or probably because they have vast possessions in other parts of the world. It is sad that these French immigrants were banned from settling there, because a settlement in this region of the South Atlantic ocean surely would offer great possibilities for navigation.*" (Weddell, James, *op. cit.*, p. 94).

9th November, 1820. Sir, I have the honour to inform you of my arrival at this Port, to take possession of these Islands, in the name of the Supreme Government of The United Provinces of South America. This ceremony was publicly performed on the 6th day of this present November, and the National Standard hoisted at the Fort, under a Salute from this Frigate, in the presence of several Citizens of The United States, and Subjects of Great Britain. It is my desire to act towards all friendly flags with the most distinguished Justice and Hospitality, and it will give me the pleasure to aid and assist such as many require them, to obtain refreshment with as little trouble and expenses as possible. I have to beg of you to communicate this intelligence to any other vessel of your nation whom it may concern. I am, Sir, D. JEWETT. Colonel of the Marine of the United Provinces of South America, and Commander of the frigate Heroína.”¹⁸⁶

The note was widely covered by the press of that time. In the United States, the Salem Gazette published it on June 12th, 1821; in Spain, *El Redactor*, of Cádiz, published it in August 1821 (it was reproduced in the Argos of Buenos Aires on November 10th of the same year).¹⁸⁷ *The Times* of London published the note in its entirety on August 3rd, 1821, reproducing the information in the *Salem Gazette*, under the title “The Capture of the Falkland Islands”, considering it an “act of sovereignty”.¹⁸⁸

The British pamphlet spills a great deal of ink in describing the pitiful state of the “Heroína’s” crew, and unwittingly, recognises that after taking possession, Jewett remained in the Falklands/Malvinas for six months.¹⁸⁹ This is a significant period of time for someone who claimed authority over the islands and who encountered no opposition or resistance from British subjects or anyone else present on the islands. Not only, but not the slightest comment was made about the Falklands/Malvinas not belonging to the United Provinces, or about the islands being British.

¹⁸⁶ Partially in BFSP, 1832-1833, vol. XX, p. 422. Spanish version in Ferrer Vieyra, Enrique, *Segunda Cronología...*, *op. cit.*, p. 26. Reproduced in newspapers mentioned infra.

¹⁸⁷ Groussac, Paul, *op. cit.*, p. 20, note 1.

¹⁸⁸ *The Times*, London, August 3, 1821, p. 2.

¹⁸⁹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 9.

THE CAPTURE OF THE FALKLAND ISLANDS.

[FROM THE BOARD OF THE NEW ENGLAND COFFEE-HOUSE,
AUGUST 2.]

Salem Gazette, June 12.

Captain Orme, who arrived here on Tuesday last from the Falkland Islands, has furnished us with the following act of sovereignty :—

CIRCULAR.

“ National frigate *Heroína*, at Port Soledad.

“ SIR,—I have the honour to inform you of my arrival at this port, to take possession of these islands in the name of the Supreme Government of the united provinces of South America. The ceremony was publicly performed on the 6th day of November, and the national standard hoisted at the fort, under a salute from this frigate, in the presence of several citizens of the United States and Great Britain. It is my desire to act towards all friendly flags with the most distinguished justice and hospitality, and it will give me pleasure to aid and assist such as may require them, to obtain refreshments with as little trouble and expense as possible. I have to beg of you to communicate this intelligence to any other vessel of your nation whom it may concern.

“ I am, Sir, “ D. JEWETT,

“ Colonel of the Marine of the United Provinces of South America, Commander of the frigate *Heroína*.”

Figure 10 News about Jewett's act of possession under the title
"The Capture of the Falkland Islands" published on August 3,
1821 at "The Times" of London

Pascoe and Pepper's conclusion is as follows: "It is a moot point whether an announcement made by a pirate who keeps it secret can count as a valid territorial claim".¹⁹⁰ We have already seen that Jewett did not act as "a pirate"; in fact, he performed the official act of taking possession in his capacity as an Argentine State official, whose appointment by the Government in Buenos Aires is reproduced here (see figure 9). The fact of having been a privateer does not diminish the official nature of his actions. The British pamphlet completely contradicts the claims over Antarctica put forward by the United Kingdom against Argentina and Chile before the International Court of Justice concerning taking possession of a territory. In making those claims, the British state that on December 7th, 1821, the captain of the British whale-hunting ship "Dove", George Powell, allegedly took possession of Coronation Island, one of the South Orkneys, on behalf of King George IV.¹⁹¹ If the United Kingdom considers that a seal-hunting ship had the capacity to take possession of a territory, it is difficult to justify the denial of the same capacity to Jewett's actions in the Falklands/Malvinas: Jewett was vested with official authority and in command of an official ship. The correspondence also proves that the crew of the

¹⁹⁰ Ibid.

¹⁹¹ *British Application in the Antarctica Cases*, I.C.J. Pleadings, p. 11-12, and Roberts, Bryan, *op. cit.*, p. 107.

“*Heroína*” considered him not only to be the ship’s commander, but also the “Commander of this Island”.¹⁹² If we are talking about pirates and privateers, as Pascoe and Pepper do in referring to Jewett, it may be worth recalling that John Strong, the supposed British “discoverer” of the Falklands/Malvinas, was one. If one follows the British pamphlet, there were “good” and “bad” privateers. If they were British, at the service of His Majesty, they had the capacity to establish sovereignty over territory; if they were mere citizens or at the service of other nations, they could not.

It is also obvious that the 1820 taking of possession was no “secret”. If the author of such an act goes to the effort of reporting it to all the ships present in the area before and after it is carried out, and publishes it in newspapers throughout two continents, and still this act is considered “secret”, then how should we qualify the British taking of possession of Port Egmont, which was neither notified to anyone nor published anywhere?

The desperate arguments of the British authors are that Jewett did not receive orders to take possession of the islands, that the government in Buenos Aires was not aware of his actions because he failed to notify the taking of possession, and that the government never made an official announcement.¹⁹³ None of these arguments, whether true or false, support the British thesis. Whether the document containing the instructions given to Jewett has been found or not is absolutely irrelevant. If Pascoe and Pepper’s criteria for taking possession, which they apply to Jewett, were applied to all takings of possession of territory carried out by British seamen, few would pass the test. We have already mentioned two examples, one in relation to Port Egmont itself, in which case a British sailor acted beyond his instructions, and the other relating to a simple seal-hunting ship, a mere subject of His Majesty, in the Shetland Islands. The list goes on. The effectiveness of the taking of possession of a territory by a public official, as was the case of Jewett in the Falkland/Malvinas Islands, is beyond reproach.

¹⁹² Laureano de Anóategui’s letter to Colonel David Jewett dated Nov. 27th, 1820 - AGN Room X 5-1-3.

¹⁹³ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 9-10.

The only time the British pamphlet cites the important and comprehensive *Informe del Comandante Político y Militar de las Islas Malvinas, D. Luis Vernet*, dated August 10th, 1832, is to say that the information it contains regarding Jewett's activities in the islands is false, and that Jewett did not give orders to any ship present in the islands.¹⁹⁴ Vernet's report reproduces the list of ships and captains that attended the ceremony of taking of possession in 1820.¹⁹⁵ The British pamphlet gives no grounds or explanation; it only states that Jewett and his men were "vegetating" in the Falklands/Malvinas, on the basis of a letter describing the situation in the islands. The reason for this absence of explanation is easy to understand. If the British authors wished to prove that the list is false, they would encounter some difficulty, because there it is: the full list of ships and captains. Because the truth is more than evident. Suffice it to read Jewett's notes before and after the taking of possession on November 6th, 1820 to affirm the opposite of the arguments in Pascoe and Pepper's pamphlet. It states that his purpose was to avoid the indiscriminate destruction of the supply sources existing in the islands; he notifies the facts to those present, and asks them to notify other ships of their same nationality.

It emerges from all this that the taking of possession of the Falklands/Malvinas by the United Provinces in 1820 was an official and public act, of which the main powers of the time took note, and did not complain. Indeed, the presence of Weddell and of other British captains, and particularly the article in the *Times* of London, leave no room for doubt as to the British government's knowledge about the taking of possession.

Pascoe and Pepper attempt to justify the lack of any British reaction on the basis of fact that Great Britain had not yet recognized the independence of the United Provinces (Argentina) and that therefore "there were no channels for any reaction".¹⁹⁶ This is no excuse. Before June 1822, the ships of the rebel American provinces were prohibited from entering the

¹⁹⁴ Ibid., p. 10.

¹⁹⁵ Translated into English and published in the British and Foreign State Papers, 1832-1833, vol. XX, p. 419 (facsimile reproduction in Perl, Raphael, *The Falkland Islands Dispute in International Law and Politics. A Documentary Sourcebook*. New York, Oceana, 1983, p. 261); also in Gómez Langenheim, A., op. cit., T. I, p. 208, Boyson, V.F., *The Falkland Islands*, Oxford, Clarendon Press, 1924, p. 90; Da Fonseca Figueira, José Antonio, *David Jewett, Una biografía para la historia de las Malvinas*, Buenos Aires, Sudamericana, 1985, p. 93-94.

¹⁹⁶ Pascoe, Graham and Pepper, Peter, op. cit., p. 10.

ports of the British Empire.¹⁹⁷ If the ports of the Falklands/Malvinas had been among them, a reaction from the British authorities should have been expected – yet reaction came there none. If a foreign State, even an unrecognized State, or an individual exercises an act of authority in a territory that another state considers to be its own, a reaction is to be expected. Nothing prevented the British government from sending a ship to the islands to exercise its alleged sovereignty – but nothing of the sort happened. As the arbitral award states in *Dubai/Sharjah*: "The first thing that a State must do when the authorities of another State enter its territory is to protest and send its police force to put an end to these actions".¹⁹⁸ Sending a "police force" evidently depends on the power of the nations involved. In the case of Britain, neither were there protests, nor was any force sent.

If the government in London did not wish to have any official contact with the government in Buenos Aires, which it did not recognise, a reaffirmation of its sovereignty in the islands would have been appropriate, or at the very least it should have made a general unilateral declaration, faced with a strangers' pretension to exercise competence over a territory they considered their own. This is only one of the many examples of British inaction inconsistent with a claim of sovereignty. The reason is quite simple: at the time, Great Britain did not lay claim to the Falkland/Malvinas Islands.

The pamphlet echoes previous British commentaries that point out that the political situation in Argentina in 1820 was chaotic and that there was barely a stable government.¹⁹⁹ However, the existence of internal crises and even civil war do not affect the international legal existence of a State, and even less do they transform its territory into a *res nullius* at the disposal of the first occupant.²⁰⁰ On the contrary, the internal crisis can explain the

¹⁹⁷ The British Navigation Act was modified in June 1822 to allow such access. Cf. Kirkpatrick, F.A., *A History of the Argentine Republic*. Cambridge, University Press, 1931, p. 134.

¹⁹⁸ I.L.R., 1993, Vol. 91, p. 620.

¹⁹⁹ For example the Foreign Office's Memorandum of 1946, *op. cit.*, p. 6, par. 39.

²⁰⁰ As Wheaton, Henry stated: "even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State." (Wheaton Henry and Dana H. Richard (ed.), *Element of International Law*, Oxford, The Clarendon Press, 1866, p.84)

absence of public acts which would ordinarily be expected from a State.²⁰¹ The truth is that Colonel David Jewett was an official of the United Provinces who performed a public act. It is irrelevant that the government that appointed him was no longer in office. The principle of State continuity, widely recognised in international law, establishes that legal acts must be attributed to the State, notwithstanding any subsequent change in government.

On the contrary to what the British pamphlet asserts, it was not necessary for the government in Buenos Aires to issue a confirmation or notification regarding the taking of possession. The United Provinces were considered to be the successor to Spain's rights over the Falklands/Malvinas. In Jewett's note addressed to Weddell, he affirms "to take possession of these islands in the name of the country to which they *naturally appertain*". This means that the act of taking possession meant the exercise of the existing title of sovereignty by means of effective possession, in such a way as to bring together all the elements necessary for both the *animus domini* and *corpus possessionis*, to make the territorial succession effective.

Pascoe and Pepper's argument that Argentina only came to know what had happened in the islands on November 10th, 1821, thanks to the piece published in the newspaper *Argos*,²⁰² even if it were true, would also be irrelevant. The authors of the pamphlet evoke the fact that Jewett, in his note sent to the government in Buenos Aires, told of the desperate conditions of his crew, but failed to mention the taking of possession. This means absolutely nothing. The objective of his note was to request relief in the face of the gravity of their situation. On February 27th and 28th, 1821 (that is to say, eight months before publication in the *Argos*), the government in Buenos Aires ordered Jewett to be relieved due to "*the unfortunate events and disasters that the National War frigate "Heroína" has suffered in the expedition*"²⁰³ and appointed Colonel Guillermo Mason as Colonel Jewett's

²⁰¹ This emerges from the ICJ's judgment in the *Territorial Dispute (Libya/Chad)*. The civil war in Chad can explain why the Court failed to attach any consequence to the country's inaction when Libya occupied the Aouzou Strip in 1973 and later between 1978 and 1982 (Cf. ICJ Reports 1994, pp. 36 and 35, par. 70 and 67).

²⁰² Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 11.

²⁰³ AGN Sala IX 5-1-2A (emphasis added).

successor, who was at “Puerto de la Soledad de Malvinas”, that is to say, the old Spanish settlement.²⁰⁴

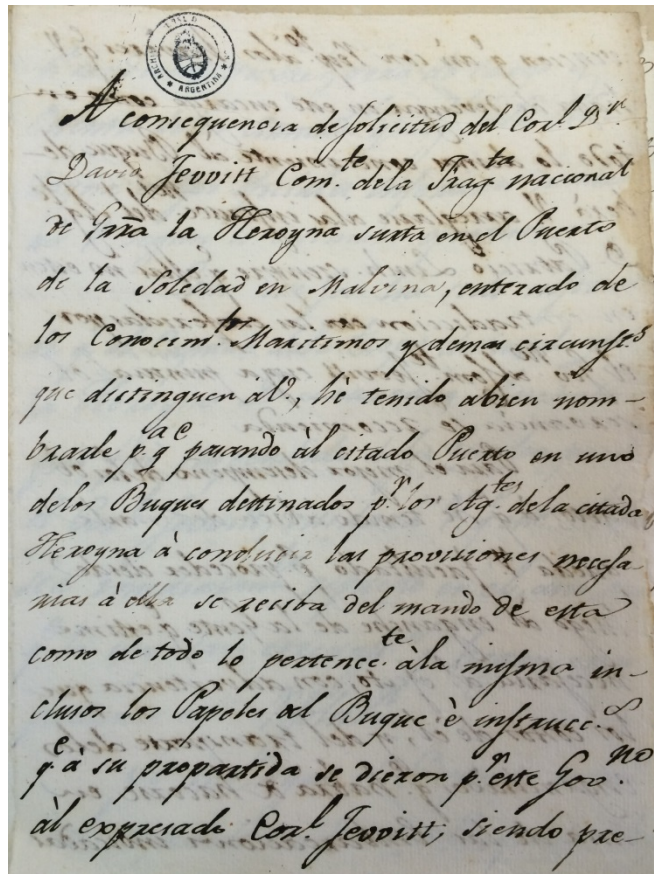


Figure 11 An order for Colonel Mason to relieve Colonel Jewett in the Port of Soledad in the Malvinas/Falklands by the Government of the United Provinces - A.G.N. Sala IX 5-1-2A

The acts carried out by Buenos Aires before and after 1820 show an uninterrupted continuity in conduct, which completely contradicts the claims in the British pamphlet: Argentina considered itself to be the sovereign of the Falklands/Malvinas before and after Jewett took possession of the islands. The situation would have been quite different if, for example, Jewett had arrived on the islands and did not consider himself to be on Argentine territory, or if the government in Buenos Aires had disowned Jewett’s acts. None of this occurred. Argentina had succeeded to the sovereignty of Spain’s colonial territories, and shortly after the taking of possession, performed other acts of sovereignty. If the British

²⁰⁴ Ibid.

authors want to diminish the taking of possession based on the fact that the Argentine government failed to notify other powers of the act, what can be said about how the British took possession of Port Egmont, or even the taking of possession and eviction of Argentina on January 3rd, 1833? Not only was Buenos Aires not notified, but even the British *Chargé d'Affaires* in Buenos Aires, when consulted a few days after the attack on Argentine sovereignty on January 3rd, 1833, answered that he ignored the fact and had not received any instruction in that regard.²⁰⁵ In sum, the notification by an Argentine authority present in the territory in question to foreign ships in the area is more than sufficient to endow that act with the character of a public and an effective exercise of sovereignty.

E. Argentine acts of sovereignty prior to the creation of the Political and Military Commandment of the Malvinas in 1829

The British pamphlet attempts to belittle the acts of sovereignty performed by Argentina in the 1820s prior to the creation of the Political and Military Commandment of the Malvinas and Adjacent Islands on June 10th, 1829. Pascoe and Pepper say nothing about Britain's silence during that period, and invent an alleged British authorisation for Luis Vernet to settle in the Falklands/Malvinas, an extravagance which Great Britain has never once brought up in the entire history of the 150-year Anglo-Argentine dispute.

The pamphlet groundlessly, inconsistently and ignorantly to the law asserts that “[at] *that time the Falklands were res nullius, “no one’s property”, though there were three limitations to that: Spain still claimed the islands, Britain had a claim dating from the establishment at Port Egmont 50 years earlier, and whether that was valid or not, Britain definitely had certain limited rights (of landing, building huts, etc.) according to the Nootka Sound Convention with Spain. Britain’s rights under the Nootka Sound Convention were meager, but they had been upheld through constant use for over 30 years and were a clear limitation on any other country’s possible claim to full sovereignty.*”²⁰⁶ This truly is legal nonsense, to use an expression of the author’s of the pamphlet themselves.

²⁰⁵ Letter from H.M.’s business officer F. Gore to Manuel Maza on January 17th, 1833, in Becerra, Alfredo, *Protestas por Malvinas (1833-1946)*, Buenos Aires, Caja Editora, 1998, p. 45.

²⁰⁶ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 11

If the islands were *terrae nullius*, the only effective acts in the 1820's were performed by Argentina, and this would be sufficient to confer sovereignty. Nevertheless, the islands were not *res nullius*, since at the moment of Argentine independence they belong to Spain and were a dependency of the Viceroyalty of the Río de la Plata. The principle of *uti possidetis* precisely has as one of its objectives that of preventing the Spanish territories from being considered *res nullius* as a result of the independence of the American nations. As emerges from the International Court of Justice's 1992 judgment in the case of the Gulf of Fonseca in Central America, under no circumstances can Britain's 1833 occupation of a previously occupied territory grant a title of sovereignty of any nature.²⁰⁷

As previously explained, Spain had no specific claim over the Falklands/Malvinas; it merely asserted its sovereignty over the entire territory of the Viceroyalty of the Río de la Plata as well as over the rest of the rebel colonial dependencies in America. The British pamphlet candidly uncovers the weakness of the British claim by recognising Spanish sovereignty over the Falklands/Malvinas by virtue of the Nootka Sound Convention and the "meager" rights – as the pamphlet calls them – recognized to Great Britain by this agreement. These "meager rights" (landing in case of an emergency, building huts, etc.) already analysed in the first chapter of this book, are unrelated to the question of sovereignty. Finally, the pamphlet contradicts itself by claiming that the "exercise" of such rights (which, in fact, were never exercised by Great Britain as a State) was sufficient to maintain a claim of sovereignty from half a century before: those "meager" rights are incompatible with a claim of sovereignty. A sovereign does not require authorization from another power to land its ships and subjects and build a shack on its own territory!

In the sections that follow, we will analyse the numerous acts of sovereignty carried out exclusively by Argentina throughout the 1820's and early 1830's, up to its expulsion by Great Britain.

²⁰⁷ ICJ Reports, 1992, p. 558, par. 333, cit. in chap. III, section A of the book. See also: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992, p. 400.

a) Cattle, land and fishing concessions in the Falklands/Malvinas

The British pamphlet recognises that in 1823, the government in Buenos Aires granted Jorge Pacheco a concession to farm cattle in the Falkland/Malvinas Islands.²⁰⁸ This is a classic example of an act that not only shows the intention to act as sovereign, but also the effective exercise of sovereignty.

Martín Rodríguez, governor of Buenos Aires, suggested to Jorge Pacheco, an ex-soldier who had served at the time of independence, that he should farm the wild cattle present in the Falklands/Malvinas as compensation for the amount owed to him by the State. They therefore signed a contract by which they would request such a concession from the government, with Pacheco being put in charge of refurbishing the existing buildings in Soledad.²⁰⁹ Pascoe and Pepper speculate that Pacheco and Vernet learned about the presence of cattle on the islands through Pacheco's sister-in-law, the wife of Bernardo Bonavía, one of the last Spanish commanders on the islands. This is clearly of no interest for the dispute; it merely serves to prove that the pamphlet's authors were well aware of who was exercising sovereignty over the islands at the beginning of the 19th century.

On August 23rd, 1823, Pacheco submitted a request to the government to farm cattle and horses and to exploit sea lion skin and oil on Soledad/East Falkland, "*rebuilding for this purpose the premises of the old settlement and committing themselves to returning these in an operational state to the government if in future the rehabilitation of the establishment were considered desirable.*"²¹⁰ Governor Martín Rodríguez and the Minister of the Economy, Bernardino Rivadavia, signed a decree on August 28th, 1823 by virtue of which permission is granted to travel to Isla Soledad, one of the Malvinas islands, to make use of it in the terms proposed and on the understanding that such a concession will never deprive the State from exercising its rights over the territory in the way it may consider more advantageous for the general interest of the Province.²¹¹

²⁰⁸ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 11, *False Falklands History...*, p. 2.

²⁰⁹ Caillet-Bois, Ricardo R., *op. cit.*, pp. 192-193.

²¹⁰ Complete text in Gómez Langenheim, A., *op. cit.*, T. I, pp. 217-218.

²¹¹ *Ibid.*, p. 217.

At the beginning of 1824, Cipriana Obes de Bonavía, widow of the colonial Commander of the Falklands/Malvinas and Pacheco's sister-in-law, requested and obtained an authorisation to fish and hunt wild livestock on the Falkland/Malvinas Islands, but she failed to make use of the concession.²¹² It is likely that this request was linked to that of Pacheco and granted as supplementary to it. These concessions leave no room for doubt as to the exercise of sovereignty over the Falklands/Malvinas by the government of Buenos Aires in 1823 and 1824.

b) The British Consul certifies an act regarding the exercise of Argentine sovereignty over the Falklands/Malvinas

There is more evidence in support of the exercise of state authority by Argentina, and British awareness of those acts. In 1825, before the imminent outbreak of war with Brazil, Jorge Pacheco pretended to cede the rights granted by the government of Buenos Aires to two British subjects, Mr Green and Mr Hodgson, both merchants living in Buenos Aires. The aim that simulation was to safeguard his property, which could be considered enemy property and confiscated by Brazilian forces because of the war. The deed of cession and the counter-document stating the true are respectively dated October 10th and December 10th, 1825. The deeds were certified by the British consul in Buenos Aires, Richard Pinfset, on January 3rd, 1826,²¹³ without eliciting the slightest reaction from Britain. If the islands were British, Great Britain's representative in Buenos Aires would have objected to such concessions being made by a foreign government. Not only was there no reaction, but the British consul certified the authenticity of the Argentine documents. Again, Britain kept silent, when in fact it should have reacted if it really considered itself to be the sovereign of the Falklands/Malvinas Islands. As for the pamphlet, its silence is eloquent on a matter that it can in no way ignore.

²¹² Caillet-Bois, Ricardo R., *op. cit.*, p. 199, note 24. Source: AGN Buenos Aires, División Nacional Sección Gobierno, Civil, 1824.

²¹³ Gómez Langenheim, A., *op. cit.*, T. I, pp. 216 and 218-220. Source: Archivo de Vernet, Carpeta (A) - "Documentos Importantes".

c) Pablo Areguatí's appointment as Commander of the Falklands/Malvinas

The British pamphlet plays with words to avoid recognising that Pablo Areguatí was appointed Commander with the purpose of exercising authority in the Falklands/Malvinas after Pacheco's settlement. It carefully says that he was not the "governor" and neither was Vernet, who occupied the position of "Political and Military Commander."²¹⁴ Of course, the importance of the terminology is secondary. Whether a "Commander" or a "Governor", Argentina appointed a person into a position of public authority on the islands. Again, this is an undisputable act of State authority.

It was Pacheco who requested the government in Buenos Aires to appoint Areguatí as Commander. In a note addressed to the government of Buenos Aires, dated December 1823, he explains: *"ready to set sail, the expedition to Puerto de la Soledad de Malvinas whose purpose, thanks to Your Excellency's kindness, is the exploitation of said Island, is under the command of retired Captain of the Militias Mr. Pablo Areguatí [...] and as to the workers and foreign ships it would be in the interest of the State and the requester that he have some authority. I request Your Excellency to grant this captain the title of Commander ad honorem of that port. In this way, Your Excellency takes possession of said island and even obliges ships to pay anchorage rights, which will be scrupulously rendered to the Treasury: because Areguatí intends to use those workers to start a Company of civilians with corporals and sergeants, in order to vest this operation with as much representation as possible as a possession of the Nation, taking weapons and ammunition as part of the negotiation; and if Your Excellency could send some iron cannons to defend the port from pirate invasions in the abandoned batteries, they would be repaired and put in condition to serve the government, at the moment it may wish to re-establish its presence. I have planned to domesticate livestock and keep it on a farm where up to two thousand merino sheep can be fed, with the purpose of providing the country with this wool; [...] to carry out this task, I request that by virtue of your high authority and faculties you grant me the territory necessary to perform these hard duties; ordering the commander to give me the*

²¹⁴ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 11, and *False Falklands History...*, p.2.

possession of such terrains, as a citizen of this Province, who will defend that territory as a sacred property of the State."²¹⁵ This request was signed and approved on December 18th of the same year.²¹⁶

In the aforementioned decree of concession, the government reserved the right to make provision for "all the other points requested by the representative."²¹⁷ The instructions given to Emilio Vernet (brother of Luis Vernet, who travelled to the islands) and to Areguatí established that once they had arrived at port, they were to bring together all those present and appoint Areguatí as Commander of the Island, "*making all people know about the decree in order to make them recognise him as the commander, to maintain order and prevent excesses.*"²¹⁸ Luis Vernet's report, dated August 10th, 1832, also mentions that Areguatí was appointed Commander.²¹⁹ This appointment, and the fact that the ship "Rafaela" on which they arrived was armed, prove that the Government of Buenos Aires took the necessary measures to exercise its authority over the Falklands/Malvinas. Areguatí arrived at Port Soledad on February 2nd, 1824, and left the Falklands/Malvinas before the end of the year, having failed in establishing what would have been the first human settlement in the islands in many years.²²⁰ In another display of argumentative weakness, the British pamphlet emphasizes this failure and goes so far as to reproduce Areguatí's letter, in which he points out the difficult living conditions on the islands.²²¹ This does not make his appointment and effective presence on the islands any less effective. Despite the failure of the attempt to establish a permanent settlement, the importance of Areguatí's appointment lies in the will of the government of Buenos Aires to establish an authority to reside on the islands and in the physical presence of Areguatí on the islands as commander for most of 1824.²²² It is worth highlighting that before Argentine independence was

²¹⁵ AGN, Sala IX 24-5-7.

²¹⁶ AGN, Sala X, División Colonia, Sección Gobierno, Guerra y Malvinas No. 48, File 18 "D. Jorge Pacheco pidiendo q.e al Capit.n Pablo Areguati se le nombre Com.te de la Isla de Malvinas".

²¹⁷ Caillet-Bois, Ricardo, *op. cit.*, p. 203.

²¹⁸ *Id.*, pp. 197-198.

²¹⁹ BFSP, 1832-1833, vol. XX, p. 419; Perl, Raphael, *op. cit.*, p. 261.

²²⁰ The date of return comes from the analysis of Caillet-Bois, Ricardo R., *op. cit.*, p. 198.

²²¹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 13, and *False Falklands History...*, p. 3.

²²² The Memorandum issued by the Research Department of the Foreign Office on September 17th, 1946 states that: "*In 1823 a "Governor" of the Islands was appointed, but no formal act of possession was carried out, and the so-called Governor never visited his province.*" (p.21)

recognised and diplomatic relations established, Great Britain had appointed a Consul in Buenos Aires, who had arrived in March 1824. The Consul could not possibly have ignored Pacheco's attempt to establish a settlement that same year.

Pascoe and Pepper's pamphlet obscures this important and accessible information, falsely stating that the book written by Caillet-Bois does not mention Areguati's appointment and citing, as if it were sufficient evidence, the opinion of an Argentine writer published in the newspaper *Clarín* in 1974 to support its position.²²³ Of course, they introduce this writer as "the leading authority on the Falklands in Argentina" – further proof of the sort of "research" carried out by the authors.

d) Argentina and the protection of marine life in the South Atlantic

On October 22nd, 1821 the government in Buenos Aires passed a law in relation to fishing and hunting of amphibians on the Patagonian coast, aiming to regulate these activities and avoid the depletion of living resources due to the excesses of foreign ships.²²⁴ The facts show that the legislation also extended to the Falkland/Malvinas Islands. During colonial times, the law was applicable in the entire southern region, as previously seen in Commander Bonavía's note dated March 27th, 1805.²²⁵ In his valuable Report dated August 10th, 1832, in explaining the extension of the "coast" during the colonial period, Political and Military Commander Luis Vernet states that, "*On examining the public Archives of this Capital, it is found that the whole Coast was divided into 3 Districts: the first, from Cape San Antonio to Santa Elena; the 2nd, from there to the Strait; and from the Strait onwards, including Isla de los Estados, and Adjacencies, belonging to the District of Malvinas, which constituted the third.*"²²⁶

²²³ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 12.

²²⁴ Archivo y Biblioteca de la Cancillería Argentina, Rec. 1947, File 25 No.1. English text published in BFSP, 1832-1833, vol. XX, p. 421; Perl, Raphael, *op. cit.*, p. 263

²²⁵ See *supra*. Chap. II, fn 66.

²²⁶ (transl.) BFSP, 1832-1833, vol. XX, p. 403; Perl, Raphael, *op. cit.*, p. 245.

Vernet himself was to explicitly apply the Law of October 22nd, 1821 and its amendments to the Falklands/Malvinas.²²⁷ A key element that supports this interpretation is the decree issued by the Governor of Buenos Aires, Balcarce, on January 5th, 1828, by virtue of which some land on Soledad Island/East Falkland and Staten Island was ceded to Luis Vernet, settlers were excepted from paying taxes and authorized to fish “in all the Malvinas islands”: all this is decided “pursuant to the Law passed on October 22nd, 1821”.²²⁸ As is well-established, it was the application of this law to American ships by Vernet that gave rise to the violent reaction of the American captain Silas Duncan, who in 1831 destroyed most of the Argentine settlement and sent its population scattering. The application of fishing and hunting laws is another clear example of the effective exercise of State authority by Argentina.²²⁹

e) The establishment of Argentine-British diplomatic relations and the Treaty of 1825

In 1825, Great Britain effectively recognised Argentine independence, which meant the establishment of diplomatic relations between the two States on the basis of international law. This implied respect for sovereign equality,²³⁰ which includes or implies respect for territorial integrity. If Argentina had violated British territorial sovereignty through its previous acts in the Falklands/Malvinas, here was an opportunity for the British government to enforce its rights. Yet no reference to the issue was made. When two nations have a territorial dispute and establish diplomatic relations, it is elementary that one or both reserve their rights or declare that the establishment of diplomatic relations does not in any

²²⁷ Decree dated October 28th, 1829 forbidding the fishing of amphibians along the Patagonian coast. Archivo y Biblioteca de la Cancillería Argentina, Rec. 1947, File 25 No. 3 and Decree revoking the decree prohibiting the inhabitants of Patagonia from fishing amphibians dated July 6th, 1831 (*op. cit.*, Rec. 1947, Ex. 25, No5).

²²⁸ AGN, Sala VII, 2-3-4. The English translation published in the British and Foreign State Papers is misleading and essentially changes the meaning of the text: “in conformity to the spirit of the Law of 22nd October, 1821” (1832-1833, vol. XX) reproduced in Perl, Raphael, *op. cit.*, p. 262; in Ferrer Vieyra’s transcription Ferrer Vieyra, Enrique, *An Annotated Legal Chronology of the Malvinas (Falkland) Islands Dispute [Cronología legal anotada sobre la cuestión Malvinas (resumen)]*. Córdoba, Lerner, 1985, p. 60-62.

²²⁹ See: *Legal Status of Eastern Greenland*, 1993, judgment, PCIJ, Series A/B n° 53, pp. 62; *Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Reports 2002, p. 625 and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, ICJ Reports 2007, par. 195.

²³⁰ Manning, William Oke, *Commentaries on the Law of Nations*, London, Milliken and Son, 1839, p. 100.

way affect their respective positions. At the time, the government in Buenos Aires was intensifying its exercise of sovereign rights over the islands. As we have already seen, the British government could not possibly have ignored Jewett's taking of possession in 1820, nor the concessions or subsequent expeditions – and yet it did not react.

On February 2nd, 1825, the United Kingdom of Great Britain and Ireland and the United Provinces of the Río de la Plata concluded a Treaty of Friendship, Commerce and Navigation.²³¹ The treaty makes numerous references to the territories and ports of the parties. Neither party made a reservation or observation of any kind in relation to the Falklands/Malvinas. The difference is that, as we have seen, Argentina was already exercising authority over the islands. and considered them its own. The same was not true of Britain.

Some British bloggers refer to a note written by Ignacio Núñez, an officer of the Ministry of Foreign Affairs, as a response to a request put forward by Woodbine Parish, Britain's first representative in Buenos Aires. The bloggers maintain that this letter was the basis for signature of the Anglo-Argentine treaty, and that not including the Falkland/Malvinas Islands in that letter excluded recognition by the United Kingdom of Argentine sovereignty over the islands when signing the agreement. However, the British minister did not ask any questions regarding the Falkland/Malvinas Islands, nor was there any need for the Argentine officer to make any reference to the subject. The facts are as follows.

Parish's note dated May 12th, 1824 is a reiteration of a previous, unanswered, letter sent to Bernardino Rivadavia, when he still was the Minister of Foreign Affairs. Parish is very clear in his request. He asks for "*a slight sketch of the origin, progress, present state, and form of government of this country; together with a summary of its revenues and military strength*".²³² No mention is made of the territorial extension of the United Provinces of the

²³¹ Parry, Clive (ed.), *The Consolidated Treaties, Vol. 75*, New York, Oceana Publications, 1969, pp. 75-84.

²³² Núñez, Ignacio, "An account, historical, political, and statistical, of the United Provinces of Rio de la Plata", London, Print. for Ackerman, 1825, p. 1. The whole letter reads: "*I entreat you to bear in mind the request which I made to Señor Rivadavia, concerning a slight sketch of the origin, progress, present state, and form of government of this country; together with a summary of its revenues and military strength. It is my wish that it should comprise all those points on which it may seem desirable that my Government (for*

Río de la Plata, nor any reference to the fact that the information is requested in view of the conclusion of the treaty of commerce and friendship that was to be signed a year later. No reference to the letter is made in the course of the treaty negotiations. In fact, Mr. Nuñez had neither the capacity nor the necessary authority to negotiate the agreement. In any case, nothing in the correspondence is useful to support the British claim or to excuse the British government's lack of reaction to Argentina's acts of sovereignty.

Nuñez simply answers what is requested. He begins with a brief summary of the historical causes of the revolution and subsequent Argentine independence; he then mentions some principles on which the government is based and finally, gives a brief account of the different branches of the administration (government, war, foreign affairs, economy). No annex makes any reference to the territorial composition of the United Provinces (or of Buenos Aires, the province on which the Falklands/Malvinas depended). The British representative in Buenos Aires, who had been in the Argentine capital since March 1824, makes no inquiry in that regard.

Parish in his request asks that "*all those points on which it may seem desirable that my Government (for whose inspection I solicit it) should be informed*".²³³ It is not possible to infer from this any request regarding the extension of Argentine territory, all the more so at a time when the borders between the United Provinces and their neighbours had not yet been drawn. There was no reason for Argentina to give Great Britain any details regarding the Falklands/Malvinas. Great Britain had abandoned its settlement in Port Egmont fifty years earlier, and nobody could recall any British claim. Never again during the long period of Spain's exclusive administration had Great Britain raised any claim of sovereignty, implicitly or explicitly (on the contrary, as we have already seen, they had agreed in a treaty not to establish a settlement in 1790) and nothing had been said about the acts of government carried out by Argentina. Therefore, just as there was no need to give any

whose inspection I solicit it) should be informed. No one is better qualified for that purpose than you, Sir; and I shall feel infinitely obliged if you will stake the trouble to furnish me with it, as soon as your occupations will permit. On another occasion, when the Commissioners of North America came to this city, Señor Tagle gave a similar exposition to Mr. Rodney".

²³³ Ibid.

information over other parts of national territory, there was no need to give any information regarding the Falklands/Malvinas.

The truth is that the Treaty of 1825 refers to “the territories” of the contracting parties and the British government raised no objections to Argentine acts of sovereignty in the Falklands/Malvinas. If the British government did not wish to contact the government of Buenos Aires in 1820 because it did not recognise such a government, as Pascoe and Pepper assert, it now had an opportunity to do so. If it had the slightest interest in the Falklands/Malvinas, it could at the very least have requested information regarding Argentina’s taking of possession as published in the *Times* in 1821, or regarding the concessions granted in 1823. It did nothing, for the simple reason that there is absolutely no proof that the British government was making any kind of claim over the Falklands/Malvinas at the moment it recognised Argentina and signed the Treaty of friendship, commerce and navigation.

f) The new Argentine concessions to Luis Vernet in the Falkland/Malvinas Islands.

In 1825, Luis Vernet organised a second expedition that set sail in January 1826. Despite numerous hardships, it turned out to be successful. He settled in Soledad Island/East Falkland on June 15th, 1826, to make use of the concessions granted to Pacheco, with whom he had made a deal.²³⁴ Since then, his settlement was permanent. Even before the creation of the Political and Military Commandment of Malvinas in 1829, the population behaved consonantly with Argentina's sovereignty over the territory in which they were located. One example is that of the observance of the national holidays of May 25th and July 9th.²³⁵

²³⁴ Gómez Langenheim, A., *op. cit.*, T. I, p. 236

²³⁵ Emilio Vernet’s journal reads: Sunday, May 25th, 1828: “Good weather with some showers, hail and wind S.O. When the sun rose we fired three cannon shots and raised the English and the Buenos Aires flags; at noon another three cannon shots were fired and at night another three. After eating meat with pelts and cakes made with that purpose, we target shot till dusk, when the people began dancing in the Cooper’s ranch, the dance lasted until dawn.” On Wednesday, July 9th, 1828: “Cloudy and rainy with moderate winds S.E. Our people celebrated the swearing of the Independence of Buenos Aires.” *Texts of Montarcé Lastra*, Antonio cit., p. 48, and Gómez Langenheim, A., *op. cit.*, T. I, pp. 265-266. This latter wrongly attributes the journal to Luis Vernet and omits the phrase which says that the English and Argentine flags were raised. No negative effect for the Argentine stance can be attributed to the fact that the British flag was raised on May 25th. It was and

On January 5th, 1828, Vernet made a new request to the government, one of particular importance for the development of the settlement. In it, he stated: *“That wishing this country development and greatness, I have thought to establish a Colony in the island called “Soledad” located among the group of islands called Malvinas; but needing for this the protection of the government and the considerations necessary not only for the owner of the enterprise but also for the new settlers to accomplish such a task, I considered it appropriate that with the purpose of achieving such an important objective, Your Excellency may cede possession and property rights to me, or protect me according to those rights in regard to the land on the island called “Statentland” on the coast of Tierra del Fuego. My commitment will be to establish a Colony within three years from the granting of the concession, to be under the authority of the Buenos Aires government in the same way as the settlers, who will be treated as citizens of the Republic and will enjoy the same rights. Likewise, it will be an express condition that in case it is necessary to expand the Colony to other islands due to growth in population, I will be obliged to be in contact with the government, to determine, with its agreement, what may be more convenient. Equally, upon the establishment of the colony, the settlers will be free and exempt from any kind of rights or contributions, maritime or land rights, for the first thirty years of the Colony’s establishment. That during the same period, the Colony will enjoy the exclusive right to fish along the coasts of Tierra del Fuego, the Malvinas Islands and other coasts and islands of the Republic, which excludes foreigners but not the native people of this country. It is necessary to consider that the Government, by allowing the establishment of a Colony in the Malvinas islands, under the conditions set forth, does no more than recover a territory which was like abandoned, but which having been acquired by the Spanish, this Government has not lost the right to possess. There is no other decision for another nation not to set its sights [on a territory] than the establishment or foundation of a Colony.”*²³⁶

*still is common for foreigners to join in national holidays by waving their flags. On August 30th, 1829, when Luis Vernet took office as the Political and Military Commander, Captain Oliver Keating of the Brig “Betsy” joined in by waiving the American flag (Caillet-Bois, Ricardo, *op. cit.*, p. 210).*

²³⁶ AGN, Sala VII 2-3-4; Gómez Langenheim cites it in *op. cit.*, T. I, pp. 229-230.

The government, by virtue of the Decree signed by governor Balcarce on January 5th, 1828, ceded to Vernet all the vacant lands on Isla Soledad, except for those ceded to Jorge Pacheco and a ten-square league stretch in San Carlos Bay reserved by the State, plus Staten Island. A map of Soledad/East Falkland made by Vernet, which is reproduced here (see figure 12), shows the land divisions as well as the settlements existing during the Argentine administration. The condition imposed on Vernet was that within a three-year period a colony should be established “and after this period, the government will provide for what is more convenient in regard to the internal and external order of its administration.”

The scope of this decree goes far beyond a simple land concession. The government of Buenos Aires: 1) establishes a special tax system, 2) grants fishing franchises, 3) reserves the property of a strategic zone in San Carlos, on the coast of the strait of the same name, 4) manifests the will to populate the islands permanently and to organize the exploitation of the natural resources of land and sea, 5) does not limit these acts to Isla Soledad, but applies them to the entire Falkland/Malvinas archipelago, and to other Argentine territories in the South; 6) clearly establishes governmental control over the development of the colony and 7) establishes a relationship of subordination of the Colony’s director (Vernet) to the government of Buenos Aires. No protest was raised by the British government, despite this being an act of public exercise of sovereignty that, as we shall see, was known by the active British representative in Buenos Aires. Of course, the British pamphlet says nothing in this regard. On the contrary, it engages in a most absurd attempt to deny the importance of Vernet’s activities for the exercise of sovereignty by Argentina. It invokes an alleged British “authorization” for Vernet to establish a settlement in the Falklands/Malvinas and asserts that Vernet would have preferred British rather than Argentine sovereignty. Before proving the mendacity of these claims, it may be useful to briefly explain both the public and private dimensions of Vernet’s actions.

Once the decree was passed in January 1828, Vernet put into action his plan of human development of the islands, which consisted in promoting European and American immigration – a model which would later be followed by the rest of the country. With this

in mind, he divided Isla Soledad into eleven sections (see Vernet's map mentioned above) and contacted German, British, Scottish, Dutch and American companies, to whom he submitted a copy of the relevant official documents, a report issued by the government of Buenos Aires supporting the establishment of a settlement, information on living conditions, the economic and geographical situation of the Falklands/Malvinas and a model contract for the concession of lands to the potential settlers, as well as the conditions for settlement. For example, article 1 states: "*All settlers whatever nation they come from shall respect the country's authority and therefore its laws.*"²³⁷ This alone proves the flagrant falsehood of the pamphlet regarding any possible doubts Vernet had about sovereignty over the islands.

g) The creation of the Political and Military Command of the Malvinas Islands and Adjacencies

As a result of the success of his enterprise and the size of the human presence in the islands, Vernet address the government of Buenos Aires in his capacity as "founder of a new colony in the Malvinas Islands" to make a variety of requests.²³⁸

The logical consequence of the development of Vernet's settlement was the creation of the Political and Military Command of the Malvinas/Falkland Islands and the Atlantic Adjacencies of Cape Horn by a Decree dated June 10th, 1829 and signed by Governor Martín Rodríguez and Minister Salvador María del Carril.²³⁹

The provisions of the Decree establish that the place of residence for the Political and Military Commander shall be Isla Soledad, that a battery shall be established under the flag of the Republic and that the Political and Military Commander "shall make the population comply with the laws of the Republic, and shall enforce the regulations concerning

²³⁷ From May 1829 to October 1831, the document was sent to Vernet's agents abroad, for the colonization of sections II to XI. Translation in: Gómez Langenheim, A., *op. cit.*, T. I, pp. 236-244. Source: Archivo de Luis Vernet- Documento No3.

²³⁸ Reproduced in Gómez Langenheim, A., *op. cit.*, T. I, pp. 246-247. Caillet-Bois dates Vernet's request on June 9th, 1829, *op. cit.*, pp. 208-209.

²³⁹ Registro Nacional, 1829, Exp. I, No1.

amphibian fishing along the coasts.” Another decree signed by Salvador María del Carril in June 1829 (the day is missing, probably also on the 10th), orders the Minister of War to provide four cannons, rifles and other weapons to Vernet to be used for “the creation of a battery in Isla Soledad”, and to issue said decree.²⁴⁰ On the same day, the government adopted another decree by virtue of which Luis Vernet is appointed Political and Military Commander of the Malvinas/Falkland Islands.²⁴¹

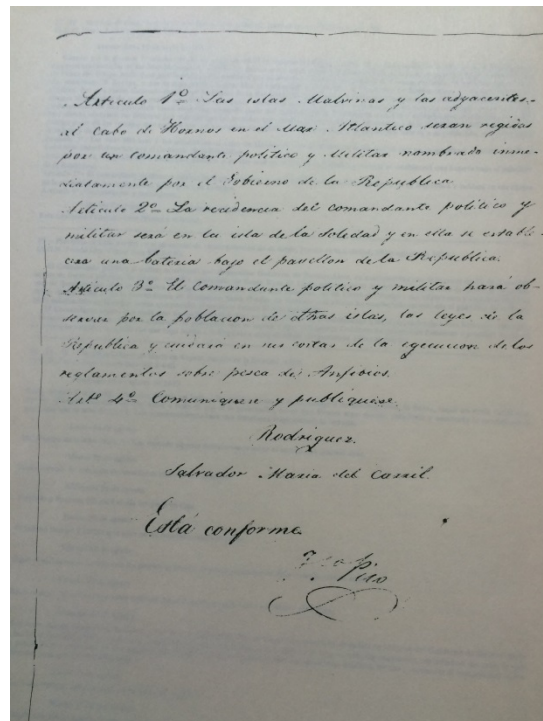
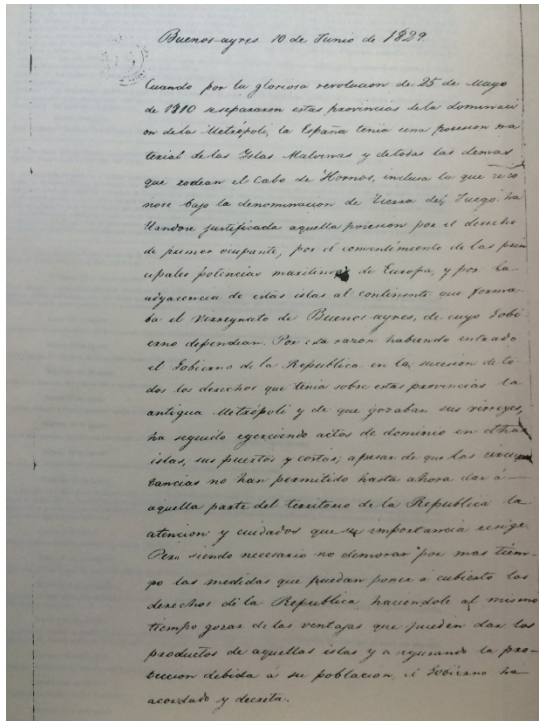


Figure 12 Decree of June 10, 1829 creating the Political and Military Commandment of the Malvinas Islands & adjacent to the Cape Horn in the Atlantic Sea - A.G.N. Fondo Luis Vernet Sala VII 2-3-3

The provisions of the Decree of June 10th set out the basis of Argentine rights and the reasons for the creation of the Command. The first provisions are as follows:

- 1) Spain had the material possession of the Falkland/Malvinas Islands at the moment the provinces of the Rio de la Plata separated from the metropolis on May 25th, 1810.

²⁴⁰ Quoted in Gómez Langenheim, A., *op. cit.*, T. I, pp. 246-247.

²⁴¹ Cancillería, Rec. 1947 Exp. 23, No3, AGN Legajo II. Photographic copy in: Gómez Langenheim, A., *op. cit.*, T. I, p. 245.

2) Spanish possession was based on a) the right of first occupant, b) the consent of the main European sea powers and c) the proximity of the islands to the continent formed by the Vice-Royalty of Buenos Aires, on whose government they depended.

3) The Government of the Republic " succeeded to all rights over the provinces of the old metropolis "

4) The government continued "exercising acts of dominion over said Coasts and Islands"

The reasons that explain the creation of the Command are as follows:

1) "Circumstances have not permitted until now to bestow upon that part of the territory of the Republic the attention and care that its importance deserves"

2) "It is necessary to delay no longer the adoption of such measures as will secure the rights of the Republic"

3) "Enjoy the advantages that the produce of said Islands and Coasts may offer"

4) Ensure to "grant due protection to its inhabitants"

From the legal point of view, the correctness of the procedures followed to support Argentina's titles is remarkable. It is established that this is a State succession and May 25th is determined to be the critical date for the succession, that is, to determine whether Spain had sovereignty over the islands and was therefore able the possibility of succession to Spanish sovereignty. The acts of possession performed by the Republic to show it already had effective possession of the territory at the moment the Command was created are mentioned. These are in particular the taking of possession of November 6th, 1820 and the concessions granted during that decade. The right of first occupant, and not Papal Bulls or discovery, are used to support Spain's titles. That is the correct interpretation, according to which the initial occupation by France is considered to be Spanish, since France recognized Spain's sovereignty and transferred the settlement at Port Louis. This is how it was understood at the time. The consent of the main European maritime powers is not considered a separate title of sovereignty, but only recognition of its existence. The proximity of the islands to the continent is also not an autonomous title (contiguity), but only a determination of the extension of the Viceroyalty of the Río de la Plata.²⁴²

²⁴² See the examples of American and French practice in relation to the Pinos and Santa María islands respectively, and the analysis of the jurisprudence in the cases of Bulama, Palmas, Alpe di Cravairola, Beagle and El Salvador/Honduras in: Kohen, Marcelo G., *Possession contestée et souveraineté territoriale*. Paris,

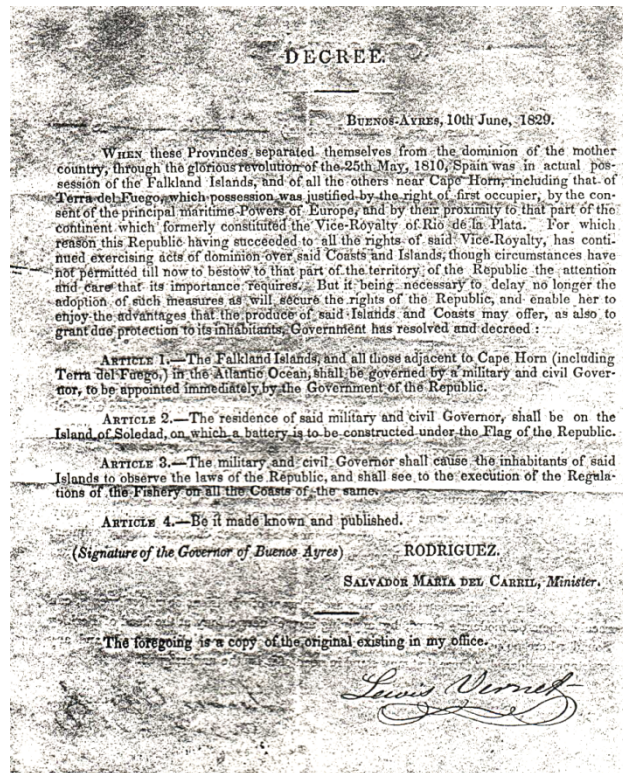


Figure 13 Decree of June 10, 1829 in English which was in the reverse of the Circular delivered by Luis Vernet to the captains of foreign vessels arriving at the Falkland/Malvinas Islands

Pascoe and Pepper maintain that the Argentine government that issued the decrees was not legitimate and that Rosas declared all the acts performed by the government of Lavalle null and void.²⁴³ For a variety of reasons, the United Kingdom cannot invoke the “nullity” of the decrees passed to create the Political and Military Command and to appoint Vernet. Firstly, there was no such nullity, and even if it had been declared by the subsequent government, it would not be opposable in the international sphere, by virtue of the principle of continuity of the State.²⁴⁴ Secondly, because the government that followed that which issued the

PUF, 1997, pp. 242-246. For another analysis of contiguity as the criterion to determine the extension of sovereignty and not as a title, see: Jennings, Robert, *The Acquisition of Territory in International Law*, Manchester, Manchester University Press, 1961, p. 74, and Brownlie, Ian, *Principles of Public International Law*, 5th ed., Oxford, Clarendon Press, 1998, p. 147.

²⁴³ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 15.

²⁴⁴ Cf. Arbitral award between United Kingdom and Costa Rica in the *Tinoco case*, R.I.A.A., vol. I, pp. 371 and following.

decrees on June 10th, 1829, including Rosas', continued to act in accordance with the content of those decrees. Suffice it to note the official correspondence exchanged between the Political and Military Commander and the government of Buenos Aires between 1829 and 1831, as well as the attitude adopted by the latter when Vernet captured three American ships, and later over the actions of the *Lexington*.²⁴⁵ Thirdly, if the decrees were hypothetically null and void, the only State that could invoke such nullity would be Argentina. This conclusion can be reached by applying the provisions of the law of treaties relating to the violation of internal law by analogy to unilateral acts of State.²⁴⁶ What is more, the British protest of November 19th, 1829 had as its sole objective the decree dated June 10th of the same year. At the moment the protest was raised, the change in government of the Province of Buenos Aires had already occurred. Such an action would not make sense if it were directed to a government which did not recognise the validity of the act being protested. All this shows the futility of the efforts of the British pamphlet, as other British sources had previously attempted, to detract from the importance of the Decree of June 10th and the creation of the Political and Military Command of the Malvinas/Falkland Islands.²⁴⁷

The acts in exercise of public authority and other demonstrations of Argentine sovereignty during Luis Vernet's command are countless. The following are only some examples: 1. Note written in English addressed to the ships hunting and fishing in the region (mostly American and British), to communicate that they had to respect relevant Argentine laws and the property of private persons settled in the Falklands/Malvinas (distributed from August 1st, 1829; on the back was the translation of the Political and Military Command creation in Malvinas/Falklands)²⁴⁸ (see Figure 15).

²⁴⁵ Vernet's notes to the Minister Secretary of Government of Buenos Aires Province dated 26th December 1829 and August 25th, 1830, answered by Government Minister Tomás de Anchorena on October 25th, 1830. Vernet's note dated March 23rd, 1831 (the original of the first kept in the Academia Nacional de la Historia) D-931, MOS. This and the others are reproduced in Gómez Langenheim, A., *op. cit.*, pp. 251-257).

²⁴⁶ Cf. Arbitral award on the *Delimitation of the maritime boundary between Guinea-Bissau and Senegal* of July 31st, 1989, R.G.D.I.P., 1990, vol. 94, par. 60.

²⁴⁷ The website of the so-called "Falkland Islands Government" takes a similar position

²⁴⁸ The date of August 1st is taken from the original, seen by A. Gómez Langenheim in the Archivo de Vernet (*op. cit.*, T. I, p. 246).

2. Entry into service ceremony on August 30, 1829 and celebration of national holidays.⁸⁵²⁴⁹
3. Criminal proceedings.²⁵⁰
4. Civil marriages celebrated by the Political and Military Commander of Malvinas, Mr. Luis Vernet, on October 25th, 1829 and May 29th, 1830.²⁵¹
5. Navigation Licence for the National Schooner “Águila”, built in the Falklands/Malvinas and owned by Luis Vernet himself, dated November 6th, 1831.²⁵²
6. Currency issuance.²⁵³ (see Figure 16)
7. Fishing and hunting controls in application of relevant Argentine laws.²⁵⁴
8. Use of inhabitants for military service and custody of prisoners.²⁵⁵
9. Land concessions, including to British subjects.²⁵⁶
10. Application of the decree dated January 5th, 1828 in favour of the colony’s inhabitants.
11. Promotion of European and American immigration.

²⁴⁹ See Luis Vernet’s proclamation of August 30th, 1829 (Sala VII 2-4-6, Documento 17, Periodo 1810-1833) Vernet’s note dated December 24th, 1829 to the Minister of the Government of Buenos Aires quoted above and María Sáez de Vernet’s diary from that date.

²⁵⁰ María Sáez de Vernet’s Diary, August 24th and 25th and September 1st, 1829.

²⁵¹ For the first point see Mrs. María Sáez de Vernet’s Diary, for the second point, see the act reproduced by A. Gómez Langenheim, *op. cit.*, T.I, pp. 263-264.

²⁵² *Ibid.*, T. I, p. 284.

²⁵³ Copies in Gómez Langenheim, A., *op. cit.*, T. I, p. 289 and the two first editions of the quoted text by Caillet-Bois, Ricardo. Also: Heijtz, Stefan, *Specialised Stamp Catalogue of the Falkland Islands and Dependencies, Including Postal History and Cancellations 1800-1996 with British Antarctic Territory and Now also Paper Money, Coins, and Telephone Cards, 3a ed.*, Stockholm, s.d.e., 1995, p. 216.

²⁵⁴ This was to result in the incident with the United States.

²⁵⁵ Caillet-Bois, Ricardo, *op. cit.*, p. 213

²⁵⁶ Made in favour of Lieutenant R.N. Langdon and G.T. Whittington. Whittington, *The Falkland Islands, Compiled from Ten Years Investigation of the Subject*, London, Smith, Elder & Co. and J. Ridgway, 1840, p. 11.

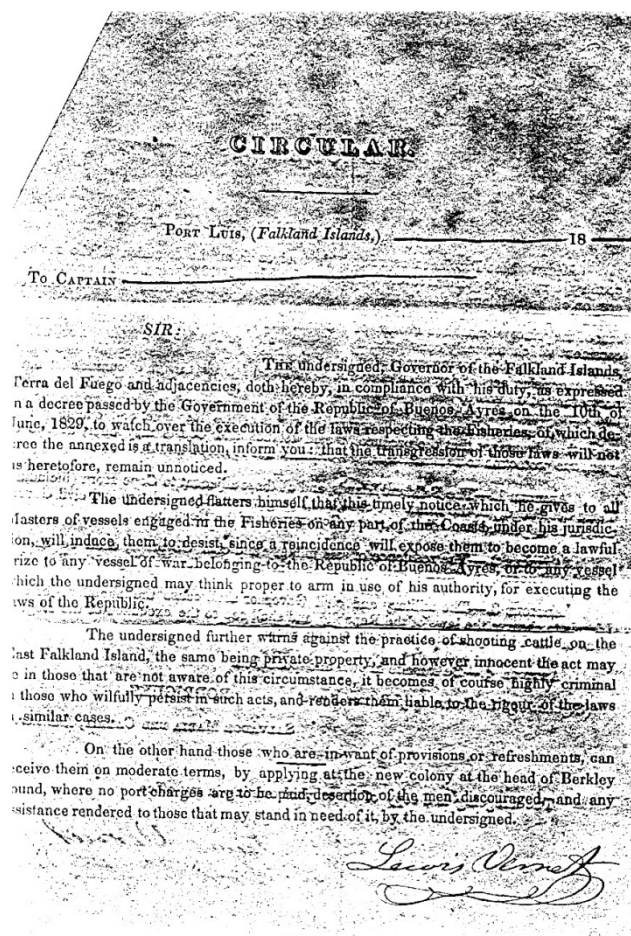


Figure 14 Circular that Vernet, as Governor of the Falklands/Malvinas, delivered to foreign vessels, notifying the Decree of June 10, 1829

If international jurisprudence relating to the establishment of territorial sovereignty is applied, these acts are largely sufficient to be considered *effectivités*, that is to say, they are concrete manifestations of the effective exercise of sovereignty over the territory in question.²⁵⁷ The settlement founded by Vernet reached a stable population of approximately one hundred and fifty people.²⁵⁸ Over the seven years of its existence, up until the expulsion of the Argentine authorities in 1833, Vernet considered that around three hundred

²⁵⁷ For example, Island of Palmas, Legal Status of Eastern Greenland, Qatar v. Bahrain, Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malasia/Singapore), El Salvador/Honduras (Nicaragua intervening), Nicaragua v. Honduras and Nicaragua v. Colombia. These *effectivités* are sufficient both to confirm the existence of a preexisting sovereignty and to establish new sovereignty if the territory was *terra nullius*.

²⁵⁸ See the list made by Gómez Langenheim based on the data from Archivo de Vernet, *op. cit.*, T. I, pp. 260-262.

people inhabited the islands at some point.²⁵⁹ Many British subjects were under the authority and the laws of the Argentine Republic. One of these was Matthew Brisbane, who had taken part in Weddell's expedition in the second decade of the 19th century and who was appointed superintendent for sea lion hunting by Vernet.²⁶⁰ As well as Port Luis and Soledad, many farms were scattered around Isla Soledad, and there existed two small towns, called Rosas and Dorrego, located respectively in the gulf and port of Polacra and in the area neighbouring Rincón de San Agustín.²⁶¹ Vernet introduced sheep and improved the existing cattle and horse stock. Over the entire period, Vernet maintained an amicable relationship with the native populations of Patagonia and Tierra del Fuego. The chief of one of the aboriginal groups, known as "the Queen of the Strait", was his guest in Port Luis or Soledad for 6 months in 1831.²⁶² The settlement at Port Luis was very useful for seamen of all nations that crossed from the Atlantic to the Pacific and vice versa, and an essential relief for the survivors of shipwrecks in those desolate areas. It is worth noting in this connection the rescue of shipwreck survivors in South Georgia.²⁶³ The best way of describing life in the islands during the period of Argentine colonisation is by reading the diary of María Sáez de Vernet, wife of the Political and Military Commander, kept between July 15th, 1829 and December 22nd of the same year, forty-five days before her daughter Matilda (Malvina)²⁶⁴ was born. The islands had never witnessed a similar human development at the time the European colonial powers were present. It was the efforts of the new Argentine nation that produced this development and proved the usefulness of the islands. It was the British Empire, with its political, military and economic supremacy, which took advantage of these efforts through the use of force.

²⁵⁹ Archivo del Ministerio de Relaciones Exteriores, Buenos Aires, División Política, Islas Malvinas, leg. II, exp. 1, 1832/35, t. III, cited by Caillet-Bois, Ricardo, *op. cit.*, p. 211

²⁶⁰ See Brisbane's note to Vernet dated July 29th, 1831, *infra* note 132.

²⁶¹ Gómez Langenheim, A., *op. cit.*, T. I, p. 259.

²⁶² Luis Vernet's letter to the Governor of Buenos Aires, Juan Manuel de Rosas, dated October 7th, 1835. Text in Gómez Langenheim, A., *op. cit.*, T. I, p. 296.

²⁶³ See the chronicles from August 16th and October 20th, 1829 from the Diary of Vernet's wife.

²⁶⁴ The original is kept in the AGN. It has been included in many publications and published for the first time in Gómez Langenheim, A., *op. cit.*, T. I, pp. 266-284. Another publication is that by Montarcé Lastra, Antonio *op. cit.*, pp. 125-156. A bilingual Spanish-English edition exists, noted and commented by her great-grandson Ernesto Greenleaf Cilley Hernández, *María Sáez de Vernet, cronista de nuestra soberanía en Malvinas*, Buenos Aires, Ed. Puerto Luis, 1989.



Figure 15 Currency issued by Luis Vernet in his condition of Governor of the Falklands/Malvinas islands

F. The argument of an alleged British authorization for Vernet’s settlement and Vernet’s supposed British “preference”

The British pamphlet clearly cannot ignore the importance of Vernet’s work for the development of the Falklands/Malvinas. It goes so far as to recognise that he was “who founded the permanent settlement which still exists today”.²⁶⁵ In an attempt to minimise both the importance of Vernet’s work as evidence of Argentina’s exercise of sovereignty from its presence on the islands in 1826 onwards, and the absence of any British claim, Pascoe and Pepper resort to a series of contradictory arguments that can only be qualified as absolutely false. As we shall see, perhaps the most serious misrepresentation made by the pamphlet is the assertion that a purported British authorisation was given to Vernet to establish a settlement on the islands.

The pamphlet’s analysis of Vernet’s actions sets out by affirming that his request to the government of Buenos Aires for a concession was “astounding” because it referred to the Falkland/Malvinas Islands, Staten Island and the Patagonian coast, and “nearly all those territories were far beyond the real limits of Argentine authority at the time”.²⁶⁶ The authors are also supposedly amazed that the government of Buenos Aires agreed to grant such a concession. It has been widely proven that during the Spanish colonial period, these

²⁶⁵ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 11.

²⁶⁶ *Id.*, p. 13.

territories were considered to be Spanish and it is unsurprising that Vernet, as well as the Argentine government, considered the South American nation to have inherited them. Any Argentine inaction over these territories could have been criticised – but not the fact that Argentina took measures to effectively exercise sovereignty.

What really is astounding is the following assertion in the British pamphlet: “it was Vernet who gave Buenos Aires rights in the Falklands, not the other way round.”²⁶⁷ Of course, the assertion at least has the merit of recognising Buenos Aires’ rights over the Falklands/Malvinas, but it is nonetheless highly extravagant. First: before the concession was granted to Vernet, Argentine acts of sovereignty had already taken place. Second: Vernet addressed himself to the State which had sovereignty over the territories he wanted to exploit. Third: that State granted Vernet the necessary authorization. It is absurd to assert that a private person could give the State rights that he, as an individual, could only legally exercise in a given territory on the basis of the State’s authorization.

Herein lies the fundamental misrepresentation. The British pamphlet asserts that “Vernet submits his concession to the British” in 1828 and the British Consul in Buenos Aires, Mr. Griffiths, “countersigned it on January 30th, 1828”²⁶⁸ Unsurprisingly, there is no footnote indicating the source of this assertion. On the basis of this claim, British bloggers affirm that Vernet’s settlement had “British authorization”, something suggested, but not categorically affirmed, by Pascoe and Pepper’s pamphlet.²⁶⁹ The authors then speculate on whether or not Parish met with Vernet at the time, and fast forward to a meeting the latter requested with Vernet more than a year later. The pamphlet attempts to make its readers believe that while the venture was private in nature, the British government was free not to react, and that such a reaction was only required when the venture became public. This is plainly wrong. If the British government considered the islands to be a possession of His Majesty, it could not have remained passive faced with the Argentine government’s granting of public concessions to a private party.

²⁶⁷ Ibid

²⁶⁸ Ibid

²⁶⁹ The “FIG” website points out that “the first of various attempts of reaffirming the British sovereignty” made by Vernet was in 1829!

Far from favouring the British claim, the truth supports the recognition of Argentine sovereignty by Great Britain. All Vernet did was to have the Decree of January 5th, 1828 certified at the British Consulate in Buenos Aires. This certification was given on January 30th, 1828 and was signed by the British Consul Charles Griffiths.²⁷⁰ It was a typical consular legalisation by which a Consulate in a foreign country certifies that an official document is signed and sealed by the competent authorities of the State in which the Consulate is located or has jurisdiction. This function of “legalisation” of official foreign documents is still exercised in Consulates the world over.²⁷¹ Why did Vernet have his official Argentine documentation certified or legalised at the British Consulate? Because his plan, which he effectively carried out, was to send the documents to Europe, with the aim of attracting European settlers to the Falklands/Malvinas. We have already cited the model contract above. This was a way to prove that he was going to the islands to establish a settlement with State authorisation. The certification relates to documents referring to acts of authority and provisions of the Government of Buenos Aires regarding the Falklands/Malvinas.

This is a far cry from “giving up his concession to the British”. By invoking this act, instead of favouring the British claim, the pamphlet, offers clear proof of Great Britain’s inaction. If the islands belonged to His Britannic Majesty, the documents should have caught the attention of the British Consulate, particularly the authentication of the decree of January 5th, 1828. At the very least, as happened with the consular certification of the fictitious cession of the concessions to Pacheco in 1826, these certifications prove that Great Britain knew about the concession of terrains, fishing rights and franchises made by the Argentine government in 1823 and 1828 regarding the Falklands/Malvinas. The United Kingdom cannot validly invoke ignorance of these dispositions. In such circumstances, a reaction was required from the British government. But reaction came there none. According to the reasoning of the British claim in the *Antarctica* case regarding the

²⁷⁰ AGN, Sala VII 2, 3 and 4 (Documento No.12 del Período 1810-1833). A. Gómez Langenheim reproduces Luis Vernet’s notes in his archives. In folder (A) “Documentos Importantes”, when talking about the property titles by virtue of a decree dated January 5th, 1828, he says: “Said titles are from January 5th, 1828, and are legalized by the British Consul Charles Griffiths on January 30th, 1828”. ” (*op. cit.*, T. I, p. 216).

²⁷¹ <https://www.gov.uk/guidance/notarial-and-documentary-services-guide-for-argentina#legalise>

concessions granted (although “imposed” would be a better word, as we shall see) by British authorities to the Compañía Argentina de Pesca, and the lack of protest by Argentina when faced with that fact, the only possible conclusion is that at that time the United Kingdom recognized Argentine sovereignty over the Falkland/Malvinas Islands.²⁷²

The truth, which the British pamphlet attempts to distort, is apparent from the description made by Parish in 1833, in his publication in the magazine of the Royal Geographic Society of London in which he describes Isla Soledad: “The claims of Great Britain to the Falkland Islands having been lately renewed, the following account of the Eastern Isle may not be uninteresting. It was drawn up for me during my late residence in South America by Mr. Vernet, who formed a settlement and resided there for several years under an authority from the government of Buenos Ayres.”²⁷³

Another fallacy in the pamphlet is the alleged preference of Vernet for British sovereignty. Even if this were true, it could not affect the dispute over sovereignty between the two States. We will examine the assertion in any case. The first argument is based on Minister Parish’s note to his Secretary of Foreign Affairs regarding an alleged conversation with Vernet during which he commented that he (Vernet) “would be very happy if His Majesty’s Government would take his settlement under their protection” as well as a conversation Vernet supposedly had with William Langdon, a British navy lieutenant, when, again, Vernet supposedly said he would not be opposed to a possible British occupation.²⁷⁴ That is to say, the British arguments are not based on a note by Vernet or any other documented statement of his, but only on something that someone claimed Vernet said. No document exists proving that Vernet invited the British to settle in the Falklands/Malvinas, as the British authors claim. The truth is that Vernet, by virtue of the authority vested in him by Buenos Aires, gave a land concession to William Langdon, a British subject, who accepted the concession and subsequently unsuccessfully tried to have it upheld by British authorities once Argentina was evicted in 1833.

²⁷² I.C.J. Pleadings, p. 23, par. 24 (2).

²⁷³ Parish, Woodbine, “Account of East Falkland Island”, *The Journal of the Royal Geographic Society, London*, 1834, vol. 3, p. 94.

²⁷⁴ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 14-15. ²⁷⁴ Caillet-Bois, Ricardo, *op. cit.*, pp. 226-227.

Vernet also proposed to Parish to invest in the islands.²⁷⁵ According to the FIG website, this was an attempt to *reaffirm* British sovereignty over the islands. This was a purely commercial transaction, not in the exercise of the public functions both men held.²⁷⁶ The Colony needed the highest possible number of investors. Vernet put it clearly: “I need a partner; among the traders [in Buenos Aires] I can’t find any”.²⁷⁷ Considering this difficulty, before setting sail for the islands with his title of Commander, Vernet proposed Parish take part as a private individual in the business he had set up in exchange for half of the amount invested up to that moment. His proposal consisted of a contract by virtue of which a public Company would be constituted with a share capital of around one hundred thousand British pounds, 50% of which would be held by them. Obviously, the investment would have had to be made in the framework of Argentine sovereignty within which Vernet was acting.²⁷⁸ He was acting in his capacity as a trader and a public servant,²⁷⁹ something quite usual at the time. To give the example of someone involved in the issue, we can mention the American Chargé d’Affaires Baylies, who upon leaving Buenos Aires referred to his double position, public and private.²⁸⁰ An example from the past is that of Spanish conquest, when the practice was often used through the position of the “*Adelantado*”. Parish did not accept the offer.

Another key element going against any supposed fancy of Vernet that might favour the British thesis is his effective behaviour during the period 1829-1833 and the deep and passionate defence of Argentine sovereignty made in his Report dated August 10th, 1832, in which he criticises in detail the assertions made by Parish in his claim of November 19th,

²⁷⁵ Caillet-Bois, Ricardo, *op. cit.*, pp. 226-227.

²⁷⁶ See Vernet’s letters to Parish dated June 19th and 21st, 1829, in Caillet-Bois, Ricardo *op. cit.*, pp. 226-227. Sources: AGN, Buenos Aires, División Nacional, Documentación donada, Archivo de Vernet.

²⁷⁷ Caillet-Bois, Ricardo, *op. cit.*, p. 226.

²⁷⁸ See the concession of lands made by Luis Vernet to Guillermo Langdon where it is set forth that settlers had to commit themselves to “respect the legitimate authority of the country”, in Caillet-Bois, Ricardo, *op. cit.*, p. 229.

²⁷⁹ *Ibid.*, p. 227.

²⁸⁰ Note by Francis Baylies to Edward Livingston, Secretary of State, dated September 26th, 1832 in Manning, William R. (ed) *Diplomatic Correspondence of the United States. Inter-American Affairs 1831-1860*. Washington, Carnegie, 1932, Vol. I, “Argentina”.

1829.²⁸¹ These are effective and public acts carried out by Vernet, which the British pamphlet shrouds in silence, whereas his purported contrary positions are merely “hearsay”.

Vernet’s attempt to get reimbursed from the British government for the investments made in the Falklands/Malvinas, after the Argentine eviction of 1833, also does not help the British thesis.²⁸² The truth is that after the eviction, the British authorities prevented Vernet from returning and rejected any attempt to have the land concessions made in his favour by the Argentine government recognised, despite their having been enjoyed for seven years.²⁸³ This attitude on Great Britain’s part openly contradicts the practice followed in regard to the respect for vested rights of individuals in disputed territories, as recognized in international jurisprudence.²⁸⁴ This is just one more aspect, this time concerning the inhabitants of the territory, in which Britain’s use of force of January 3, 1833 was not respectful of international law. For the rest, whatever the already elderly Luis Vernet may have written in an attempt to convince the British authorities to pay him compensation many years after his retirement from any official position in the Argentine government, is of no relevance for the dispute over sovereignty, whether or not it contradicts his previous position.

G. The British protest of November 19th, 1829

The business representative of His Britannic Majesty, Woodbine Parish, following the instructions of his government, protested on November 19th, 1829 against the adoption of the decree dated June 10th of the same year, “which contains some measures for the government of the Falkland Islands.” According to the protest, the measure was incompatible with the sovereignty rights of His Britannic Majesty.

²⁸¹ English text in Perl, Raphael, *op. cit.*, pp. 251 and following (photographic reproduction in the BFSP, 1832-1833, vol. XX).

²⁸² Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 26-27.

²⁸³ Graham E. Hamond to L. Vernet, on board the “Dublin” in Rio de Janeiro, August 27th, 1836 in Caillet-Bois, Ricardo, *op. cit.*, p. 388.

²⁸⁴ *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland* (advisory opinion September 10th 1923) C.P.I.J., Series B No. 6, p. 36; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* I.C.J. Reports 1992, par. 66.

The British protest of 1829 may be said to be belated, limited and made in bad faith. *Belated*, because the British government knew of the previous acts of public power over the islands carried out by Buenos Aires between 1820 and 1829. *Limited*, because it is circumscribed to the decree of June 10th, 1829, without protesting against any previous acts. In fact, the reference to the acts having been made or being made against His Britannic Majesty's rights is related to those carried out in the framework of the decree which was the object of the protest, and not in relation to acts occurring before the decree, to which Great Britain was not oblivious. And finally the protest was made in *bad faith*, because among the grounds for British sovereignty, Spain's continuous presence in the islands until 1811 and Argentina's subsequent acts are not mentioned, even though the British government could not have ignored both facts. This is proven by a note of Woodbine Parish himself preceding the Argentine Decree of June 10th. In his dispatch to London No. 17 of March 15th, 1829, Parish reminded his government that the Spanish had constantly maintained a garrison, a prison and a war ship in the Falklands/Malvinas until 1813 (*sic*) and that since that time the government of Buenos Aires had never stopped considering the territory as being its own, granting land, fishing and hunting concessions.²⁸⁵ In his report No. 24 dated April 25th, 1829, he even sent copies of the Buenos Aires' Government concessions to Vernet – the same ones the British Consul Griffiths had certified in January 1828.²⁸⁶ The same bad faith would be repeated later when Lord Palmerston used the same arguments in response to the protest by Manuel Moreno, with the aggravating factor that in the meantime, Woodbine Parish had obtained – and sent to London – copies of the documents proving the destruction of the English fort at Port Egmont by the Spaniards, the withdrawal of the plaque and other acts carried out by Spain after 1774 to reaffirm its sovereignty.²⁸⁷

In relation to this British protest after a fifty-year silence, we could paraphrase what was said by the Chamber of the International Court of Justice in the case of *El Salvador/Honduras* in relation to Honduras' protest against El Salvador's exercise of

²⁸⁵ Supra, note 107.

²⁸⁶ Down, Wilfred, *The Occupation of the Falkland Islands and the Questions of Sovereignty. Doctoral Thesis*, Cambridge University, August 1926, typed ed., p. 116.

²⁸⁷ Letter No34, November 20th, 1830, FO 118, 24. Down, Wilfred, *op. cit.*, p. 128.

sovereignty over Isla Meanguera: “this protest [from the United Kingdom], coming after a long history of acts of sovereignty [by Spain and Argentina], was made too late to affect the presumption of acquiescence on the part [of the United Kingdom]”.²⁸⁸

Minister Maza acknowledged receipt of the note of protest on November 25th, 1829, and announced that the government had the intention of giving it careful consideration and that he would be happy to communicate the decision adopted, once he received instructions in this regard.²⁸⁹ No reply to the protest was ever given. The reasons invoked after the British invasion of January 3rd, 1833 were that “this response required some time, [but] it is not proven that His Majesty’s diplomatic Agents had demanded or insisted on such a response.”²⁹⁰ It is remarkable that in spite of the fact that no response was issued, the representative in Buenos Aires did not insist, as he had previously done in the case of a simple request for reports, as we saw in previous paragraphs, above all given the successive changes of government having occurred over that period in Buenos Aires. As for the rest, the note did not offer any legal avenues to solve the dispute. The British author V.F. Boyson maintains in regard to the absence of an answer that “the matter dragged on and dropped, it seemed, into oblivion”.²⁹¹

H. The capture of American ships and the “Lexington’s” attack on Puerto Soledad

One of Luis Vernet’s constant concerns was the indiscriminate hunting of amphibians being carried out mainly by American ships in the region, as well as fish poaching. In his note to the Government Minister of Buenos Aires dated December 24th, 1829, he asserted

²⁸⁸ I.C.J. Reports 1992, p. 577, par. 364.

²⁸⁹ English version in BFSP, 1832-1833, T. XX, p. 347; Perl, Raphael, *op. cit.*, p. 189.

²⁹⁰ Gómez Langenheim, A., *op. cit.*, T. II, p. 178.

²⁹¹ Boyson, V.F., *The Falkland Islands*, Oxford, Clarendon Press, 1924, p. 93.

that for the colony's progress all that is required is for the Law on fishing to be effective,

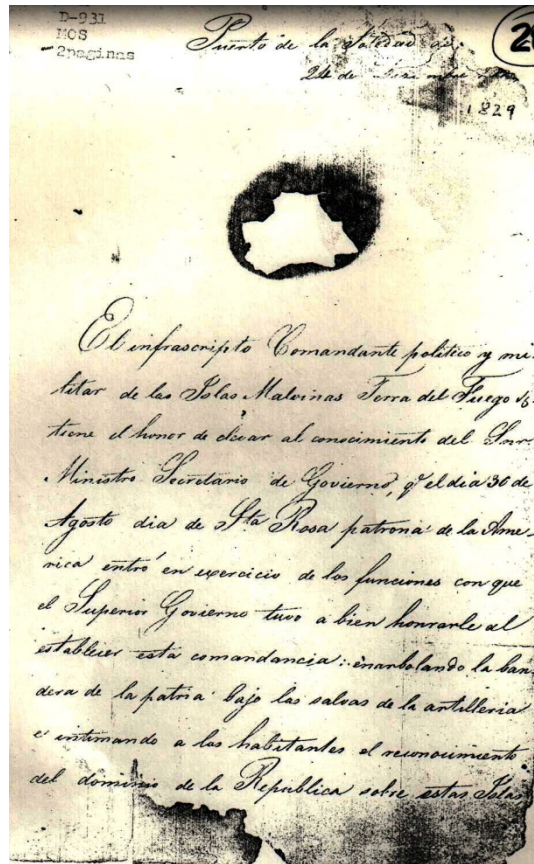


Figure 16 Note from Vernet to the Minister of Government of Buenos Aires from December 24, 1829

for nationals to be reimbursed for the immense sums that foreign fishermen have been making for years, who, not content with fishing in the proper season, they mainly do so in the spawning season, which, if this practice is not prevented, will destroy the species within a few years.²⁹²

The British pamphlet claims that Vernet only captured American ships because “he had been warned by Britain not to do so, and in any case he wished to get the British protection and the British sovereignty over the Falklands.”²⁹³ We have already seen that this is pure,

²⁹² Document cited supra.

²⁹³ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 15.

groundless speculation. In regard to the first point, the pamphlet gives no evidence. It only mentions that Parish seemingly said such a thing to Matthew Brisbane, a British subject at Vernet's service.²⁹⁴

What is sure, and publicly known, is the following. In a public announcement regarding the "Lexington" incident, Luis Vernet reports that the English ships respected the prohibition on fishing in the jurisdiction of the Falklands/Malvinas and that they had been warned to do so by authorities in London.²⁹⁵ Vernet's assertion refutes the interpretations made by American officials, who claimed that American ships were the only vessels prohibited from fishing and that British ships were not hassled.²⁹⁶ The British representative in Buenos Aires did not react to Vernet's public assertion that the owners of the British vessels received orders from London to respect the settlers and the prohibition on hunting in the islands. Other British accounts also relate that American ships were mainly responsible for the depredation of marine life in the Falklands/Malvinas.²⁹⁷

The facts that resulted in the partial destruction of the Argentine settlement in the Falklands/Malvinas by the American vessel "Lexington" are as follows. In a note of July 29th, 1831 in Puerto Soledad addressed to Political and Military Commander Luis Vernet, Matthew Brisbane, after recalling that he had been appointed by Vernet more than two years before to "supervise sea lion hunting" relates the abuses committed by foreign sea lion hunting ships which did not respect the notice prohibiting fishing in the Falklands/Malvinas jurisdiction. He proposes that he should be authorised to capture the offending ships, which are to be taken to the Commander in order to "analyse the

²⁹⁴ Ibid., footnote 165.

²⁹⁵ Vernet, Luis, To the Public. Buenos Aires, May 3rd 1832, photograph: Muñoz Azpiri, José L., *Historia completa de las Malvinas*, Buenos Aires, Oriente, 1966, T. 3, p. 61.

²⁹⁶ The American business representative Francis Baylies, in his note to Minister Maza dated June 20th, 1832 referred to the fact that the English ship had illegally hunted seals in the Falklands/Malvinas (BFSP, 1832-1833, vol. XX, p. 333; Perl, Raphael, *op. cit.*, p. 175). In this regard, Vernet affirms in his report dated August 10th, 1832: "It is untrue that the *Adeona* had fished within my jurisdiction. She did so before my appointment as Governor, but after that period she abstained therefrom, as I can prove by written vouchers which I have in my possession, as well as the Log-books of the *Breakwater*, *Harriet*, and *Superior*, by which it appears that there was not then fishing in the Islands, any English Vessel, or Vessels of any other Nation. Consequently, although I might have wished to exercise foolish preferences, I had not the opportunity of so doing". BFSP, 1832-1833, vol. XX, p. 388; Perl, Raphael, *op. cit.*, p. 230.

²⁹⁷ Mackinnon, Lachlan B., *Some Account of the Falkland Islands, From a Six Months' Residence in 1838 and 1839*, Londres, A.H. Baily and Co., 1840, p. 42, cited in Gough, Barry, *op. cit.*, p. 33.

travelogues and sworn declarations of the crews to get their offences judged accordingly and after such offence is proved, I hope Your Excellency will oblige them to compensate the Colony for the damages they have caused with their wrongly acquired ships and cargos.”²⁹⁸

On August 1st, 1831 the American ship “Harriet” was captured. The aforementioned note contains the confession of one deserter from the ship, who informed Brisbane and other settlers of the locations at which they had hunted seals.²⁹⁹ On August 18th of the same year the same fate threatened the schooner “Breakwater”, but it was able to escape on the 21st. On August 20th the schooner “Superior” was captured, another American ship. In all these cases infringements of the laws in force were found. Vernet agreed with the captains that the “Harriet” would go to Buenos Aires with the documents of both ships, to be judged by the prize court, and that the “Superior” would set sail to hunt seals on the western coasts of Patagonia. Vernet travelled to Buenos Aires on board the “Harriet”. The American Consul Georges Slacum interceded in favour of the American hunters and denied any authority for Vernet and the government of Buenos Aires to proceed as they did. This was the origin of a dispute between the governments of Washington and Buenos Aires, whose crowning point was the destruction and pillage of public and private property and the arbitrary arrest of settlers at Puerto Luis, carried out by the American war corvette “Lexington” on December 31st, 1831, in retaliation for the capture of the ships detailed above³⁰⁰ For the Argentine government, this was a particularly serious wrongful act, which led to recalling diplomatic officials.

The aim of the United States was to guarantee the free hunting of amphibians and whales, an activity that American ships engaged in intensely at the end of the 18th and beginning of the 19th centuries. The United States rejected the Argentine claim, using the British protest of 1829. They did not make a claim of sovereignty themselves, but claimed the existence of fishing rights for their citizens. The American position was to take advantage of a latent

²⁹⁸ Archivo y Biblioteca de la Cancillería Argentina. Documento N° 23 del Período 1810-1833

²⁹⁹ Caillet-Bois, Ricardo, *op. cit.*, p. 239.

³⁰⁰ The statements of several inhabitants of the Islands in Gómez Langenheim, A., *op. cit.*, T. II, p. 23-36. See the Declaration of the Government of Buenos Aires from February 1832 (AGN, Fondo Luis Vernet, Sala VII 2-4-6.).

dispute between the Argentine and British governments to justify the actions of the “Lexington” and to guarantee the activities of its seal and whale hunting ships in the South Atlantic. This position cannot be given such an importance that it would shatter Argentina’s claim. The legal scope of the attitude of the United States is to ignore Argentine sovereignty, without implying recognition of the sovereignty of the other State claiming it. The American interests at stake do not prove that this amounted to a lack of recognition of Argentine sovereignty at the international level. The American government did not hesitate to implicitly remind the British government of the existence of the Anglo-Argentine dispute when its ships that were carrying out their activities in the waters near the Falkland/Malvinas Islands were captured by the British in 1854, as we shall see. As is well known, the United States is neutral concerning the question of sovereignty. This is what Secretary of State Daniel Webster told the Argentine Minister in Washington, Carlos María del Alvear, when the latter insisted on Argentina’s protest over the acts of the “Lexington”.³⁰¹

The destruction and partial depopulation caused by the “Lexington” at Puerto Soledad did not turn the islands into a *terra nullius*. In his reply to the question asked by the Foreign Affairs Committee of the House of Commons "Does the disbandment by force of the Argentine settlement by Captain Duncan of USS Lexington in December establish *terra nullius* status?" the Foreign and Commonwealth Office answered that "In and of itself, this action would not have been sufficient to establish *terra nullius* status"³⁰² Claiming the opposite would reward the wrongful act and punish its victims. What counts to arrive at a conclusion regarding the question of sovereignty in such circumstances is the attitude of the State towards these acts. The Argentine government reacted quickly both at the diplomatic and the factual level. From the diplomatic point of view it protested vigorously and demanded compensation for the wrongdoings against it. On the practical level, the Argentine government arranged for an interim civilian and military Commander to be appointed, who happened to be a member of the Army, and sent a war ship.

³⁰¹ Note of December 4th, 1841. Manning, William R. (ed.), *Diplomatic Correspondence of the United States Concerning the Independence of the Latin-American Nations, Vol. I*, New York, Oxford University Press, 1925, pp. 18-19.

³⁰² Question No8, House of Commons, Foreign Affairs Committee, Session 1982-1983. Falkland Islands, Minutes of Evidence, Monday 17 January 1983.

I. The appointment of an interim Political and Military Commander in 1832

On September 10th, 1832, the Government in Buenos Aires issued a decree, signed off by Juan Manuel de Rosas and Juan Ramón Balcarce, by virtue of which the Sergeant Major of artillery José Francisco Mestivier was appointed the interim Political and Military Commander of the Malvinas /Falkland Islands and adjacent areas in the Atlantic Sea. The justification was the presence of Commander Vernet in Buenos Aires and his momentary inability to return to the islands.³⁰³ It was also decided that the war Schooner “Sarandí”, commanded by Lieutenant Colonel José María de Pinedo, was to transport the interim Commander and his garrison and assist him in performing his duties. His instructions included the investment of Mestivier as commander in the Soledad/East Falkland Island, to scour the coast from Soledad to Isla Nueva to warn foreign ships about their duty to respect fishing laws, and to assist the interim commander in the event the island was attacked. It was formally stated that “The commander of the Sarandí will not be able to leave the Malvinas/Falkland islands while he is not officially ordered to do so”.³⁰⁴

Sergeant Major Mestivier took over the position of Political and Military Commander in a ceremony performed by Pinedo at Puerto de la Soledad on October 10th, 1832 in front of the troops, the ship, the sailors and the inhabitants of the island.³⁰⁵ Pinedo left soon after in compliance with his orders, to supervise hunting and fishing along the other coasts and waters of the Falklands/Malvinas, the Strait of Magellan and Tierra del Fuego. On December 7th, 1832 he came across the American schooner “Sun”, under the command of captain Trott, in Isla Nueva (at the southwestern extremity of the archipelago, near Gran Malvina/West Falkland), which was illegally hunting sea lions. He ordered the captain to cease his activities and return to his country, under threat of arrest and transfer to Buenos

³⁰³ AGN, Sala VII, 2-3-4.

³⁰⁴ September 14th, 1832. AGN, in Muñoz Azpiri, J., *op. cit.*, T. I, p. 434.

³⁰⁵ See the corresponding Act. Source: Academia Nacional de la Historia.

Aires for judgment.³⁰⁶ In the meantime, a mutiny broke out in Puerto Soledad and Mestivier was murdered on November 30th, 1832.

Incredibly, the British bloggers and even a member of the so-called Legislative Assembly of the islands, Mr Mike Summers, refer to the appointment of Mestivier as interim Commander and the establishment of his garrison as the “first Argentine invasion of the islands.”³⁰⁷ The reason, according to Mr Summers, is that “An Argentine military garrison was sent to the Falkland Islands in 1832 in an attempt to impose Argentine sovereignty over what was already, and had been for 67 years, British territory.”³⁰⁸ This manipulation of history, which ignores Spain’s presence and Britain’s absence, and the fact that Argentina was already present in the islands long before November 1832, is hardly worthy of comment. The same goes for the qualification of the appointment of an interim authority by reason of the existing authority’s presence in Buenos Aires as the “First Argentine invasion”.

J. The British protest of 1832

On September 28th, 1832 a second British protest was made in a note sent by the Minister Plenipotentiary of His Britannic Majesty S. Foxal to Minister Maza. Its object was the decree of September 10th, 1832 appointing Mestivier as interim Commander of the Malvinas/Falklands.³⁰⁹ Two points are of interest in this note: 1) the recognition of Britain’s abstention from making any observations in regard to the American-Argentine dispute, “out of a sincere and friendly desire not in any way to embarrass the Government of the Republic, in the discussions in which it seemed likely to be engaged with the United States of America”, and 2) the protest is made to avoid that silence being interpreted as a

³⁰⁶ Letter of J.D. Mendenhall to Slacum dated January 16th, 1833. Manning, W., *Diplomatic Correspondence of the United States. Inter-American Affairs 1831-1860, vol. I*, Washington, Carnegie Endowment For International Peace, 1932-39, p. 183.

³⁰⁷ Words of Mr. Mike Summers before the Decolonization Comitee of the UN in June 20 2013. Available in United Nations, Doc. A/AC.109/2013/SR.8, <http://undocs.org/A/AC.109/2013/SR.8> and the complete text in http://sartma.com/artd_10917_06_2013_32.html. He repeated this assertion in other presentations before the Committee.

³⁰⁸ Ibid.

³⁰⁹ Caillet-Bois, Ricardo, *op. cit.*, p. 320.

waiver of His Britannic Majesty's rights.³¹⁰ The silence maintained by Great Britain during the dispute between the American and the Argentine governments over the "Lexington" incident, which we will discuss later, speaks volumes. The purported justification that Britain did not wish to inconvenience Argentina lacks credibility, especially when the American-Argentine discussions, considered likely, did in fact occur.

K. The forcible expulsion of January 3rd, 1833

On August 30th, 1832 the Under Secretary of Foreign Affairs, Sir George Shee, communicated to the Admiralty Britain's decision to exercise "sovereignty rights" over the Falklands/Malvinas by sending a ship to Port Egmont and organizing an annual inspection trip.³¹¹ On November 28th, 1832, T. Baker, Chief Commander of the British Naval Station in South America, ordered John James Onslow, Captain of the "HMS Clio", to set sail for Port Egmont. The order stated that, if necessary, he could use force to overcome any foreign resistance to Britain's exercise of sovereignty.³¹² Having taken possession of Port Egmont on December 23rd, 1832, Onslow set sail for Puerto Soledad and proceeded to expel the Argentine forces present there on January 3rd, 1833. It is worth highlighting that this action was performed autonomously, since going to Isla Soledad was not among his instructions, which were limited to Port Egmont.

Pinedo, who had arrived on December 31st from his inspection voyage around the Strait of Magellan, Tierra del Fuego and the rest of the Falklands/Malvinas, had only just finished restoring order in the colony, after the mutiny that had ended with the death of Mestivier. Onslow's message to Commander Pinedo on January 2nd, 1833 reads: "*It is my intention to hoist, tomorrow morning, the National Flag of Great Britain on shore; when I request you will be pleased to haul down your flag, and to withdraw your Forces, taking with you all the stores, &c., belonging to your Government*".³¹³ Argentine and British sources concur in

³¹⁰ Translation from Nicolás Mariño. Archivo y Biblioteca de la Cancillería Argentina, REC 1947, B. CAN, EXP. 1, No4.

³¹¹ Copies included in the note from Palmerston to Fox No8 September 4th 1832, FO 118, 29, cited in Down, Wilfred, *op. cit.*, p. 148.

³¹² Text in: Whittington, G.T., *op. cit.*, pp. 12-15.

³¹³ Gómez Langenheim, A, *op. cit.*, T. 2, p. 131; BFSP, 1832-1833, T. XX, p. 1197.

affirming that Pinedo did not accept to lower the Argentine flag, although he was prepared to withdraw his forces,³¹⁴ given the evident military superiority of the British.

Pascoe and Pepper affirm that the islands were not taken by force in 1833, but that Onslow had “persuaded” Pinedo and his garrison to leave peacefully.³¹⁵ This analysis goes against preceding arguments.³¹⁶ There is no doubt that these actions may be qualified as a forcible action, despite the fact that not a single shot was fired. The use of a war ship and military staff, the coercion exercised by requiring the lowering of the flag and withdrawal of Argentine forces within 24 hours with a warning that in case they failed to do so, he would do it himself, mean that possession was obtained by a military presence in the territory and by threatening the use of force. This was the interpretation made by the government of Buenos Aires three weeks after the events, in qualifying Onslow’s actions as “an aggressive and violent dispossession” and “the most outrageous abuse of force.”³¹⁷ Claiming that in such circumstances, the act performed was not violent would be like affirming that the Argentine actions of April 2nd, 1982 were not violent either because any military actions on that day were merely a response to the few British troops stationed in the islands opening fire. The same could be said regarding Spain’s actions on June 10th, 1770 in evicting the British garrison settled in Puerto Egmont/de la Cruzada. It is clear that all three cases involve the use of force.

The 1833 eviction must be analyzed from the point of view of the international law of that time. From the legal point of view, the United Kingdom should have respected the territorial integrity of a State with which it maintained peaceful relations. The obligation to respect territorial integrity of States in peacetime is inherent to the existence of relations

³¹⁴ See Onslow’s report to Admiral Baker, in Montevideo dated January 19th, 1833 (in Whittington, G.T., *op. cit.*, pp. 16-17, the message of the Government of Buenos Aires to the Chamber of Representatives on January 24th, 1833 (BFSP, 1832-1833, T. XX, pp. 1194-1197) and the military criminal trial of Pinedo in Buenos Aires for failing to comply with his instructions (text in: Pinedo, Enrique, *Malvinas: su extraño destino*. Buenos Aires, Corregidor, 1994, pp. 25-136).

³¹⁵ Answer of the Foreign and Commonwealth Office to the Committee of Foreign Affairs of the House of Commons, Question No. 9 *op. cit.*, p. 146. The Internet site of the “FIG” makes the same assertion.

³¹⁶ The preliminary Memorandum issued by the Foreign Office in 1946 explains that captain Onslow “lowered the Argentine flag, and raised the British and expelled the Argentine garrison” (*op. cit.*, p. 9, par. 57); Ferrer Vieyra, E., *Segunda Cronología...*, *op. cit.*, p. 503.

³¹⁷ Text in Spanish in: Gómez Langenheim. A., *op. cit.*, T. II, pp. 135-137, text in English: BFSP, 1832-1833, vol. XX, pp. 1194-1196.

based on international law, regardless of the period of time in question.³¹⁸ As the British government categorically maintained barely nine years after the use of force in 1833, in the dispute with the United States over the “Caroline” case: “(...) we are perfectly agreed as to the general principles of international law applicable to this unfortunate case. Respect for the inviolable character of the territory of independent nations is the most essential foundation of civilization. It is useless to strengthen a principle so generally acknowledged by any appeal to authorities on international law, and you may be assured, Sir, that Her Majesty's Government set the highest possible value on this principle, and are sensible of their duty to support it by their conduct and example for the maintenance of peace and order in the world”.³¹⁹

L. The expulsion of civilians by the British authorities

Pascoe and Pepper are at great pains to demonstrate that Onslow did not expel the civilians living in the Argentine settlement, but that only the garrison was evicted, which cannot be considered the “genuine population”. They also claim that only eleven civilians left the island, most of which were not “genuine residents”. According to the British authors, only those present since the time Vernet had established a human presence in the islands, not those who had arrived in 1832, were “genuine residents”. The authors conclude that only four “genuine residents” left the islands as a result of Onslow’s actions.

The aim of the British pamphlet is quite clear: attempting to prove that the Argentine population was not evicted, thereby circumventing the argument which denies the application of the principle of the right of peoples to self-determination to the present British inhabitants of the islands. It would be hard to justify the application of this principle to a situation in which the colonial power replaced a population with its own and then claimed that the latter should decide the fate of the territory.

³¹⁸ See: Kohen, M.G., *Possession contestée et souveraineté territoriale*, Paris, PUF, 1997, pp. 369-371.

³¹⁹ Note of the British representative Lord Ashburton to the American Secretary of State Webster dated July 28th, 1842 BFSP, 1841-1842, Vol. XXX, pp. 195-196.

There is an evident manipulation of data, particularly through the arbitrary differentiation between “genuine” residents and others who are not part of that category. Why should the residents settled there by virtue of the Argentina’s actions be distinguished on this basis? The presence of the newcomers, many of them with their families, was a logical continuation of Argentina’s existing presence, and their arrival aimed at re-establishing a normality violently shattered by the actions of the American frigate “Lexington”.

There is also a gross manipulation of numbers. The truth is that as a consequence of the British invasion, 53 people who were living on the islands returned to Buenos Aires from Puerto Soledad. The British schooner “Rapid” escorted the “Sarandí” for the British and carried in shackles the nine insurgents who had killed Argentine commander Francisco Mestivier. These were: 2nd Sergeant José María Díaz; 1st Corporal Francisco Ramírez and privates Manuel Sáenz Valiente, Antonio Moncada, Bernardino Cáceres, Manuel Delgado, Mariano Gadea, Manuel Suares and José Antonio Díaz. The schooner “Sarandí” took 17 military men with 10 members of their families (wives and children) to Buenos Aires and 17 inhabitants of the islands that worked there. The military men and their families were the following: Captain J. Antonio Gomila; Sargeant Santiago Almandos; 1st Corporal Miguel Hernández and his wife María Romero; Corporal Daniel Molina; and privates José Barrera, José Gómez, Manuel Francisco Fernández, Toribio Montesuna, Juan J. Rivas and his wife María I. Beldaño, Dionisio Godoy, Hipólito Villareal and his wife Lucía Correa and two children, Gregorio Durán and his wife Carmen Manzanares with two children, Benito Vidal and his wife María Saisa, José Soto and José Rodríguez, Juan Castro and his wife Manuela Navarro and Antonio García. Finally, the group of civilians was composed of the following workers: Joaquin Acuña and his wife Juana, Mateo González and his wife Marica, and the foreigners José Viel, Juan Quedy, Francisco Ferreyra and Máximo Warnes and a female group with their children: María Rodríguez with three children; Anastasia Romero; Encarnación Álvarez; Carmen Benítez; Tránsita González and daughter.³²⁰

The numbers speak for themselves: 53 people set sail, and according to the British pamphlet itself, only 22 remained on the islands. That is to say, the British eviction resulted

³²⁰ AGN Sala III 16-6-5.

in almost 70% of the population leaving the islands. The British pamphlet claims that “only the garrison was expelled” and that the civilians who left made that decision freely.³²¹ It does not require a great deal of intelligence to understand that the “choice” was motivated by the British occupation and the subsequent expulsion of Argentina. If we take into account the multinational nature of the Argentine population settled in the islands, it becomes clear that essentially individuals from the Río de la Plata left.³²² If the British eviction had not occurred, the population would have remained on the islands, and the reestablishment of order would have permitted the return of the population sent scattering

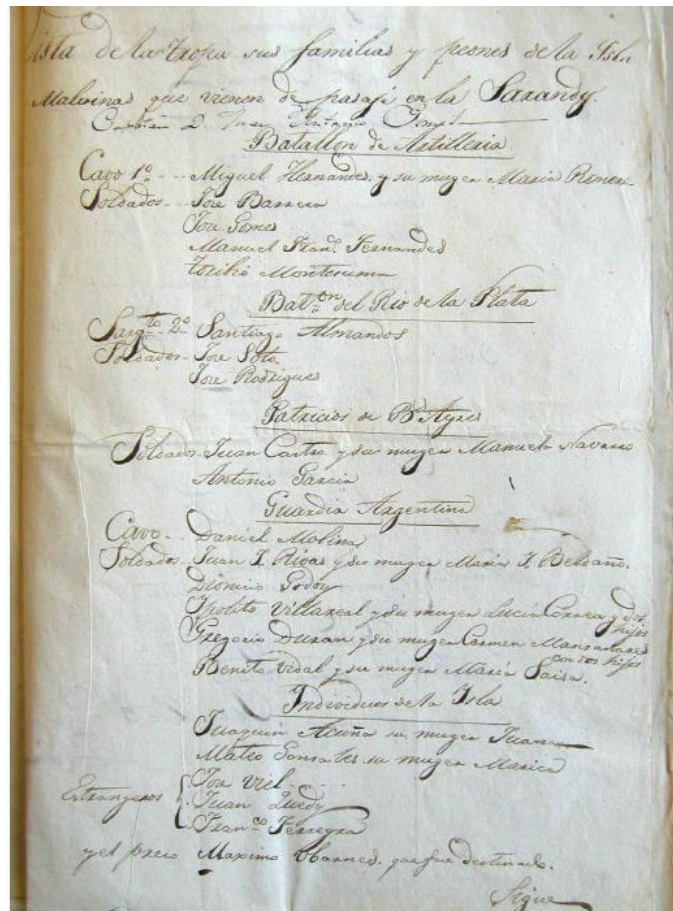


Figure 17 First sheet of the list of people expelled by the British forces, prepared by Commander Pinedo - A.G.N. Sala III 16-6-5

³²¹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 20, and *False Falklands History...*, p. 4.

³²² Cf. Betts, Alejandro, “*Monografía acotada de la situación en Puerto Soledad en el momento de la invasión británica el 3 de enero, 1833*” (unpublished).

by the “Lexington” in 1831. The Argentine settlement would have continued to develop, a task Luis Vernet was devoted to in Buenos Aires. It is of little use to claim that Captain Onslow tried to persuade the inhabitants to stay: to place a population taken to the islands by the actions of Argentina under the authority of a British subject acting to maintain British control over the islands is a typically colonial action.

The key point here is that: 1) there was a permanent human settlement in the islands, which had no military objectives but only the aim of the economic development of the territory promoted by the Argentine government; 2) in 1831 the Lexington’s brutal actions disbanded the population; 3) in 1832, Argentina was making the necessary efforts to re-establish the situation and 4) in 1833 the British dispossession put an end to the first true human development of the Falklands/Malvinas.

Great Britain expelled Argentina from the islands in 1833. They evicted the authorities and part of the population – men, women and children. The key point is that by this act of force Argentina was prevented from re-establishing the settlement that had been founded in the 1820s with so much effort. The leaflet does not mention that, as a consequence of the 1833 use of force, the residents of the Argentine settlement in the Falklands/Malvinas who had been removed in 1831 were never able to return. The residents living in the Falklands/Malvinas in 1833 were only part of the population. The attempt of the British pamphlet to justify the use of force by saying that the inhabitants it considered “genuine” were not expelled does not stand up to the slightest analysis. Furthermore, if the inhabitants taken to the islands by Vernet were “genuine” and they recognized Argentina’s authority over the islands, why should they be made to live under British authority?

M. The British usurpation of 1833 was in breach of international law

The available documentation shows that the United Kingdom took possession of the islands for strategic reasons and used its long-abandoned claim as an excuse, in the framework of its policy of colonial, commercial and maritime domination, against a newborn State, which

was overcoming an internal crisis, but which had succeeded in establishing a human settlement on the islands and in proving its feasibility.

At the moment of the usurpation, not only were the parties not at war, but they had concluded a treaty of peace and friendship. As we will explain below, mutual respect for territorial integrity had to be observed. Besides, a simple act of force did not in itself imply belligerency between the parties. It was necessary for the States involved to consider themselves at war. There was no state of belligerence between Argentina and Great Britain when commander Onslow expelled Argentine agents from the Falklands/Malvinas in 1833. Nor did this fact imply the outbreak of a war between the two countries. The concept of conquest does not therefore apply to the case of the Falklands/Malvinas. As Sharon Korman explains in her book on conquest as a means of acquiring territorial sovereignty:

It is reasonable to suppose that if the mere use or threat of force in the absence of war had been recognized in the nineteenth century as a lawful means of acquiring territory or of establishing a title by conquest, Britain would have appealed to that title as a means of putting an end, once and for all, to the disputed status of the territory (...). But Britain – contrary to what would have been the advice of some present-day international lawyers – did not put forward the claim of conquest precisely because it had not been at war with Argentina, and war, in the traditional international system, was the only lawful means of acquiring rights to territory by force.³²³

Pascoe and Pepper refer to “*the visit by HMS Clio to Port Louis, January 1833*”³²⁴ This is consistent with the efforts of the British government to avoid recognizing the forcible displacement of Argentina. However, the British officials who analysed this question in internal ministerial reports have referred to the act of January 3rd, 1833 in categorical terms. In 1936, a publication on South America by the Royal Institute of International Affairs expressing that “*Great Britain annexed the Falkland Islands from Argentina in 1833*”³²⁵ resulted in an exchange of opinions between the departments involved, advising the semi-

³²³ Korman, Sharon, *The Right of Conquest, The Acquisition of Territory by Force in International Law and Practice*, Oxford, Clarendon Press, 1996, p. 108.

³²⁴ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 17.

³²⁵ FO 371/19763, f^o 352.

official institution to change the publication. On October 16th, 1936, the Foreign Office's Troutbeck said: "*The difficulty of the position is that our seizure of the Falkland Islands in 1833 was so arbitrary a procedure as judged by the ideology of the present day. It is therefore not easy to explain our possession without showing ourselves up as international bandits.*"³²⁶

In this regard a note dated November 3rd, 1928 from Sir Malcolm Robertson to Sir Ronald Lindsay was mentioned; the note reads: "*As regards the Falkland Islands, I have always considered, ever since reading de Bernhardt's Foreign Office memorandum of December, 1910, that our claim to the islands was very weak indeed. In point of fact it is based upon force and very little else. This view appears to have been held by successive British governments since Lord Palmerston's days, for they have been at pains to avoid the question's being raised. I realised that the islands are of vital strategic value to us, and that we cannot give them up, however just or unjust our position may be.*"³²⁷ The preliminary Memorandum issued by the Foreign Office's Investigation Department on September 17th, 1946 concludes: "*the British occupation of 1833 was, at the time, an act of unjustifiable aggression which has now acquired the backing of the rights of prescription*".³²⁸ The 1946 Memorandum is correct only on one point. The Falklands/Malvinas is a typical example of the policy of the force against the law. The next chapter will prove that the United Kingdom cannot invoke prescription.

³²⁶ Ibid., f° 349 vta., Spanish text in Ferrer Vieyra, E., *Segunda Cronología...*, *op. cit.*, p. 505.

³²⁷ Ibid., f° 363. Spanish text in Id., pp. 480-481. 164 Loc. cit., p. 21. Spanish text in Id., p. 541.

³²⁸ Loc. cit., p. 21. Spanish text in Id., p. 541.

Chapter V

The situation after Britain's ousting of Argentina in 1833

Introduction

The British pamphlet continues with the analysis of the situation following Britain's dispossession of Argentina on January 3rd, 1833 with explanations for the absence of effective British authority for over a year and Vernet's despatch of supplies to what was left of his settlement at Port Soledad through his representative, Matthew Brisbane, a British national. A key occurrence is the episode of August 26th, 1833, when eight "gauchos" led by Antonio Rivero assassinated Brisbane, Dickson (Vernet's storekeeper, a British national who was ordered by Onslow to hoist the British flag each time a ship approached) and three other people. The pamphlet mentions that the Vessel "HMS Beagle", commanded by Fitz Roy, with the renowned naturalist Charles Darwin on board, arrived on the islands in March 1833. Nevertheless, it does not mention a comment made by Darwin that was not without significance: "We arrived early in the morning at Port Louis, the most Eastern point of the Falkland Islands: The first news we received was to our astonishment, that England had taken possession of the Falklands islands & that the Flag was now flying"³²⁹.

This chapter will examine the issue of the absence of a British trial for the murders committed by the gaucho Rivero, Argentina's protests and lack of acquiescence to Britain's seizure of the islands and, in particular, the novel and fanciful interpretation of the 1849 Anglo-Argentine Treaty whereby the British blockade of the States of the Rio de la Plata came to an end.

A. The absence of a trial for Gaucho Antonio Rivero

The purpose here is not to enter into the existing historiographical debate over the actions of the gaucho Rivero and his gang in August 1833. It is however worth focusing on the way

³²⁹ Keynes, Richard Darwin (ed.), *The Beagle Record. Selections from the Original Pictorial Records and Written Accounts of the Voyage of H. M. S. Beagle*, Cambridge, University Press, 1979, p. 118.

the British pamphlet examines what happened afterwards. In January 1834, the British Navy Officer Henry Smith, who had been sent to the islands by his Government, arrested Rivero's gang. Pascoe and Pepper stated: "*Smith sent them all for trial in Britain, but only British citizens could be tried in Britain for murders committed abroad, even in the King's dominions. Doubts over whether the murderers could reasonably be regarded as British led to their being sent back to Montevideo and released*"³³⁰ This is a pitiful attempt to ignore the simple fact that British justice system failed to bring to trial the authors of serious crimes against British citizens in territories that were supposedly British, using the argument that... the perpetrators were not British! This is absurd. In other words, according to Pascoe and Pepper, if the perpetrators of the murders had been British and not Argentine, they would have been brought before a judge and most likely sentenced to death. Instead, as they were Argentine, they were sent back to South America and freed! In actual fact, the British justice system simply did not consider British legislation to be applicable in the islands at the time the acts occurred³³¹. It is well known that criminal law is essentially territorial in nature and can only exceptionally be personal. The absence of a trial and the surreptitious freeing of Rivero and his gang of gauchos is better seen as evidence of the weakness of the British legal position regarding sovereignty.

B. The establishment of the British Colony in 1843

The British pamphlet overlooks an important historical aspect of British colonialism in the Falklands/Malvinas: the formal establishment of the islands as a colony of Her Majesty only occurred on June 23rd, 1843, through a Letter Patent. The first Lieutenant Governor was appointed in 1841, and the colonial administration was only appointed in 1845.³³² Under English law, the British Crown can obtain territorial sovereignty by settlement, cession, conquest or annexation. Great Britain claims to have established sovereignty over

³³⁰ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 21.

³³¹ Caillet-Bois, Ricardo, *op. cit.*, p. 379, footnote No6, and Canclini Arnoldo, *Malvinas 1833. Antes y después de la agresión inglesa*, Buenos Aires, Claridad, 2014, pp. 56-57.

³³² Reginald, Robert; Elliot, Jeffrey, *Tempest in a Teapot: The Falkland Islands War*, Illinois, Whitehall Co., 1983, p. 9.

the Falklands/Malvinas by settlement.³³³ Acquisition by settlement occurs through the "settlement by British subjects in a place where there was no population or no form of government considered civilised and recognised in international law".³³⁴ If the British method of obtaining sovereignty was by settlement, none of the conceivable possibilities fit that definition. If the settlement in question was that of McBride in 1766, the islands were already occupied by France, and therefore the only possibility of acquiring sovereignty over them according to British law was by cession, conquest or annexation. None of these occurred. As we have seen, the settlement had ceased to exist many decades earlier. If the "settlement" in question was the one having taken place after Argentina's dispossession in 1833, the British pamphlet itself admits that there was an Argentine settlement and claims that its "genuine residents" (those brought by Vernet between 1826 and 1829) were not expelled. This also does not fit the conditions of a "settlement" as defined by British law. The only alternatives are acquisition by conquest, cession or annexation, but again, none of these took place. The British government never invoked conquest, cession by Spain or Argentina, nor annexation (which, what is more, would have been illegal if the territory belonged to another State).

The fact that the Colony was only established in the 1840s is significant for another reason: for the first time in history, Great Britain appointed a Governor for the islands, something it had never done before. Not in 1765, 1766 or 1771, nor at any time during the period in which Spain had appointed 32 Governors for the islands, or during the period of the Argentine administration, when three Commanders had been appointed. Not even after expelling the South American country from the territory. In other words, the State that claims to be sovereign over the islands since 1765 only appointed a Governor once it had expelled Argentina, and nearly eighty years after the supposed establishment of its sovereignty, in spite of the effective presence of France, Spain and Argentina during most of that period of time. The truth is that the Falklands/Malvinas had never been incorporated

³³³ As an example see Parish's claim dated November 19, 1829, Palmerston's reply to Moreno on January 8, 1834 and John Russel's letter to Richard C. Moody of August 23, 1841

³³⁴ Halsbury's Laws of England, vol. 13, 5a ed., London, Lexis Nexis, 2009, par. 801; in Hendry, Ian & Dickson, Susan, *British Overseas Territories Law*, Oxford, Hart, 2011, p. 6.

into the possessions of Her Britannic Majesty by a legislative, or any other, act before 1843.

This is the same period in which the distribution of land exclusively to the subjects of Her Majesty begins. Against the will of its few inhabitants, in 1845 the capital of the islands was transferred from Port Luis (Soledad) to the Port named Stanley. At the same time, Vernet was definitively prohibited from returning to the islands to continue his venture. The arrival of British settlers began, and the few South American inhabitants were “returned” to the Rio de la Plata.³³⁵ This discredits the efforts made by British propaganda to portray the actions of 1833 as having the sole aim of expelling the Argentine military presence, but leaving the inhabitants which had been brought there by Buenos Aires. It also clearly evidences Britain’s intention to eliminate all traces of Argentina’s presence. Other examples of this attitude are the unfair clauses incorporated into contracts for the taming of wild cattle drawn up by the British authorities, which obliged the contractants to recognise that the cattle and all that was produced on the islands was the property of the Queen of Great Britain. If that wasn’t enough, loyalty also had to be sworn to the Crown under the threat of expulsion from the islands. Finally, it is worth mentioning the precarious working conditions of the gauchos, both Argentine and Uruguayan. In theory they were hired permanently, but once they had finished their summertime duties, they were fired without compensation, leaving them to their fate without housing or food. Instead of putting an end to this maltreatment, the British authorities decided to retain a portion of their salaries to pay for their return ticket to the Rio de la Plata.³³⁶

C. Argentine protests, 1833-1849

The British pamphlet admits that Argentina protested between 1833 and 1849, and by virtue of its protests maintained its rights and claim over the Falkland/Malvinas Islands. It certainly does not mention the nature of British replies (when these were provided), both regarding the fallacy of their arguments and the complete refusal to discuss the issue. The

³³⁵ At the time the census showed only three inhabitants of Argentine origin. See Solari Yrigoyen, Hipólito, *Malvinas. Lo que no cuentan los ingleses*, Buenos Aires, El Ateneo, 1998, p. 30.

³³⁶ *Ibid.*, pp. 29-30.

latter point is of key importance to understand the implications of the subsequent conduct of the parties. It is not justifiable to require a permanent protest to be maintained when faced with a State that refuses to enter into discussions and considers the issue “closed”. We will come back to this point when analysing the argument of Argentina’s acquiescence between 1850 and 1884 and between 1888 and 1941.

British replies to Argentina’s protests of 1834 and 1843 show the same bad faith as the British protest of November 19th, 1829. They ignore the continuous presence of Spain on the islands until 1811, as well as the total absence of British sovereign actions or intention since 1774, as well as the fact that British representatives were aware of Argentina’s exercise of sovereignty during the 1820s. They grossly distort the scope of the Anglo-Spanish agreement of 1771 by claiming that through it, Spain had recognised Britain’s sovereignty (a fact that is denied by the British pamphlet itself, when it states, mistakenly, that *both parties* reserved their claims to sovereignty). Finally, it displays imperial arrogance in considering the issue closed without further ado, as if Argentina were merely required to acknowledge Britain’s position.³³⁷ To this is added the contempt shown towards the Argentine representative in London, who was presenting his protest when he was told that the meeting had to end because there were other people waiting.³³⁸ Comments of a similar nature were made in the British press in relation to the Argentine Minister in London.³³⁹

a) Exchanges between Moreno and Palmerston in 1849

The British pamphlet also grossly misconstrues the content of the diplomatic exchanges, specifically the 1849 exchange of notes between the Argentine Minister in London, Manuel

³³⁷ See the March 15, 1842 note in Muñoz Azpiri, *op. cit.*, pp. 191-192, and Note dated January 13th, 1885 in Gómez Langenheim, *op. cit.*, pp. 234-236.

³³⁸ See Minutes of the conference between Manuel Moreno and the Count of Aberdeen on February 21st, 1842 in Muñoz Azpiri, *op. cit.*, T. II, pp. 188-189.

³³⁹ In its issue of April 14th, 1849, the Times stated, regarding Moreno’s claims: “we do not know what is to be admired the most: the insolence of the South American or the resignation of the Queen's Minister who refrained from kicking him down the stairs”, quoted in Lynch, John, *Juan Manuel de Rosas*, Buenos Aires, Hyspamerica, 1986, p. 273.

Moreno, and the British Secretary of Foreign Affairs, Lord Palmerston. This is not a coincidence, given the key importance of this exchange. The facts are as follows.

British newspapers report that on July 27th, 1849, during a session at the House of Commons, Mr Baillie asked Lord Palmerston a question regarding the status of the Falklands/Malvinas issue between the Government of Buenos Aires and the British Government. The reply attributed to Lord Palmerston is that “it would be most unadvisable to revive a correspondence which had ceased by the acquiescence of both parties”³⁴⁰ or “consent of one party and the maintenance of the other”.³⁴¹ This publication generated a note of protest on July 31st, 1849 from the Argentine representative, where he states that: “(...) *the silence of this Office should not be taken at any time as confirmation of the wrongful assertion attributed to H.E. in the event it effectively occurred, I allow myself to remind to H.E. that the Government of Buenos Aires and the Argentine Confederation, has never consented the dispossession of its sovereignty over the Malvinas islands made by the English Government in 1833 (...) and, if, at any time to these days, the correspondence has not been as active, is due to the exhaustion of the discussion and to the status of the relations since the intervention; but H.E. the Viscount Palmerston, in his highest consideration, cannot misinterpret the interval of correspondence with an acknowledgement or acceptance whether tacit or express that has by no means been given by the Argentine Government to the acts in this regard by HM’s Government.*”³⁴² On August 8, 1849, Lord Palmerston replied to the Argentine representative in the following terms: “*I have the honour to acknowledge to you the receipt of your letter of July 31 that expresses the reply which I was reported by some of the London Newspapers, to have made to a question put to me by Mr. Baille in the House of Commons on the 27th of July, did not correctly describe the State of the question between the British Government and the Government of Buenos Aires respecting the Falkland Islands; and I have the honour to inform to you whatever the Newspapers may have represented me as having said on the*

³⁴⁰ According to Daily News, Ferrer Vieyra, E., *Segunda Cronología...*, *op. cit.*, p. 178; Becerra, Alfredo, *op. cit.*, p. 136.

³⁴¹ According to the Times; *Ibid.*

³⁴² Moreno’s Note to Palmerston dated July 31st, 1849 in Muñoz Azpiri, *op. cit.*, T. II, pp. 195-196.

*occasion above referred to, I have always understood the matter in question to stand exactly in the way described by you in your letter.”*³⁴³

Pascoe and Pepper make an intricate (and fruitless) effort to maintain that what Palmerston actually said to Moreno is that the issue was closed due to Argentina’s acquiescence and Britain’s maintenance. That is, the authors of the pamphlet supposedly believe that Palmerston told Moreno the words that the papers attributed to him as having said in Parliament. A literal and contextual interpretation shows the opposite: it indicates that Palmerston confirms to Moreno that the issue is the same as he declared in his note, that is, that there had been no Argentine consent or acquiescence. Therefore, the issue was not closed, but rather pending. In his reply to Moreno, there is no confirmation of Palmerston’s words before Parliament. There is also no rejection of Moreno’s assertion. On the contrary, Lord Palmerston starts his conclusion by making reference to “whatever the Newspapers may have represented me as having said”. This formulation would make no sense if the newspapers had truthfully reflected what he said regarding the status of the situation, which he wanted to confirm to Moreno.

Pascoe and Pepper’s absurd interpretation ignores the key part – the object itself – of Moreno’s note: there is no Argentine acquiescence. It is difficult to claim that Palmerston’s objective was to confirm Argentina’s acquiescence by affirming that the status of the situation is that described in Moreno’s note. It is telling that Palmerston’s declaration does not appear in British parliamentary records (*Hansard Parliamentary Debates*, Third Series, v. CVII, Col. 1030 to 1070).

In the attempt to undermine the significance of the 1849 exchange of notes between Moreno and Palmerston, the pamphlet also states, without adducing reasons, that Moreno’s protest was made “clearly unaware of what Rosas was negotiating”.³⁴⁴ It refers to the Government in London sending a messenger to Buenos Aires to negotiate a solution for the Anglo-French blockade of Argentina and Uruguay due to a dispute related to the navigation

³⁴³ Ibid., T. II, pp. 197.

³⁴⁴ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 23.

of South American rivers. European powers claimed the right of free navigation, while South American States invoked their sovereignty and the need for foreign vessels to request an authorization for navigating their rivers. Pascoe and Pepper's pure speculation makes no sense. *First*, because Moreno was of course aware that messengers were being sent to Buenos Aires, and had been for a year. *Second*, because he also knew what the object of the negotiation was, and that it was not related to the issue of the Falklands/Malvinas but to the blockade and the matter of river navigation. *Third*, because Moreno set out Argentina's legal position with respect to the issue of the Falklands/Malvinas, which was the same position the country had always maintained. *Fourth*, because that legal position did not depend in any way on the negotiation that Rosas was engaged in. *Fifth*, because Rosas himself in his address to the Legislature on December 1849 mentioned the pending question of the Falklands/Malvinas after having separately mentioned the negotiations with the British envoy, Southern, regarding the blockade of the Rio de la Plata... and explicitly confirmed Moreno's complaint to Palmerston with regard to the Falklands/Malvinas!

The explanation proffered in the British pamphlet is therefore a crude fabrication with no historical or linguistic basis, and its purpose is to open the door to another of the biggest historic misrepresentations made by Pascoe and Pepper: the belief that the Anglo-Argentine Treaty of November 24th, 1849 implied the renunciation of sovereignty by Argentina. As we will see, this belief not only has no basis in the treaty itself, but the exchange between Moreno and Palmerston that took place only a few months before the treaty is key to refuting the interpretation of the treaty as Argentine acquiescence before and after Moreno's protest being formulated.

D. The Arana-Southern Convention of November 24th, 1849

The attempt to consider the treaty dated November 24th, 1849 between Argentina and Great Britain as the abandonment of Argentina's claim over the Falkland/Malvinas Islands is unfounded for a number of historical and legal reasons. It is a "Convention between Great Britain and the Argentine Confederation, for the settlement of existing differences and the re-establishment of friendship", signed on November 24th, 1849, also called the Arana-

Southern Convention after the representatives of the signatory countries, by virtue of which the conflict relating to the English blockade to the Rio de la Plata came to an end, and the issue of the navigation of international rivers was settled.³⁴⁵ The treaty is similar to the one signed with France having the same object: “Convention between France and the Argentine Confederation, for the settlement of existing differences and the re-establishment of friendship”, dated August 31st 1850, known as the Arana – Le Predour Convention.³⁴⁶

Pascoe and Pepper manipulated the terms of the Treaty’s preamble and its Article 7.³⁴⁷ They ignore the first article, which is of fundamental importance, as well as the object and purpose of the treaty, which has nothing to do with the Falklands/Malvinas. They also ignore Article 6, which includes the condition of Uruguay’s acceptance of the treaty.

No primary source has been or can be put forward to support the novel British thesis. The British pamphlet itself confirms that the issue of the Falklands/Malvinas was not mentioned in the negotiations, nor in the text of the treaty.³⁴⁸ There was in fact only one mention of the issue of the Falklands/Malvinas, and it was in the British House of Lords, something the writers of the pamphlet could not possibly ignore. This was in the intervention of the Earl of Harrowby on April 23rd, 1849, during the debate about “Affairs of the River Plate”. In a critical speech where he complained about the complete lack of information regarding the negotiations with Argentina and the instructions given to the British envoys, the British legislator posed the following questions: “*Are we to agree to give a compensation of about three millions sterling for the very grave offences and the very serious damages which our Government, in concert with that of France, has inflicted on Buenos Ayres during the Anglo- French intervention? Are we prepared to give up the Falkland Isles? or to make the*

³⁴⁵ Ministerio de Relaciones Exteriores y Culto de la República Argentina, Biblioteca Digital de Tratados, Treaty Id number 4751, available at http://tratados.mrecic.gov.ar/tratado_ficha.php?id=4751

³⁴⁶ Ministerio de Relaciones Exteriores y Culto de la República Argentina, Biblioteca Digital de Tratados, Treaty Id number 4606, available at http://tratados.mrecic.gov.ar/tratado_ficha.php?id=4606

³⁴⁷ In the following way: «The introduction and the ratification document of the Convention speak of “putting an end to the existing differences” and to “the settlement of existing differences” between Britain and Argentina, and the title and Article VII say that “perfect friendship” or “perfect relations of friendship” between Britain and Argentina are restored by the Convention. So, once the Convention had been ratified, “the existing differences” between Argentina and Britain had been settled and “perfect friendship” between the two countries had been restored» Pascoe and Pepper, *op. cit.*, p. 23.

³⁴⁸ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 23.

whole settlement of affairs in that country dependent upon the good will of General Oribe? For these, it appears, are the only terms upon which President Rosas will deign to receive an accredited Minister from Her Majesty? In what position are our interests now?”³⁴⁹

A year earlier, on the sidelines of discussions concerning the negotiations with the Argentine Government, Member of the House of Commons William Molesworth had proposed to accept the Argentine claim in the following terms: *“I will now conclude (...) with the Falkland Islands. On that dreary, desolate, and windy spot, where neither corn nor trees can grow, long wisely abandoned by us, we have, since 1841, expended upwards of 35,000£ we have a civil establishment there at the cost of 5,000£ a year What I propose to the House is this: acknowledge the claim of Buenos Ayres to the Falkland Islands.”*³⁵⁰ As we can see, at the time some legislators were even prepared to return the Falklands/Malvinas. Concretely, neither did Great Britain return the Falklands/Malvinas, nor did Argentina renounce its claim. If at some point during the negotiations it made a verbal attempt to include the issue of the Falklands/Malvinas, and there is no evidence of such a thing happening, it is likely that neither of the parties could impose its position on the other. There is no proof that Great Britain demanded the renunciation of Argentine sovereignty, and Rosas was not required to give up the claim to be able to conclude the treaty. On the contrary, it was he who was in the stronger position, despite not having enough power to impose the restitution of the islands to Great Britain within the framework of the conflict generated by the blockade of the Rio de la Plata and the navigation of the South American Rivers. Anything that may be said in this respect is pure speculation.

If Great Britain had wished to impose Argentina’s renunciation to its claims over the Falklands/Malvinas in the treaty – which in fact it was not in a condition to do – it would have stated it expressly. The issue of the Falklands/Malvinas remained as it was: Argentina maintained its claim and Great Britain refused to discuss the issue, as emerges from the exchange of notes between Moreno and Palmerston only three months earlier, and from Rosas’ address to the Legislature only a month after the treaty was concluded.

³⁴⁹ Hansard, HL Deb, vol. 104, p. 609.

³⁵⁰ HC Deb, 25th July 1848, vol. 100.

Another element undermining this new argument of the British pamphlet is the simple fact that, over the protracted history of the dispute, the British Government never once invoked the Arana-Southern Treaty. If Argentina had given up its claim through the treaty, the natural course for the British Government to take would have been to recall this point in response to the Argentine protests. There is also not the slightest reference to the Argentina's supposed abandonment in the treaty anywhere in the vast internal documentation of the British Government in which the Falklands/Malvinas issue is discussed from 1850 onwards. The first time that the United Kingdom invoked this argument – following the position of Pascoe and Pepper - was in January 2013, that is, 164 years after the treaty was concluded, in a document distributed in the General Assembly of the United Nations³⁵¹ as a reply to the communication of the Ministry of Foreign Affairs of Argentina dated January 3rd, 2013, which had also been distributed to the General Assembly. This occurred a little too late for the argument to have any credibility whatsoever.

A serious analysis of the scope of the treaty requires the application of the rules of interpretation in Article 31 of the Vienna Convention on the Law of Treaties. This article establishes that a treaty should be interpreted in good faith in light of the ordinary meaning to be given to its terms in their context and in light of its object and purpose.³⁵² Which, of course, the British leaflet does not do in the least.

The object and the purpose of the treaty in question clearly emerge from its Article 1 (which Pascoe and Pepper omit entirely), which states: “*Art. I. The Government of Her Britannic Majesty, animated by the desire of putting an end to the differences which have interrupted the political and commercial relations between the 2 countries, having on the 15th of July, 1847, raised the blockade which it had established of the ports of the 2 Republics of the Plata, thereby giving a proof of its conciliatory sentiments, now hereby binds itself, in the same amicable spirit, definitively to evacuate the Island of Martin*

³⁵¹ United Nations doc. A/67/703. Can be consulted at <http://undocs.org/A/67/703>

³⁵² Vienna Convention on the Law of Treaties, Art. 31, para.1 - UN Doc A/CONF.39/27 (1969).

Garcia; to return the Argentine vessels of war which are in its possession, as far as possible in the same state as they were in when taken; and to salute the flag of the Argentine Confederation with 21 guns."³⁵³ The "differences which have interrupted the political and commercial relations between the 2 countries" were those that originated in the Franco-British intervention on the Rio de la Plata, to put an end to the blockade and resolve the issue of fluvial navigation. The issue of the Falklands/Malvinas had never interrupted political or commercial relations between the two countries. In 1833, Argentina did not break off diplomatic relations, contrary to its actions in respect of the United States over the Lexington incident.³⁵⁴ This speaks to the very special nature of Anglo-Argentine relations, forged before the declaration of independence and characterized by the extensive commercial dependence of the South American country on the European power. This can be observed in the first Argentine protest of January 1833, which mentions the "friendship relations between Argentina and Great Britain". Rosas expresses himself in similar terms in his address to the Legislature a month after the signing of the treaty. "There is no other plan or feeling than to provide the most decent way to re- establish solidly with reciprocal honour, the friendship relations between Great Britain and the Republic".³⁵⁵ This did not prevent him from referring once more, and immediately, to the permanent Argentine claim over the Falkland/Malvinas Islands, ratifying the claim Moreno had made to Palmerston a few months before the treaty was signed.

In its preamble, the treaty sets out that HM Government has no separate or interested aim in view, nor any other desire than to see "securely established the peace and independence of the States of the River Plate".³⁵⁶ Article 6 is of particular importance in that it imposes an indispensable condition for the resolution of "existing differences". It relates to the previous approval of the treaty by the Uruguayan President Oribe. This clearly shows the

³⁵³ Message of Governor Juan Manuel de Rosas at the opening sessions of the Legislature of the Province of Buenos Aires on December 27, 1849, in *Mensajes de los gobernadores de la Provincia de Buenos Aires, 1822-1849, Vol. II*, La Plata, Archivo Histórico de la Provincia de Buenos Aires, 1976.

³⁵⁴ On September 3rd, 1832, the Chargé d' Affairs of the United States, Francis Baylies, received his Passports and at the end of that month left Buenos Aires. See Caillet-Bois, R., *op. cit.*, p. 280.

³⁵⁵ Message of Governor Juan Manuel de Rosas at the opening sessions of the Legislature of the Province of Buenos Aires on December 27th, 1849 in *Mensajes de los gobernadores de la Provincia de Buenos Aires, 1822-1849, Vol. II*, La Plata, Archivo Histórico de la Provincia de Buenos Aires, 1976.

³⁵⁶ Cf. the Preamble of the treaty.

scope of the agreement and what “existing differences” refers to: the issue over the Rio de la Plata, that is, the naval blockade and fluvial navigation. This is why the approval of the Uruguayan president is required. It would be absurd to think that a treaty relating to Anglo-Argentine relations over the Falkland/Malvinas Islands required the approval of Uruguay.

That the Arana-Southern Treaty only refers to the dispute regarding the blockade of the Rio de la Plata and the navigation of the Argentine-Uruguayan rivers is also confirmed by the words of Viscount Palmerston to the British Parliament once the treaty was concluded. In his entire speech, he constantly refers to the dispute (in the singular) resolved by the treaty, which is obviously the one mentioned in Article 1, and covers the problem arising with a third State (Uruguay), and not to the existing disputes (plural) between Argentina and Great Britain.³⁵⁷ No mention of the Falklands/Malvinas, whether implicit or explicit, was made.

E. The British pamphlet fails to mention Rosas’ address to the Legislature in December 1849

Rosas’ 1849 address to the Legislature is of key importance, having been made a month after the signature of the Arana-Southern Treaty. The address relates in detail the negotiations that resulted in the signature of the agreement. Nothing emerges from the preparatory works of the treaty, nor from the debates in the British Parliament, that may prove that Argentina accepted to settle the issue of the Falkland/Malvinas Islands through that instrument. On the contrary, after presenting the Anglo-Argentine treaty, Rosas’ 1849 address to the Legislature continues by expressly mentioning the issue of the Falklands/Malvinas in relation to the reports in British newspapers concerning the exchange of notes between Moreno and Palmerston, and ratifies the actions of the Argentine representative in London.³⁵⁸ Therefore, it is absurd to claim that Rosas renounced the Falklands/Malvinas through the treaty, when he continued to officially claim the islands a month after having concluding the treaty! The fact of having discussed the subject separately clearly shows the difference between the two issues (the blockade of the

³⁵⁷ Hansard, HC Deb 12 August 1850 vol 113 pp. 1028-1029.

³⁵⁸ Supra notes 340 & 341.

Rio de la Plata and fluvial navigation on the one hand, and the issue of the Falklands/Malvinas on the other). Rosas' words leave no room for doubt:

*“The Government pays serious attention to the pending claims of the Republic before Great Britain for the unjustifiable retention of the Malvinas Islands (...) The government fully approved the well-founded complaint and protest of the Argentine minister against the inaccurate assertions of HM’s minister of foreign affairs and expressed that, through that protest it supported, as it should have and as it had to verify in any case, the proper rights of the Argentine Confederation in the Malvinas Islands, against the renewed disregard of HM’s Minister of foreign affairs, who made the unfounded supposition that the correspondence had ceased by reason of acquiescence on the part of the Confederation or of both parties, according to the different versions that appeared in the newspapers (...) the Government ordered its Minister that when discussing this, he always uphold the same principles and base himself on the same facts that resulted from the correspondence followed on this topic, and transmitted other orders for upholding the unquestionable rights of the Confederation in the Malvinas islands.”*³⁵⁹

This address to the Legislature debunks any British pretension to make believe that through the Arana-Southern Treaty Argentina gave up to its sovereignty over the Falkland/Malvinas Islands. The same is true of the absurd statement in the British pamphlet that “Argentina had effectively ceded the islands to Britain by the Convention of Settlement in 1850”.³⁶⁰ The writers of the pamphlet could not ignore the full content of the address to the Legislature in 1849, since they mention its existence. They resort to the gimmick of speaking about the “1850 Convention”, because the treaty concluded on November 24th, 1849 was ratified on May 15th, 1850, and attempt to overlook the clear Argentine position of maintaining its sovereignty and its claim irrespective of the conclusion of the agreement, as expressed in the address to the Legislature a month later. Naively, to say the least, Pascoe and Pepper write “At that time treaties only came into force after they had been ratified”.³⁶¹ It is well known by any student of international law as well as by any informed

³⁵⁹ Message of Governor Juan Manuel de Rosas, *op. cit.*, December 27, 1849.

³⁶⁰ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 31.

³⁶¹ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 23.

person that bilateral treaties subject to ratification enter into force after the exchange of instruments of ratification, both in the 19th and 21st Centuries. This fact does not alter the interpretation of the treaty, but it does speak volumes about the intellectual quality of the British pamphlet.

F. The lack of importance of the authors cited in the British pamphlet

The authors of the British pamphlet support their interpretation by referring to the book of a Mexican writer on the Arana-Southern Treaty published 60 years after its conclusion, the opinion of the Argentine member of the Lower house Absalón Rojas, given a century later, and two other books published in the 1970s that also briefly mention the issue.³⁶² These are merely the opinions of writers who, however, did not make any legal analysis of what is an eminently legal problem. It is worth recalling that both the historiography and Argentine society were generally (and still are) significantly divided in relation to the figure of General Rosas. The comment of Representative Absalón Rojas was given in the context of a highly anti-Rosas speech. It was refuted in detail by Representative John William Cook in the following terms:

“Dr. Rojas’ interpretation can be countered as follows:
1° Article 1, in referring to “differences” being resolved, reads that they are “those that have interrupted political and commercial relations between both countries”. The Malvinas/Falklands conflict had not provoked this effect.
2° In the preamble, Her Britannic Majesty declares to have “no separate or interested object in view, nor any other desire than to see securely established the peace and independence of the States of the River Plate”. No reference can be seen regarding the Falklands/Malvinas.
3° Evidence of what has been stated in the previous points – that the treaty refers solely to the resolution of issues created by armed interventions, blockades, war situations, etc. is Article 6, where it emerges that the Argentine Government considered the acceptance of its ally, President Oribe, an indispensable condition.

³⁶² Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 24-25.

If the interpretation is made that without an express reservation of Argentine rights over the Malvinas Islands, the position previously held is repudiated and English rights are tacitly accepted, considering the “difference” existing in the conflict ended, the absurd result would be reached that both the renunciation of Argentine rights as well as the strengthening of the English rights – which would result from the treaty – would be subject to the acceptance of president Oribe, because said acceptance is for the Argentine Government (Article 6) an “indispensable condition in any arrangement of the existing differences.” Can it be maintained that he has been granted this role of arbitrator, even tacitly?

4° Using the same argument of reduction to the absurd, whoever interprets that there has been an omission in not including a reservation of the rights over the Malvinas, should also consider an omission exists in respect of all navigable rivers of the Argentine Confederation, because in Article 4, Her Britannic Majesty only recognises the navigation of the rivers Parana and Uruguay as internal, without mentioning the rivers Negro, Colorado, Napostá, etc. And I will not mention further arguments.(...)»³⁶³

No interpretation on the basis of Article 31 of the Vienna Convention on the Law of Treaties, or of interpretation in good faith of the text in its context, taking into consideration its object and purpose, can assert that Argentina renounced its claim through the Arana-Southern Treaty. The preparatory works also do not support this statement.³⁶⁴ The issue of the Falklands/Malvinas simply did not enter into the negotiations, and therefore it is not included in their outcome.

G. The implications of a “Peace Treaty”

In their attempt to find an Argentine renunciation in the Arana-Southern Treaty, the authors of the pamphlet insist on its nature as a “peace treaty” and claim that it is because of this nature that the renunciation existed. Pascoe and Pepper use a quote by the North American

³⁶³ Cook, John William, *Acción parlamentaria*, Duhalde, Eduardo Luis (comp.), Buenos Aires, Colihue, 2007, pp. 389-390.

³⁶⁴ Article 32 of the Vienna Convention on the Law of Treaties.

jurist Henry Wheaton to justify their mistaken interpretation. The British writers refer to the consequences emerging from the signing of a peace treaty in relation to conquered territories. But here they seriously contradict themselves: if the islands were British, as they claim, then there was nothing for the United Kingdom to conquer. As we saw in the previous chapter, none of the prerequisites in the international law of the time are met for an acquisition of British sovereignty by conquest in 1833. The 1849 treaty also does not relate to conquest. The fact that commentaries have referred to it as a “peace treaty” does not change this fact. There was no declaration of war made by Great Britain against Argentina (and Uruguay) or vice versa. Military actions were unrelated to the Falklands/Malvinas. The treaty of November 23rd, 1849 makes no mention of an Argentine renunciation, as is done in peace treaties where the parties dispose of sovereignty over their territories. It was simply not a treaty of a territorial nature. Furthermore, the treaty was a triumph for Argentina and Uruguay: Great Britain recognised the Argentine-Uruguayan thesis of the internal character of their rivers, and its own obligation to request authorisation to sail them, a formal end to the blockade, the return of its ships, British retreat from Martin Garcia Island in the Rio de la Plata (which at the time was the object of claims both by Argentina and Uruguay, and occupied by the British during the blockade) and a salute to the flag as satisfaction. The same pamphlet says Rosas was able to impose his will “on two humiliated opponents, Britain and France”, then immediately goes on to say that he “was prepared to pay a price – the Falklands”.³⁶⁵ It would be extremely curious for a victor capable of humiliating its defeated opponents to have to pay a price to one of them which, furthermore, no one had asked for. There is not a shred of evidence that this was the condition for French and British acceptance of the Argentine-Uruguayan thesis. Quite simply, the Anglo-French naval blockade did not bear fruit, but actually damaged British and French traders in the Rio de la Plata region.

In spite of it being unnecessary due to what we have just said, let us continue to address with the statement of the British pamphlet, developed further by some bloggers of the same nationality, according to whom the 1849 Convention is a “Peace Treaty”. We will cite the work of writers both preceding and contemporary with the facts, which can reflect the state

³⁶⁵ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 22.

of international law at the time, and which categorically contradict the interpretation made by the British leaflet. Vattel wrote: “*The effect of the treaty of peace is to put an end to the war, and to abolish the subject of it. (...) the effect (...) cannot be extended to things which have no relation to the war that is terminated by the treaty.*”³⁶⁶ He then goes on to say that “*The treaty of peace naturally and of itself relates only to the war which it terminates. It is, therefore, in such relation only, that its vague clauses are to be understood. Thus, the simple stipulation of restoring things to their former condition does not relate to changes which have not been occasioned by the war itself*”.³⁶⁷ Henry Wheaton says: “*The effect of a treaty of peace is to put an end to the war and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties and to bury in oblivion the original causes of the war.*”³⁶⁸ And he continues: “*If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows, that all previous complaints and injury, arising under such claim are thrown into oblivion, by the amnesty necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition it remains open for future discussion.*”³⁶⁹ Finally, he establishes that “*The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect.*”³⁷⁰

As we can see, both jurists agree: the object of peace treaties is to put an end to war and its cause; these treaties do not extinguish claims existing prior to the war and unconnected with its cause, unless this is expressly stipulated and, finally, the effects of the treaty cannot extend to facts that have no connection with the war that motivated it. It does not further the British cause to consider the Arana-Southern Treaty as a peace treaty. An implicit renunciation by Argentina to its sovereignty over the Falklands/Malvinas cannot be inferred in this way, nor by interpreting the content and scope of the treaty.

³⁶⁶ De Vattel, Emer, *The Law of Nations or the Principle of Natural Law* [1797], by Pitt, Nicklin & T. Johnson, Philadelphia, Liberty Fund, 1829, p. 500.

³⁶⁷ *Ibid.*, p. 505.

³⁶⁸ Wheaton, Henry, *Elements of International Law*, 8a ed., London, The Clarendon Press, 1866, p. 544.

³⁶⁹ *Ibid.*

³⁷⁰ *Id.*, p. 545.

H. Status of the Falklands/Malvinas issue between 1850 and 1884

The British pamphlet claims that the absence of formal Argentine protests between 1850 and 1884 is the result of the signature of the Arana-Southern Treaty in 1849. The truth is quite different. There are other reasons for the absence of protest; some relate to British conduct in relation to the dispute, others to the situation in Argentina during the years in question. As to the first, it is worth mentioning the humiliating refusal of the British Government to discuss the matter or even to reply to previous notes, and Argentina's statement that in this situation its silence should not be construed as acquiescence, a point accepted by Palmerston in 1840. This alone would justify any Argentine silence. As to the second, it is worth mentioning the worsening civil war, which caused the deposition of Rosas in 1852, the separation of the province of Buenos Aires from the rest of Argentina between 1853 and 1860 to create an independent State, reunification and national organisation during the 1860s, the war against Paraguay between 1864 and 1870, the extension of territorial control towards the south of the continent, the arbitration with Paraguay in 1876 to establish a border, the pending border issues with Chile and the accompanying risk of armed conflict, which only ended with the conclusion of a boundary treaty in 1881. This internal and international situation of Argentina would also in itself explain any Argentine silence regarding the Falklands/Malvinas. We will examine in turn the different points raised by the pamphlet.

Pascoe and Pepper claim that from 1850 the annual address of the Executive Power to the Legislature did not again mention the question of the Falklands/Malvinas, which would prove the abandonment of the claim. They leave aside the clear content of the 1849 address and ignore the events occurring in the country thereafter. The civil war increased in intensity, and there is no evidence as to whether there was an annual address in 1850. In 1851, the Board of Representatives (the Legislature) excused Rosas from giving his address due to the situation of civil war.³⁷¹ That is, it is not that there was no reference to the

³⁷¹ It should be recalled that it should have been given before the Junta at the end of December. On February 3rd, 1852, the Battle of Caseros took place, which defined Rosas' fate at the hands of Urquiza.

Falklands/Malvinas in the address; there simply was no address. Rosas was overthrown in February 1852. Argentina divided, and from that year to 1860 the province of Buenos Aires became an independent State from the rest of the Confederation.

a)Constitutional texts

The British pamphlet invokes as further “proof” of the alleged Argentine abandonment the fact that the Constitution of 1853 “distributed seats in Congress on a territorial principle but without any mention of the Falklands.”³⁷² Once again its authors show their ignorance: the seats were assigned to the *existing* provinces, and at the time the Malvinas clearly did not constitute a separate province. Other undoubtedly Argentine territories that did not constitute separate provinces are also not mentioned.

Pascoe and Pepper’s arguments regarding abandonment of the claim lose even more strength when we observe that in the year 1852, on request of Justo José de Urquiza³⁷³ – the man who beat Rosas – the official historian Pedro de Angelis developed a draft National Constitution, whose Article 5 (included in the section called “About the territory of the Republic”) established: “*The same Assembly shall dictate the necessary measures to enforce the rights of the Republic over the Province of Tarija, the Malvinas Islands and part of the Strait of Magellan, illegally occupied by foreign forces*”. It is clear that in 1852, less than three years after the signing of the Arana-Southern Treaty, Argentina had not given up its sovereignty over the Falklands/Malvinas. Finally, the 1853 Constitution did not include a section relating to the territory of the Republic, which does not detract from the idea that clearly emerges from the 1852 project: in the 1850s, Argentina claimed the Falkland/Malvinas Islands.

The 1854 Constitution of the State of Buenos Aires defines in its Article 2 the extension of its territory as follows: “Irrespective of the concessions that could be made in the General Congress it is declared: that its territory extends from North to South from the Medio

³⁷² Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 31.

³⁷³ According to Tagle Achával, Carlos and González Arzac, Alberto, *Proyecto constitucional de Pedro de Angelis*. Buenos Aires, Instituto Nacional de Investigaciones Históricas “Juan Manuel de Rosas”, 1998, p. 39.

stream to the entrance of the mountains into the sea, along a West to South-west line, and to the West with the flanks of the mountain range and to the North East and East by the Rivers Parana and Plata and the Atlantic, including Martin Garcia Island and the islands adjacent to its river and sea coasts".³⁷⁴ The Falkland/Malvinas Islands, though not explicitly mentioned, are included in this definition. This can be gleaned from the text Domingo F. Sarmiento wrote the same year, in which he was offered the role of legislator for the State of Buenos Aires. In examining the issue of citizenship of the State of Buenos Aires, Sarmiento wrote: "... *so those born in the Malvinas, occupied by England, are born on the territory of Buenos Aires, as are those who were born under British rule, if they claim their birthright, while the State of Buenos Aires does not desist from its claims to sovereignty over the islands.*"³⁷⁵ Clearly, in the 1850s there was no renunciation to sovereignty over the Malvinas, neither by the Argentine Confederation nor by the State of Buenos Aires.

b) The incident with the American ship "Germantown" in 1854

The fact that at the time Argentina considered the islands to be Argentine, and that the issue was thus open, is also supported by the incidents that occurred in the Falkland/Malvinas Islands between the British occupying authority and American ships – another historical fact that the writers of the British pamphlet cannot ignore but prefer not to mention. Upon the detention on March 7, 1854, of American ships by the British authorities, the commander of the American ship Germantown, W.F. Lynch, wrote the following to the *facto* British Governor, Rennie: "*As to the right of British sovereignty over those islands, my commanding officer could not, when I left him, instruct me; and, as I stated verbally to your Excellency, I am not authorized by him either to admit or deny it. Neither could the United States chargé d' affaires to the Argentine Republic advise me. But he assured me that the government to which he was accredited had not, and would not, relinquish its claim to these islands*"³⁷⁶ It emerges from this that in the 1850s the American officers

³⁷⁴ Constitution of the State of Buenos Aires sanctioned on April 8th, 1854, Article 2.

³⁷⁵ Sarmiento, Domingo Faustino, *Derecho de ciudadanía en el Estado de Buenos Aires*, Santiago, Imp. de Julio Belín y Cía., 1854, p. 2.

³⁷⁶ Congressional Series of United States Public Documents, Vol. 1478, p. 34. Lynch added: "(...) availing myself of the arguments advanced by British statesmen in the Nootka Sound treaty in 1790, I could show that

accredited to Buenos Aires correctly considered that Argentina had not renounced (and would not renounce) its rightful claim.

c) The 1856 Argentine-Chilean Treaty

In 1856 Argentina and Chile signed a treaty whereby they recognized the application of the *uti possidetis iuris* of 1810, that is, that each State had the right to the territory corresponding to the relevant Spanish administrative division, according to its territorial extension (Viceroyalty of the Rio de la Plata or Chilean Captaincy-General)³⁷⁷ There is no doubt that in 1810 the Falkland/Malvinas Islands were part of, and effectively administered by, the Viceroyalty of the Rio de la Plata. As we shall see, this treaty gave rise to the publication of maps that interpreted the situation resulting from the 1810 *uti possidetis iuris*, where the Falklands/Malvinas naturally appeared as part of Argentine territory.³⁷⁸

d) Diplomatic discussions regarding Welsh immigration to Patagonia

Further proof can be adduced regarding the fact that Argentina did not remain silent over the Falklands/Malvinas issue between 1850 and 1884. The British representative in Buenos Aires, Edward Thornton, in a note dated May 25th, 1865 informed Lord Russell, British Secretary of Foreign Affairs, about discussions on the establishment of a group of Welsh settlers in Patagonia. In the note, he declared that the Argentine Minister of Home Affairs, Guillermo Rawson, had suggested that even though Great Britain had possession of the islands, it did not have *de iure* title over them. He subsequently asked Thornton if the British Government would be ready to “cede” the islands to Argentina and, if that was the case, he was sure that Parliament would not object to the establishment of a Welsh colony in Patagonia. The British representative in Buenos Aires repeated what his predecessor, Parish, had told the Argentine Government in 1829 and what the British Government had

your government is excluded from occupying any of the Falkland Islands so long as the stipulation contained in the sixth article of that treaty remains in force." Ibid.

³⁷⁷ Cf. Article 39.

³⁷⁸ See the 1875 map by Arthur von Seelstrang and A. Tourmente, presented at the Argentine stand of the 1876 Philadelphia Exhibition, as part of the geography book signed by Richard Napp “Die Argentinische Republik” of 1875, reproduced below.

replied to Moreno in 1833, and stated that there was nothing more to add.³⁷⁹ Once again, the British Government insisted on its position of unwillingness to discuss the issue.

e) Protests before the United States for the Lexington Incident

In 1866 the Argentine Ambassador to the USA, Domingo F. Sarmiento, sent a note to his Minister of Foreign Affairs, Rufino de Elizalde, in which he made a detailed analysis of the issue and requested the authorization to request from the American Government, amongst other things, the payment "to the Republic of Argentina of millions of ... strong pesos for compensation of all damages, including the loss of the Malvinas Islands, without implying a renunciation to recover them on the part of the Argentine Republic".³⁸⁰ It emerges from the context that this related to the loss and recovery of the *possession* of the Falkland/Malvinas Islands. Clearly, there was no intention to abandon the efforts of recovering the islands. If there had been a renunciation to sovereignty in 1850, it would have been odd to mention, only a few years later, that there was no renunciation to their recovery.

f) Interpretation of the islands Clause of the 1881 Boundary treaty between Argentina and Chile

On July 23rd, 1881, the Treaty of Limits between Argentina and Chile was signed, which, as its name indicates, had the aim of delimiting the borders between the two countries. Article 3 of the Treaty expresses that "other islands on the Atlantic to the east of Tierra del Fuego and Eastern coasts of Patagonia" belong to Argentina. In the arbitration proceedings related to the *Beagle Channel* case, the interpretation of this article was to play a key role in determining sovereignty over the Picton, Lennox and Nueva islands. Chile claimed that the article of the 1881 treaty in question referred to the Falklands/Malvinas, which proves that Argentina's direct neighbour in the Southern regions considered that it had not renounced its sovereignty over the Falkland/Malvinas Islands at that time (and that the islands were

³⁷⁹ CO 6, 111, cit. in Ferrer Vieyra, E., *op. cit.*, p. 377.

³⁸⁰ Note from Sarmiento to Elizalde, dated April 6 1866, in Muñoz Azpiri, *op. cit.*, vol. II, p. 202.

Argentina's). The Argentine team before the arbitral tribunal presided by the British judge Sir Gerald Fitzmaurice declared that the islands were then in dispute between Argentina and Great Britain, and that therefore it would be difficult to consider that the object of Article 3 was to refer to the Falklands/Malvinas and not to Picton, Lennox and Nueva.³⁸¹ In the 1977 arbitral award, the tribunal and the Queen of England who underwrote it, took note of these positions. For Argentina and Chile, Argentina claimed sovereignty over the Falkland/Malvinas Islands in 1881.

*
* * *

As we can see, the issue of the Falklands/Malvinas was present and the focus of attention whenever the circumstances permitted it, even at times when Argentina found itself involved in civil war, in a war against a neighbouring country and in the consolidation of the control of its national territory. It cannot be said that Argentina did nothing in relation to the Falklands/Malvinas from 1850 to 1884 or that it abandoned its position, even less that it renounced its sovereignty or recognised Britain's purported sovereignty. Nothing exists which allows a change of attitude to be inferred. We will turn now to examine the situation from a legal perspective.

I. Argentina's supposed acquiescence compared to Britain's attitude

According to the British authors, the Argentine Republic did not make any type of claim or carry out any act in relation to the Falkland/Malvinas Islands between 1850 and 1884. They consider this to be the result of the 1849 Convention, and come to the conclusion that it implies acquiescence by Argentina or could even amount to an acquisitive prescription in favour of the United Kingdom. Neither the facts nor the law allow either conclusion.

³⁸¹ Award of Her Britannic Majesty's Government pursuant to the Agreement from Arbitration (Compromiso) of a *Controversy between the Argentine Republic and the Republic of Chile concerning the region of the Beagle Channel*, February 18 1977, United Nations, Reports of International Arbitral Awards, vol. XXI, p. 113.

We already saw that the Southern-Arana Treaty of 1849 did not imply Argentina's renunciation to sovereignty, and that over the complicated years of its history from 1850 to 1884, Argentina never gave up its sovereignty, nor behaved in such a way as to renounce its claims or recognise British sovereignty. On the contrary, we have pointed to some facts which confirm its traditional position.

The British pamphlet claims to make use of general statements of presidents and one vice-president in relation to the friendly relations of Argentina with the world in general or with the British government in particular, when we have seen that Argentina has made a permanent effort to maintain friendly relations with Great Britain, even when faced with serious incidents such as the occupation of the Falklands/Malvinas or the naval blockade of the Rio de la Plata. In spite of these facts, Argentina never withdrew its representative in London, nor did it ask the British Government to do likewise with its representative in Buenos Aires. The desire to maintain the best possible relations with what was at the time the greatest economic and naval power in the world, within the framework of Argentina's economic dependence on Great Britain, cannot be used to undermine the Argentine position; especially when the British attitude was that of a refusal to enter into discussions over the islands.

It is important to understand what acquiescence is from the legal point of view. If any of the parties acquiesced in this dispute, that party was Great Britain, first in relation to Spain and then in relation to Argentina. The International Court of Justice defines the situation as follows: *“Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct à titre de souverain of the other State or, as Judge Huber put it in the Island of Palmas case, to concrete manifestations of the display of territorial sovereignty by the other State (Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, RIAA, Vol. II, (1949) p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence “is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent . . .”*

(Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, p. 305, para. 130). *That is to say, silence may also speak, but only if the conduct of the other State calls for a response.*³⁸²

Argentina's attitude cannot be assimilated to a lack of reaction which could be interpreted as consent to British sovereignty for a variety of reasons. In the first place, Argentina immediately protested against its dispossession, and maintained its position thereafter. Secondly, it was the British Government itself who considered the issue closed and did not wish to have any further communication in this respect. Thirdly, Argentina clearly expressed that in spite of the attitude of the British government, it maintained its position and that its silence could not be considered acquiescence. Fourthly, once the parties' legal positions are known, it is not necessary to reiterate them for each and every one of the facts that are a consequence of the protest itself. It would be absurd to require that for a State not to accept the position of another, it should make daily protests against the multiple acts of State authority over a territory known to be in dispute. Fifth, and not less important, the behaviour of the British government itself places it in a position in which it cannot invoke acquiescence for Argentina's behaviour. We will begin by explaining this last point.

The United Kingdom considers, and has made Argentina aware of its position, that its complete silence for 55 years over Spanish and Argentine acts of public power in the Falklands/Malvinas did not imply the loss of its purported sovereignty from the abandonment in 1774 until its first protest in 1829. It can hardly claim then that a period of 34 years can be considered acquiescence, particularly when preceded by a clear rejection of any possibility of acquiescence, and containing other expressions of the persistence of Argentina's claim. This is a textbook case of the technical concept of estoppel.³⁸³ The United Kingdom led Argentina to believe that⁵⁵ years of complete and total inactivity cannot be considered abandonment. Argentina trusted this British interpretation to its detriment, and the British Government is therefore precluded from invoking acquiescence. A minimum of good faith justifies the rule of estoppel.

³⁸² *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, judgment, I.C.J. Reports 2008, pp. 50-51, par. 121.

³⁸³ See the definition of the International Court of Justice: ICJ Reports 1990, p. 118, par. 63.

Jurisprudence defines the conditions for the existence of acquiescence. These include a “clear and constant” conduct from which arises an “unequivocal acceptance” of the position of the other party.³⁸⁴ The statement of the British pamphlet in no way allows such a clear, permanent and unequivocal conduct to be inferred from the purported Argentine acquiescence. On the contrary, Britain’s lack of reaction when faced with uninterrupted Spanish presence on the territory in question, Spanish destruction of the British constructions in Port Egmont and the withdrawal of its sovereign insignia, the fact of having found the insignia in Buenos Aires during the British invasions of 1806 and 1807, the awareness of Argentina’s taking of possession and acts of sovereignty between 1823 and 1828, are all evidence of acquiescence, because there was an obligation to react if Britain considered itself sovereign over the islands.

On the contrary, considering the lack of a satisfactory response from the British side, the statement that it considering the issue closed, and the thinly veiled threats for attempting to insist on the subject at a time where there were no international bodies to resort to, Argentina’s attitude was coherent with what could be expected from a State confronted with such a situation and policy of force. In this respect, Manuel Moreno’s note to the Count of Aberdeen on March 10th, 1842 – a result of the systematic lack of response from the British Government to Argentina’s claims –, and Moreno’s note to Lord Palmerston on July 31st, 1849, and the latter’s aforementioned reply, are of fundamental importance.³⁸⁵ Argentina’s representative in London is absolutely clear:

“(…) The undersigned, as a result of the duties invested in him, feels the need to express, so that the silence of the United Provinces is not considered an implicit acquiescence, that the United Provinces cannot, and will never accept the resolution of Her Majesty’s Government [to consider the case closed], and the

³⁸⁴ See, among others, *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports 1962, p. 30; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, p. 25, par. 28 and p. 26, par. 30; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Reports 1992 p. 247, par. 13.

³⁸⁵ *Supra* note 340.

*Government of the United Provinces gives these protests all the value that they might have now, or at any other time.*³⁸⁶

Argentina expressly reserved that its silence could not, and should not, be considered acquiescence or consent to the British position. This was confirmed, as we saw, by Lord Palmerston himself.³⁸⁷ It was a consequence of Britain's refusal to engage in discussions, an attitude which made any Argentine protests futile.

The International Court of Justice has been clear when referring to the conditions necessary for invoking a tacit conduct that may imply a transfer of sovereignty: "Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory"³⁸⁸

It is clear that neither Argentina's attitude in concluding the Arana-Southern treaty, nor its subsequent conduct can allow us to state that Argentina declared in any manner its will to relinquish sovereignty over the Falkland/Malvinas Islands.

J. The non-argument of acquisitive prescription

The pamphlet vaguely refers to acquisitive prescription in examining the supposed absence of Argentine protests. The existence of acquisitive prescription in international law is controversial. The International Court of Justice described acquisitive prescription as a

³⁸⁶ Becerra, Alfredo, *op. cit.*, p. 131.

³⁸⁷ *Supra* nota 341.

³⁸⁸ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, judgment, I.C.J. Reports 2008, p. 51, par. 122.

“doctrine”,³⁸⁹ in clear contrast to other legal rules applicable in the international sphere. One example of such rules is *uti possidetis iuris*, which the Court described as a “principle” and was used by the principal legal organ of the United Nations to resolve several territorial disputes.³⁹⁰ The reason why the United Kingdom hesitates in invoking prescription is simple: it would involve admitting that in 1833 it did not have the sovereignty over the Falklands/Malvinas. There are also various reasons why it couldn’t invoke acquisitive prescription as a subsidiary argument. Its possession has not been peaceful, and suffers the initial vice of possession obtained by use of force; nor is it undisputed, as Argentina has never acquiesced to the situation.

Even if it were true that Argentina remained silent for 34 years, this period would not be sufficiently long for prescription. This is so for a variety of reasons. As we have seen, the British Government itself considered that 54 years of silence did not deprive it of its purported claim of sovereignty. In an arbitration agreement between Britain and Venezuela in which the parties explicitly admitted the application of adverse possession as a source of sovereignty, a period of fifty years was considered necessary.³⁹¹ During the long Anglo-Argentine conflict, the South American country never refrained from expressing its sovereignty for a similarly long period of time. The simple passing of time in itself does not produce a change in a territorial situation. As Hugo Grotius, one of the founders of the science of international law, declared: “time has no productive virtue, nothing is done through time, but rather everything happens in time”.³⁹² The unsuccessful attempt of the British pamphlet to misleadingly claim that Argentine silence extended from 1888 to 1941 should come as no surprise.³⁹³ As we shall see, it is a coarse historical forgery.

³⁸⁹ *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, pp. 60-63, par. 90-95.

³⁹⁰ *Case of the Frontier Dispute (Burkina Faso/Mali)*; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras - Nicaragua (intervening))*; *Case concerning the Land and Maritime Boundary (Cameroon v. Nigeria - Equatorial Guinea intervening)*; *Frontier Dispute (Benin/Niger)*; and *Frontier Dispute (Burkina Faso/Niger)*.

³⁹¹ *Case concerning the Land and Maritime Boundary (Cameroon v. Nigeria - Equatorial Guinea intervening)*; *Territorial and Maritime Dispute (Nicaragua v. Honduras)*; *Frontier Dispute (Burkina Faso/Niger)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

³⁹² Grotius, Hugo, *Le droit de la guerre et de la paix [1625]*, livre II, chap. IV, XII, 1-2. Trad. par P. Pradier-Fodéré [1867]. Paris, PUF, 1999, book II, ch. IV, I, p. 210.

³⁹³ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 31.

The perception existing in international law at the end of the 19th Century was that Argentina had maintained its sovereignty. As the French jurist Gaston Jèze wrote in 1896: "*If in fact, thanks to its power, England triumphs, in law there is no doubt that the Argentine Republic maintains sovereignty over the Malvinas Islands and maintains it for as long as the English usurpation lasts.*"³⁹⁴

K. Consulates and the Spanish scientific expedition

The British pamphlet imaginatively claims that the existence of consuls and the fortuitous arrival of Spanish vessels on the islands are foreign recognition of Britain's purported sovereignty. According to its writers, in 1875 the United States was "abandoning the US government's earlier policy of not recognising any territorial sovereignty in the Falklands", and another six countries would not "accept that there was a valid Argentine claim to the Falkland Islands".³⁹⁵ Amongst them they mention Chile, when we have already seen that according to the Chilean Government the 1881 Boundary Treaty with Argentina included the Falklands/Malvinas when referring to "the other islands of the Atlantic Ocean".

The intermittent presence of consuls in Port Stanley is irrelevant for the issue of sovereignty. It is well known that consular relations do not necessarily imply an acceptance of territorial sovereignty. Consular agents are not diplomatic agents, and their duties were simply of a commercial nature. Their accreditation recognises a *de facto* situation, but not a recognition of sovereignty. This was the understanding of the British Government itself when, for example, it sent a Consul to Buenos Aires before it had recognised Argentina's independence.³⁹⁶ A current example is the presence of consulates of a number of countries in Jerusalem, without implying any recognition of the factual situation in the city.

The British pamphlet refers to an "official Spanish diplomatic and scientific expedition" that visited the Falkland/Malvinas Islands in 1863, and that for that reason Spain would

³⁹⁴ Jèze, Gaston, *Etude théorique et pratique sur l'occupation comme mode d'acquérir les territoires en Droit international*, Paris, Giard & Brière, 1896, p. 77.

³⁹⁵ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 26-27.

³⁹⁶ See Ferns, H. S., *Gran Bretaña y Argentina en el siglo XIX*, Buenos Aires, Ed. Solar, 1966, p. 125.

have recognized Britain's alleged sovereignty over the islands. No documentary reference is given. The truth, which once again the pamphlet conceals, is the following. The scientific expedition commanded by Luis Hernández de Pinzón departed on August 10th, 1862 from the port of Cadiz. On October 6th, it reached Rio de Janeiro, and during the first days of November it anchored at Montevideo. After a short stay in Buenos Aires, the crew headed for the Pacific. In a book published by the doctor of the expedition shortly after his return to Spain, he explains the reason of the unexpected trip to the Falklands/Malvinas. A storm in the area of the Strait of Magellan damaged the vessels of the expedition, preventing the continuation of the trip and forcing them to seek shelter. Fearing that they might run out of coal, "they decided to not hold it any longer, retreat to the Atlantic, favoured by the strong current, and arrive at the Malvinas Islands".³⁹⁷ This casual arrival on the islands is very different to the description given by Pascoe and Pepper. However, the *de facto* colonial Governor, HW Mackenzie, prevented the Spaniards from making any forays into the interior of the islands, (it is to be recalled that this was a scientific expedition).³⁹⁸ The vessels remained at anchor, and due to the scarcity of materials available on the islands to carry out the necessary repairs, wood and coal had to be sent from Montevideo. Finally, they departed towards the Pacific in April 1863, circumnavigating Cape Horn.

The "visit" by Pinzón's expedition was simply forced by the weather conditions, with the sole objective of repairing their ships. Such a long stay occurred simply due to the lack of necessary materials. The alleged gun salute greeting, and the Governor's boarding of the ship, are interpreted by the British pamphlet as Spanish recognition of Britain's alleged sovereignty. But a fair dose of imagination is required to interpret this act of courtesy as proof of a Spanish recognition of sovereignty, all the more so given the specific context described. Needless to say, the Captain of a vessel is not authorized, nor does he have the capacity to recognize the sovereignty of a territory on behalf of his State.

L. Maps

³⁹⁷ Almagro, Manuel de, *Breve descripción de los viajes hechos en América por la Comisión científica enviada por el gobierno de S.M.C. durante los años de 1862 a 1886*, Madrid, Impr. de Rivadeneira, 1866, p. 35.

³⁹⁸ Caillet-Bois, Ricardo, *op. cit.*, p. 404.

Pascoe and Pepper's pamphlet also ventures to imagine that, by virtue of cartography, Argentina recognised Britain's alleged sovereignty, and that for that very reason Argentina is now prevented from claiming its sovereignty by virtue of the rule of estoppel.³⁹⁹ To support this, they reproduce two maps, one from 1876 (Napp) and another from 1882 (Latzina) in which, according to them, the Falklands/Malvinas do not appear as Argentine territory. This is false, as we will see below. But it will first be helpful to outline the value of cartography in territorial disputes. The jurisprudence of the International Court of Justice is very clear on the matter: "*Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial titles, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.*"⁴⁰⁰

The British pamphlet reproduces a map from the book edited in German by Richard Napp, *Die Argentinische Republik*, published in 1876. It is a "phyto-geographic map of the Argentine Republic", that is, a map that describes the vegetation found in the Republic. In the place of where the islands should be, there appears an explanatory box of the different types of habitat. This, according to the British pamphlet, is the "evidence" that Argentina did not claim the Falklands/Malvinas in 1876. This clumsy ploy is worsened by two elements that could not have gone unnoticed by Pascoe and Pepper: in the same book there is another map, whose object is to describe the territory, titled "Map of the Argentine Republic", in which the Falkland/Malvinas Islands are presented as being Argentine (see Figures 18 and 19 of this book).⁴⁰¹

³⁹⁹ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 29-30.

⁴⁰⁰ ICJ Reports 1986, p. 582, par. 54.

⁴⁰¹ This is the map made in 1875 by Arthur von Seelstrang and A. Tourmente, presented in the 1876 Exhibition Of Philadelphia as part of the geography book signed by Richard Napp, "Die Argentinische Republik". It can also be consulted in the website of the Museo de América, Ministerio de Educación, Cultura y Deporte de España: <http://ceres.mcu.es/>

But that is not all: the text of the book containing both maps also contains a description of the geographic regions of Argentina. Two pages are dedicated to the Falkland/Malvinas Islands. The text begins as follows: “*The Malvina -or Falkland- Islands belong to Patagonia, although England is in possession of them since 1833, notwithstanding the rights of the legal owner*”.⁴⁰² There follows a description of Argentina’s rights over the islands, of the illegal actions of the United States and Great Britain, Argentine protests and



Figure 18 Map of the Argentine Republic by Richard Napp where the Falklands/Malvinas islands are seen as an integral part of the Argentine territory



Figure 19 Enlarged part of the area of the Falklands/Malvinas islands in the map of Richard Napp

⁴⁰² NAPP, Richard, *The Argentine Republic. For the Central Argentine Commission on the Centenary Exhibition at Philadelphia*, Buenos Aires, Sociedad Anónima, 1876, p. 443.

Britain's wrongful position. It concludes with the following:

*“Although it [Argentina's protests] has produced no practical consequences, it has nevertheless served to protect our rights. The Malvina, -or Falkland- islands, are therefore, Argentine property which England has appropriated and still keeps under her dominion, contrary to all law and right”.*⁴⁰³

And this is the book that the writers of the British pamphlet intend to use as proof that Argentina no longer considered the islands its own in 1875! It should be highlighted that the book was published with the aim of promoting Argentina at the 1876 International Exhibition of Philadelphia, organised to celebrate the centenary of the Independence of the United States and welcoming the representatives of 37 countries. It was published by the Central Argentine Committee for the Philadelphia Exhibition in other languages apart from German, including English and French. There was no British reaction to this, something in complete contrast to its attitude in 1884, when it protested against the future publication of an Argentine map that, of course, included the Falkland/Malvinas Islands.

The second map that Pascoe and Pepper make reference to is the so- called “Latzina Map”, published in an 1882 book entitled “*The Argentine Republic as a destination for European Immigration*”. According to the writers of the British pamphlet, the map in question does not show the islands as being Argentine, on the basis of the argument that the colour used to indicate them is similar to that of Chile or Uruguay and not to that used for the rest of Argentina. In the full map, the meaning that the author gave to the different colours is visible in the key, with the various colours distinguishing “uncultivated lands” from “pastoral lands”. The writers omit to mention that the continental territory of Argentina is also not uniform in colour. The Falkland/Malvinas Islands are the same colour as the Federal Capital (the present-day Autonomous City of Buenos Aires). The aim of the map was to illustrate for immigrants the possibilities for developing agricultural activities. Neither of the territories were susceptible to being cultivated, one because it was the most important urban centre of the country and lacking available land for agricultural and

⁴⁰³ Ibid. p. 444.

livestock activities, and the other by reason of its occupation by a foreign power (see Figure 20). Furthermore, if we analyze the neighbouring countries and compare them with Argentina, none of these include the names of geographical features (bays, inlets, straits, etc.), whereas they do for Argentina. The names of the geographical features of the Falkland/Malvinas Islands are specified in the same manner as those of Argentina's continental territory (see Figure 21).



Figure 20 Part of Latzina's map of 1882 - it can be observed the significance of different colors and the fact that the Falklands/Malvinas islands have the names of their geographical features like the Argentine mainland, contrary to those of foreign States



Figure 21 Part of Latzina's map of 1882 - it can be observed the significance of different colors and the fact that the Falklands/Malvinas islands have the names of their geographical features like the Argentine mainland, contrary to those of foreign States (i.e. Chile, Uruguay)

The above is confirmed in a map by the same author from 1888. The 1888 map had a different purpose to the previous one. It showed the political division of the territories and was not meant to give any information as to the suitability of land for agricultural and livestock activities. In it, the Falkland/Malvinas Islands again clearly feature as part of Argentina's territory (see Figure 22).

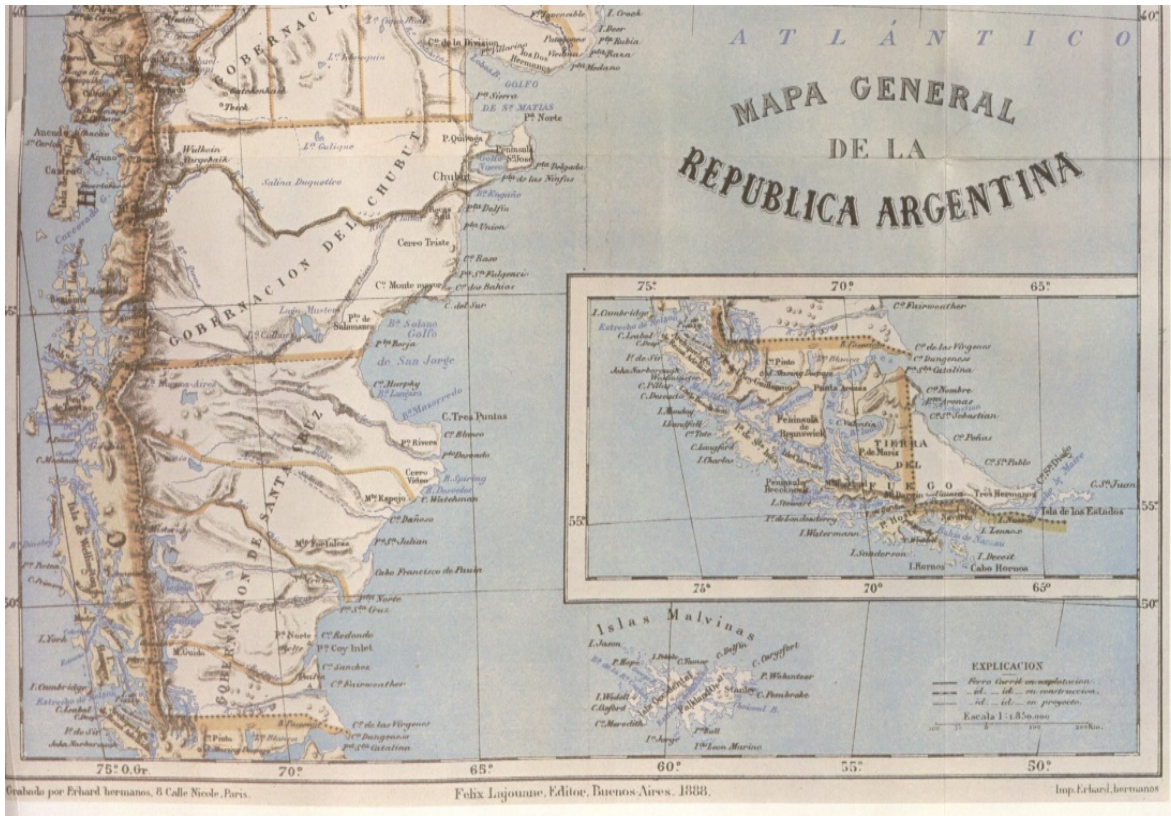


Figure 22 Government of the Tierra del Fuego and the Falklands / Malvinas islands - Sheet XXVII - Map of Arturo Seelstrang of 1886 - IGN

In the *Atlas of the Argentine Republic* published by the Argentine Geographical Institute in 1886 we can observe how, once again, the Falkland/Malvinas Islands feature as an integral part of Argentina, and more precisely of the Tierra del Fuego governorship created two years earlier (see Figure 23). This was the map that, as we shall see, motivated the British protest of 1884 even before its publication.

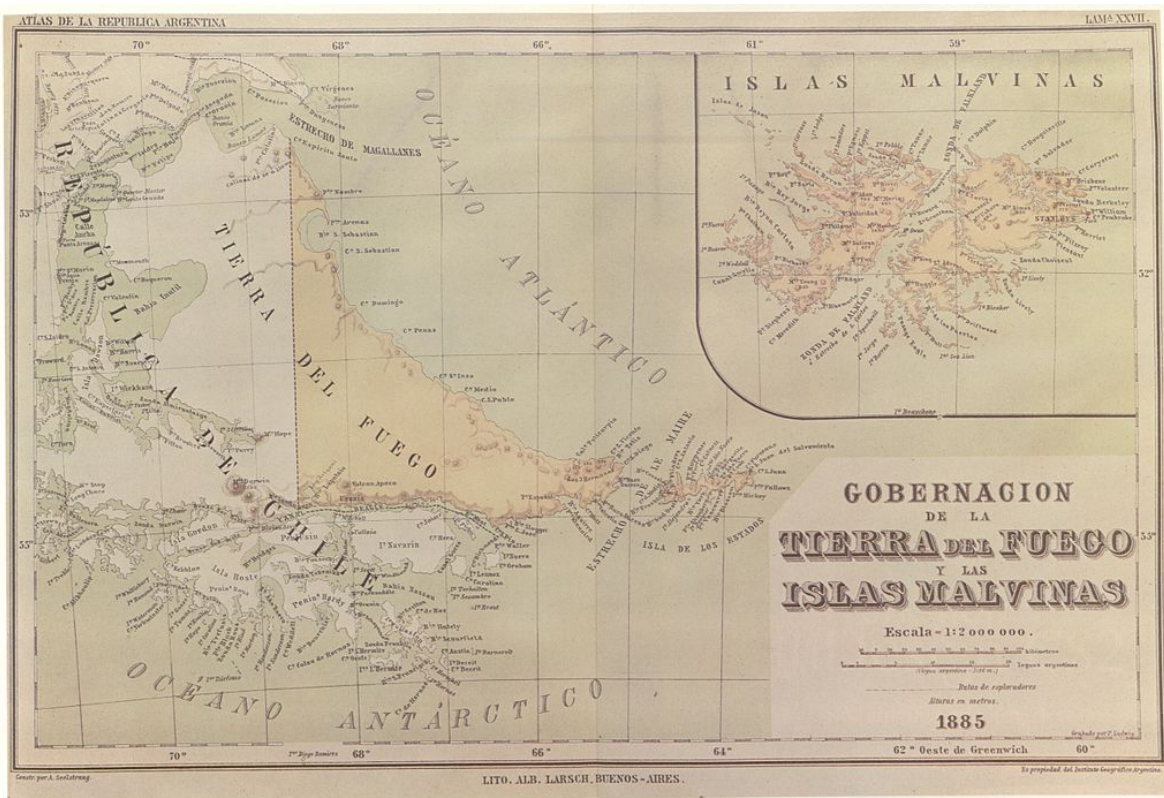


Figure 23 Government of the Tierra del Fuego and the Falklands / Malvinas islands - Sheet XXVII - Map of Arturo Seelstrang of 1886 – IGN

Similarly, the map of the governorship of Tierra del Fuego and the Malvinas Islands of 1888 was officially produced by the National government without any reaction from Britain (See Figure 24)

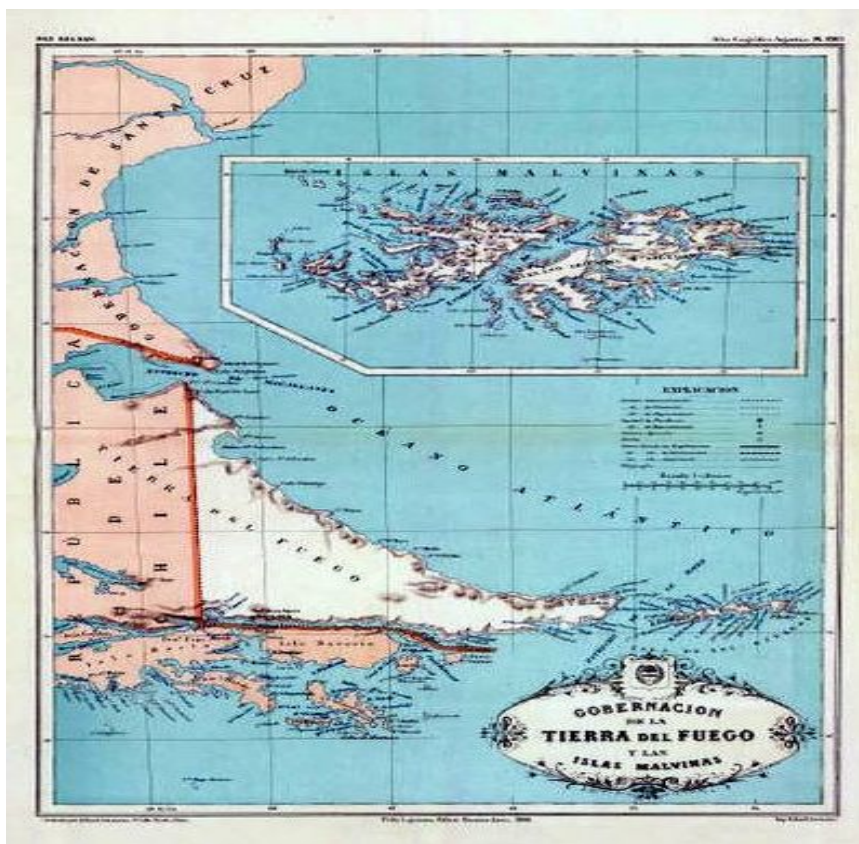


Figure 24 *Map of the Government of the Tierra del Fuego and the Falklands/Malvinas islands - Mariano Paz Soldan of 1888*

If we were to follow the reasoning of Pascoe and Pepper (i.e. using unofficial maps and their colour schemes as a guide to interpretation), we might mention the map made by the British cartographer Samuel John Neele of 1809, where the Falkland/Malvinas Islands are shown as part of Spanish dominions, and speculate that, according to this map, the British did not consider the Falklands/Malvinas to be part of their territory (a point which is correct in this case –not because of a map, but rather because of the abandonment that occurred 35 years before the map was produced).



Figure 25 John Neele's map of 1809

Of course, unlike the British writers, we understand the real significance of cartography, which, as indicated by the ICJ's jurisprudence, is merely secondary evidence and does not create any title to sovereignty unless it is part of a treaty or another legal title.

M. Argentine proposals for arbitration and British refusals

The British pamphlet makes a brief reference to the note of the Argentine Minister of Foreign Affairs, Dr. Francisco Ortiz, to the British representative in Buenos Aires, Mr. Monson, without attributing any value to it whatsoever. On May 30, 1884, Dr. Ortiz informed Monson that, considering that the Government was finalising the delimitation of its territories (it is worth recalling that in 1860 Buenos Aires and the Confederation had recently reunited as a single State, in 1870 the War with Paraguay had ended, in 1879 the Governorship of Patagonia was created, in 1881 the Boundary Treaty with Chile had been signed and in 1884 the creation of the Governorship of Tierra del Fuego was being considered), it considered it would be appropriate to seek a solution to the dispute over the Falkland/Malvinas Islands. It should be noted that the decree dated June 10, 1829 included the Falklands/Malvinas and Tierra del Fuego as one single administrative division.

Consistently with the good relations that always existed with Great Britain, the Argentine Minister indicated to the British Representative in Buenos Aires that he trusted that the issue could be easily resolved by pacific means of dispute settlement. In this case, he proposed arbitration. He further added that he considered this feasible, not least because the United Kingdom has given such a good example by accepting it for other issues. In this way, Ortiz and the Argentine Government believed in advance that they could surely appeal to the Government of Her Majesty “to give to this proposal your fairest consideration”.⁴⁰⁴ The British reply arrived almost two months later in the negative. It is one of the many times in which Argentina offered a peaceful solution and Great Britain rejected it.

Between December 15th, 1884 and May 6th, 1885 an exchange of notes took place between the British representative in Buenos Aires and Minister Ortiz, initiated by the first, regarding an article that mentioned that the Argentine Geographic Institute was preparing a first map of the Argentine Republic that was to include the Falklands/Malvinas. The British Government wanted to know if the map would be official. The Argentine Minister’s reply was categorical: “*The publication (the map) would not alter in any way the status of the question regarding the sovereignty of the Malvinas or Falkland Islands; the same reply could be given to H.E. on this point as was given in 1849 to the Argentine Minister in London (...) whatever may be the importance that the Argentine Minister attributed to the statements made, they did not alter in any way the status of the pending issue, which should be considered on our part to be in the same condition it was left in 1843.*”⁴⁰⁵

It is worth highlighting the coherence of the Argentine interpretation of the exchanges between Moreno and Palmerston in 1849 depicted below. In another note, the Argentine Minister also correctly maintained that “a map neither gives nor takes away rights, and those of England or the Argentine Republic in this case are not to be settled by colouring

⁴⁰⁴ Memorandum Respecting the Falkland Islands and Dependencies. Confidential (13336), by Field, John W., Foreign Office, February 29th, 1928, p. 23, par. 150 (FO 371/12735). In spanish in Ferrer Vieyra, E., *op. cit.*, p. 179.

⁴⁰⁵ Note from Ortiz to Monson dated December 19, 1884 in Memoria de Relaciones Exteriores, 1888, pp. 109-110, also in Becerra, Alfredo, *op. cit.*, pp. 143-144.

the islands blue or red on the map”⁴⁰⁶ before once more offering a peaceful settlement of the dispute in expressing that, “*(the) means to resolve the pending affair would be to treat directly the heart of the issue, I would be pleased to listen to Mr. Minister on the above, if your Government had any instruction to that effect (...) the greatest interest of the Republic is to maintain its relations with Great Britain on the best footing, without in any case allowing them to be altered by a friendly and reasoned discussion on a point of international law, such as would be the sovereignty over the aforementioned islands*”.⁴⁰⁷

In response to the British protest on December 31st 1884, Dr. Ortiz, in his counter-protest, once again makes reference to the status of the issue: “*(...) this inclusion (of the Malvinas Islands in the map) should not modify in any way the status under which the Malvinas have always been considered, which issue, as H.E., has had the deference of expressing to me, is pending and subject to resolution by the Governments.*”⁴⁰⁸ It again insists on resolving the issue by the peaceful means of dispute settlement: “*trusting in the assurance the Argentine Government has of the integrity of Her Britannic Majesty, that the delayed discussion will be reopened by the reply that the undersigned awaits to his observations, and resolved by the friendly means of settlement that civilized nations of today adopt for the resolution of issues of this kind.*”⁴⁰⁹ A Memorandum was attached to this note listing Argentina’s rights to the islands. This note clearly shows that the Argentine Minister attributes to the British representative the statement that the issue was pending, and refers implicitly to the arbitration previously proposed.

The British reply arrived five days later in a threatening tone: Mr. Monson stated that “*no good could possibly arise from an attempt to reopen the question*”.⁴¹⁰

It is interesting to note how Pascoe and Pepper then skip forward to 1888 and maintain that

⁴⁰⁶ Note from Ortiz to Monson dated December 24th, 1884 in Memoria de Relaciones Exteriores, 1888, pp. 113-114, en Becerra, Alfredo, *op. cit.*, pp. 148-149.

⁴⁰⁷ Ibid.

⁴⁰⁸ Note from Ortiz to Monson dated January 2nd, 1885 in Memoria de Relaciones Exteriores, 1888, pp. 116-120, Becerra, Alfredo, *op. cit.*, p. 155.

⁴⁰⁹ Id., p. 156.

⁴¹⁰ Note from Monson to Ortiz dated January 8th, 1885 in Memoria de Relaciones Exteriores, 1888, pp. 135-138, Becerra, Alfredo, *op. cit.*, p. 181.

only at that point did Argentina again protest over the issue of the islands, setting aside the representation (and offers to solve the dispute by the relevant peaceful means) just analysed. Likewise, the British authors “forget” to mention that on March 11th, 1887 the Argentine Minister of Foreign Affairs, Dr Quirno Costa, ordered the Argentine Ambassador in London, Luis Domínguez, to remind the British Government about the memorandum on the issue presented by Dr Ortiz on January 2nd, 1885,⁴¹¹ which remained unanswered. Domínguez complied with the order on November 3rd, 1887 with a note to the Marquis of Salisbury,⁴¹² which was answered on November 9th of the same year⁴¹³ along the same lines as previous ones: Great Britain considered the matter closed.

Two months later, on January 20th, 1888, Argentina replied to the British refusal and Dr Quirno Costa stated that “*considering the terms of H.E.’s note which I am replying to, I must first reproduce precedents that justify the legitimate rights that the Argentine Republic holds regarding this question, whose resolution cannot depend only on one of the parties*”.⁴¹⁴ The Argentine Minister is clear: Great Britain cannot unilaterally decide when a dispute is settled. He then recalls the Great Britain’s rejection of the offer to submit the issue to a peaceful settlement: “*Especially when, as in the current case, the Government of Her Britannic Majesty closes any discussion, not even opting for the means of conciliation that nations appeal to for settling disputes such as those which concern us and whose means were suggested in the Note dated January 2, 1885*”,⁴¹⁵ concluding, along the same lines as previous notes, that “*today, as before, the Argentine Government maintains its claim regarding the illegitimate occupation of the Malvinas Islands, that it is not and never will abandon its rights over those territories*”.⁴¹⁶

⁴¹¹ Note by Quirno Costa to Domínguez dated March 11th, 1887 in Memoria de Relaciones Exteriores, 1888, p. 147, in Becerra, Alfredo, *op. cit.*, pp. 191-192.

⁴¹² Note by Domínguez to the Marquis of Salisbury dated November 3rd, 1887 in Memoria de Relaciones Exteriores, 1888, p. 149, in Becerra, Alfredo, *op. cit.*, pp. 193-194.

⁴¹³ Note by Pakenham to Quirno Costa dated November 9 1887 in Memoria de Relaciones Exteriores, 1888, pp. 151-152, in Becerra, Alfredo, *op. cit.*, pp. 197-198.

⁴¹⁴ Note by Quirno Costa to Pakenham dated January 20 1888 in Memoria de Relaciones Exteriores, 1888, pp. 152-158, in Becerra, Alfredo, *op. cit.*, p. 203.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid. p.205

The British reply continued with a refusal to discuss the question. However, some months later, on June 12th, 1888, Dr. Quirno Costa offered, once again, to solve the controversy through the peaceful means offered by international law. In his note to Jenner, who was *Charge d' Affairs* of HBM in Buenos Aires, the Argentine minister stated that “*in spite of the resolution (...) of refusing to discuss the rights that it may have to sovereignty over the islands, the Government of the Republic does not deem its own to be compromised by that declaration and even less by the silence that the English Government is keeping upon the indication to submit the issue to arbitration made by the Argentine Government*”.⁴¹⁷

On June 14, Jenner limited himself to acknowledging receipt of the Argentine Note. In March of that same year, British concern over the inclusion of the Falkland/Malvinas Islands in official Argentine publications resurfaced. A report by the Foreign Office accounted for the use of a map made by the Argentine Information Office in which the Falkland/Malvinas Islands appeared as part of its territory.⁴¹⁸ However, the British authorities decided this time not to intervene. In October of the same year, the British Representative informed his Government of the inclusion of the Falklands/Malvinas as part of the territory of Argentina in the Memoire of the Argentine Minister of Foreign Affairs.⁴¹⁹ Once again, the British Government decided to remain silent.

As we can see, the Argentine Government offered on at least in three occasions to resort to pacific means of dispute settlement (more specifically, arbitration), which the United Kingdom disregarded, irresponsibly leaving the dispute open.

N. Argentina's consistent conduct between 1888 and 1941

In a desperate attempt to substantiate a presumed Argentine abandonment, the British pamphlet attempts to persuade that Argentina did not maintain its claim between 1888 and 1940 because “Argentina remained silent for almost 60 years from 1888 until well into the

⁴¹⁷ Note by Quirno Costa to Jenner dated June 12 1888 in *Memoria de Relaciones Exteriores*, 1888, pp. 159-160; Becerra, Alfredo, *op. cit.*, p. 209.

⁴¹⁸ PRO FO 118/208, note of the FO to its representative in Buenos Aires, 10 March 1888.

⁴¹⁹ PRO FO 118/209, dispatch of the British representative in Buenos Aires to the FO, 13 October 1888.

1940's without any formal protests to Britain over the Falklands".⁴²⁰ Leaving aside the clear inclusion of the Falklands/Malvinas in the Tierra del Fuego Governorship created in 1884,⁴²¹ as shown in the maps above, the truth is that the Argentine Government took every opportunity to demonstrate its sovereignty over the islands, both internally and internationally. It is also incorrect to state that no formal protests were made during the period, as we shall now see.

In 1908, upon receiving the communication made by the Italian Ambassador to Buenos Aires about the inclusion of the Falkland/Malvinas Islands as a British colony in the Rome Convention of the Universal Postal Union, the Argentine Government made a "formal and solemn claim"⁴²² which went unanswered by the British Government, in spite of its being informed thereof.⁴²³

In 1910, an official map sponsored by the Centennial Committee led by the Minister of Home Affairs, showed the Falklands/Malvinas as being Argentine. The British representative in Buenos Aires was instructed not to take note of its existence.⁴²⁴

In 1911, in the heyday of the conclusion of arbitration treaties between States, the British Government explored the possibility of signing one such instrument with Argentina. The note by the British Secretary of Foreign Affairs Sir E. Grey, to his colleague in the Colonial Office, dated September 27th, was blunt. In reply to the concerns of the latter, he informed him that the Foreign Office "*[does not] propose the conclusion of a treaty [of arbitration]*

⁴²⁰ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 31.

⁴²¹ On October 16th, 1884 the Argentine Government sanctioned Act No1532 on The Organization of the National States in which the extensive territory of Patagonia was divided, creating the National Territory of Tierra del Fuego.

⁴²² Memorandum respecting the Falkland Islands. Confidential (9755), December 7 1910, by De Bernhardt, Gaston, Printed for the use of the Foreign Office, January 1911, pp. 13-15 (FO 881/9755) (FO 881/9755), p. 48.

⁴²³ Memorandum respecting the Falkland Islands and Dependencies. Confidential (13336), by Field, John W., Foreign Office, February 29th, 1928, p. 27, par. 176A-178 (FO 371/12735). See also Memorandum by Beckett, William dated September 17th, 1946, p. 527 and Draft Report by Sir Anthony Kershaw 1982-1983, both in Ferrer Vieyra, *op. cit.*, p. 527 & p. 556.

⁴²⁴ Respecting the Falkland Islands and Dependencies. Confidential (13336), by Field, John W., Foreign Office, February 29th, 1928, p. 27, par. 179-180 (FO 371/12735).

*with the Argentine Government until the British title to the Falkland Islands has been recognised".*⁴²⁵ This clearly shows that the British Government was perfectly aware that Argentina still maintained its claim over the Falkland/Malvinas Islands in 1911.

In 1919, after the end of the First World War, and taking account of British silence and refusal to initiate negotiations regarding the Falklands/Malvinas issue, the Argentine Government decided not to accept radiotelegraphic messages for the islands, except in cases of maritime disasters or requests for help. The Navy Minister, Dr. Julio Moreno, was clear about this: "*For the very special situation of our government, which has never renounced its sovereignty over the aforementioned islands, they advise to adopt such a disposition*".⁴²⁶

On December 20th, 1926, Argentina lodged a formal protest before the Government of Belgium, having been informed by its representative in Buenos Aires of the notification from the Embassy of Great Britain regarding the inclusion of the Falkland/Malvinas Islands in the Brussels sanitary convention.⁴²⁷

The following year, on March 22nd, 1927, the Universal Postal Union delivered a circular letter to all its members upon receiving a request by the Argentine Postal Service for information on the territorial jurisdiction of each member (boundaries had changed considerably as a result of a variety of peace treaties signed by several powers). When the Argentine Government received information that the United Kingdom had included the Falkland/Malvinas Islands within its jurisdiction, it issued a formal protest to the International Office of the Postal Union that was communicated to the rest of the Postal Union countries on October 14th, 1927. The relevant part of the Argentine note is absolutely clear: "*Argentina's territorial jurisdiction extends, in law and in fact, over the land surface, the territorial sea, the islands situated on the coast, to a part of Tierra del Fuego and the archipelagos of Estados, Año Nuevo, South Georgia, South Orkney and the undelimited*

⁴²⁵ FO 371/1258.

⁴²⁶ Julio Moreno to Honorio Pueyrredon, November 14 1919, in Becerra, Alfredo, *op. cit.*, p. 212.

⁴²⁷ Note by A. Gallardo to Straten, December 20th, 1926 in Becerra, Alfredo, *op. cit.*, p. 215.

*polar lands. Of right, being unable to exercise in fact because of the occupation held by Britain, the Malvinas archipelago also belongs [to Argentina].*⁴²⁸

The Argentine declaration generated a British complaint dated December 17th, 1927, which was replied to by the Argentine Ministry of Foreign Affairs and Worship on January 20th, 1928, where it indicated that since 1833 the Falkland/Malvinas Islands had been under British occupation, and that since this date the Argentine Government had protested against this occupation.⁴²⁹ As we can see, here too the British pamphlet falsely states that Argentina made no formal complaints between 1888 and the 1940s.

The British authors maintain that the Argentine Minister of Foreign Affairs, Angel Gallardo, “undermined Argentina’s claim”, supposedly expressing to Sir Austen Chamberlain during a visit to London that the British position was extremely solid.⁴³⁰ The only evidence of this statement is a note from the British Minister to his Ambassador in Buenos Aires. However, the official position of Minister Angel Gallardo, and of Argentina, was clear: it protested in Brussels, it protested in Berne and it replied to the British note, upholding Argentina’s position. It speaks volumes that the British authors could only find this indirect reference to an Argentine comment in so many years of conflict, when the British archives themselves contain dozens of commentaries from British officials, from the rank of Prime Minister down, expressing strong doubts over the existence of British sovereignty: from the Duke of Wellington⁴³¹, British Prime Minister, to Gerald Fitzmaurice, former British judge in the International Court of Justice.⁴³²

⁴²⁸ Dirección General de Correos y Telégrafos de la República Argentina to the International Office of the Universal Postal Union, September 14th 1927, in Becerra, Alfredo, *op. cit.*, pp. 222-223.

⁴²⁹ Palacios, Alfredo, *Las Islas Malvinas - Archipiélago argentino*, Buenos Aires, Ed. Claridad, 1934, pp. 153-154.

⁴³⁰ Pascoe, Graham & Pepper, Peter, *op. cit.*, p. 35.

⁴³¹ “*It is not clear to me that we have ever possessed the sovereignty of all these islands. The convention certainly goes no farther than to restore to us Port Egmont, which we abandoned nearly sixty years ago.(...) But in this case in which our right to possess more than Port [Egmont] is disputed, and at least doubtful, it is very desirable [sic] to avoid such acts.*” Despatches, Correspondence, and Memoranda of Field Marshall Arthur, Duke of Wellington, Vol. 6, p. 48.

⁴³² “*Our case has certain weaknesses. But we have been in effective (though as the Argentines alleged wrongful) occupation for over a century; and for strategical reasons we could never give up the islands. So it seems best to take a strong line. We cannot be forced to arbitrate because the matter is covered by our reservations of the optional clause (...)*”, February 6 1936, FO 371/19763 (A 1245, 889/2), folio 282.

The British pamphlet omits to inform its readers about what Sir Austen Chamberlain told his Argentine colleague on the same occasion of the supposed reply by Dr. Gallardo. The following is the quote from the relevant Foreign Office document: “*Sir Austen made it plain to Dr. Gallardo that he did not wish to embarrass the Argentine Government by forcing upon them an embarrassing retraction of their claim but was requesting him to desist from such a useless and provocative action as the one in Berne.*”⁴³³ The British pamphlet also omits to mention that upon receipt of the communication from London, the British Ambassador in Argentina spoke with the acting Minister of Foreign Affairs, who told him that “*the Argentine felt that she had a good claim to the islands*”,⁴³⁴ and that the British Ambassador replied “*we were fully aware of that, and that the Argentine Government were constantly maintaining that claim to us in writing. This was, however, a wholly different matter from allowing their Postal Administration to go out of its way to assert that claim to an international body*”.⁴³⁵ The British Ambassador went further. He stated: “*That the Argentine Government claimed the islands, and had formally maintained their claim, was known to the whole world*”.⁴³⁶

In 1928, when postal, telegraphic and radiotelegraphic exchanges with the islands were finally authorized, Argentine President Alvear adopted a decree whose Article 1 established that such authorization is made “*under the formal reservation and previous declaration that said fact does not diminish in any way the right of Argentine sovereignty over the Malvinas islands, nor can it be invoked by any party against it*”.⁴³⁷ The British Government was aware of this decree, but as on other occasions where Argentina exercised or manifested its sovereignty, it preferred not to protest, as we shall now see.

That same year, a citizen born in the Falkland/Malvinas Islands, Juan Walker, enrolled in the Argentine Army in the registration office of San Julian, Province of Santa Cruz, by

⁴³³ Memorandum respecting the Falkland Islands and Dependencies. Confidential (13336), by Field, John W., Foreign Office, February 29th, 1928, p. 31, par. 214 (FO 371/12735).

⁴³⁴ Id., p. 32, par. 217.

⁴³⁵ Ibid.

⁴³⁶ Id., p. 32, par. 220.

⁴³⁷ Decree dated July 27th, 1928 (transcribed in Becerra, Alfredo, *op. cit.*, p. 242).

virtue of his rightly being considered by the Argentine authorities as having been born in Argentine territory.⁴³⁸

As we can see during this period, in the face of constant Argentine activity, the British maintained a strong and persistent policy of refusing to deal the issue of the Falklands/Malvinas, going so far as to reject the many proposals of arbitration. This is illustrated by the Annual Report No 21 of the British Ambassador in Buenos Aires, dated January 31 1929, which maintains: *“A careful study of previous correspondence leads me to the conclusion that various British Governments, beginning with that of Lord Palmerston, were not satisfied that our claim was such that it would bear argumentative reiteration. We took refuge in silence. Argentines safeguard their claim by reasserting it at intervals. I suggest that our wisest course would be to allow this state of affairs to continue. (...) Should we take undue notice of periodical pinpricks (...) as seems to be desired by the Government of the islands, we may force the Argentine Government to take definite and unpleasant action, such as insisting that the whole question be referred to arbitration. (...) My strong recommendation is that we should remain silent”*.⁴³⁹

It is clear that for the British Ambassador in Buenos Aires that the issue was open: Argentina maintained its claim and Great Britain hid behind a wall of silence and the *de facto* control of territory.

During the 1930's, multiple opportunities arose for Argentina to assert its claim. The incidents related to British passports held by people born in the Falkland/Malvinas Islands, the issuing of British postal stamps relating to the “centenary of British administration” of the islands in 1833, the issuing of Argentine postal stamps showing the islands as part of Argentina, and a diplomatic exchange in London during the International Whaling Conference of 1937, in which Argentina once again asserted its rights over the

⁴³⁸ Becerra, Alfredo, *op. cit.*, pp. 218-220.

⁴³⁹ CO 78 183/6, 108880.

Falklands/Malvinas, as well as identical reservations made to various postal conventions concluded in Cairo in 1938.⁴⁴⁰

Over the following years, faced with the silence and refusal of the United Kingdom to seek a peaceful settlement to the dispute, Argentina took its claim of sovereignty out of the bilateral sphere and on to the multilateral level. During the First Consultative Meeting of Foreign Ministers of the American Republics of the year 1939 in Panama, the Argentine delegation declared: *“That in the waters adjacent to the South American Continent, of a territorial extension corresponding to the coasts of Argentina, the zone defined as free from any hostile act, it does not recognize the existence of colonies or possessions of European countries, and it particularly reserves and maintains intact the legitimate titles and rights of Argentina to islands such as the Malvinas, as well as to any other Argentine territory located within or beyond said zone.”*⁴⁴¹

From the moment the United Nations was created, Argentina asserted its claim.⁴⁴² In 1946, Argentina made a formal reservation based on its territorial claim when the United Kingdom registered the Falkland/Malvinas Islands on a list of Non-self Governing Territories (Chapter XI of the UN Charter), as a territory under its administration.⁴⁴³

The Inter-American Treaty of Reciprocal Assistance was approved at the Inter-American Conference for the Maintenance of Continental Peace and Security that took place in Rio in 1947. By an Argentine initiative, the area for the application of the Treaty included the Falkland/Malvinas Islands, South Georgia, South Sandwich and the South American Antarctic zone. Argentina made an express reservation regarding its rights.⁴⁴⁴

In the IX Pan-American Conference in Bogotá in 1948, the United Kingdom awoke from its slumber and submitted a declaration regarding the Falklands/Malvinas and the Argentine

⁴⁴⁰ Research Department, Foreign Office, Preliminary Memorandum on the Falkland Islands. Secret (17111), September 17th, 1946 (FO AS 5728/311/2), p. 15.

⁴⁴¹ Gómez Langenheim, *op. cit.*, vol. II, p. 281.

⁴⁴² Declaration by the Argentine representative E. Ferrer Vieyra during the first session of the General Assembly (doc. A/C4/SR 25, Ferrer Vieyra, E., *op. cit.*, p. 195).

⁴⁴³ See UN GAOR C4 p. 156, UN Doc A/C. 4/SR.25 (1946).

⁴⁴⁴ Memoria del Ministerio de Relaciones Exteriores y Culto, Buenos Aires, 1948, p. 63.

Southern territories. It was contested by the Argentine delegation in the session of April 21st, 1948, in which it “updates the subject of the sovereignty that Argentina exerts over the Malvinas Islands, and that it constitutes a longstanding problem for our Republic, as well as an issue that can be easily resolved if the occupying power takes inspiration from international law”.⁴⁴⁵

Thanks to the intervention of the Argentine delegate, the American Commission of Dependant Territories, in its meeting in La Havana in 1949, designated the Falklands/Malvinas a “territory *de facto* occupied by a foreign power”.⁴⁴⁶ The British pamphlet then claims to disregard the studies and publications of non-Argentine writers such as Paul Groussac⁴⁴⁷ and Julius Goebel⁴⁴⁸ – a professor of the prestigious Columbia Law School whom Pascoe and Pepper prefer to consider “the son of a German immigrant in the United States” and “Anti-English”.⁴⁴⁹ The main argument of the writers of the British pamphlet is that the books by Groussac and Goebel do not mention the Arana-Southern Convention. As explained before, there was no reason to mention it. But the most absurd element of this criticism is the fact that of the British Government, its officials that studied the Falklands/Malvinas issue, and the British writers that wrote about the Falklands/Malvinas, none mentioned the Arana-Southern Convention!

O. The irrelevant reference to the “Desert Campaign”

The British pamphlet loses itself in considerations that bear no relation to the Falklands/Malvinas issue, such as the situation of Patagonia in the last quarter of the 19th century. The aim is to discredit Argentina and to attempt to compare this situation with that of the Falklands/Malvinas. They raise the point that the British colony in the islands is the oldest Southern population in the world.⁴⁵⁰ They forget that Argentina was already present

⁴⁴⁵ See full reply in Muñoz Azpiri, J.L., *op. cit.*, Vol. II, pp. 397- 413.

⁴⁴⁶ Pastorino, Ana, *op. cit.*, p. 114.

⁴⁴⁷ Paul Groussac (1848-1929), French historian, writer and essayist, autor of Les îles Malouines.

⁴⁴⁸ Julius Goebel (jr) (1892-1973), Law and history professor for over thirty years in the prestigious Columbia Law School, writer of the renowned piece The Struggle for the Falkland Islands. A Study in Legal and Diplomatic History.

⁴⁴⁹ Pascoe, Graham & Pepper, Peter, *op. cit.*, p. 35.

⁴⁵⁰ Pascoe, Graham & Pepper, Peter, *op. cit.*, p. 28.

in the Falklands/Malvinas when the British occupied and colonized the islands. The British writers omit to mention that Argentina exercised its sovereignty over the Falkland/Malvinas Islands well before than in continental Patagonia. In fact, the first birth registered under the sovereignty of a State in the Falkland/Malvinas Islands is Argentine: it is the daughter of Luis Vernet, who was born on February 5th, 1830 and was named Matilde Vernet y Sáez, though she was known as Malvina Vernet. It cannot pass unnoticed that the Argentine Government had created a territorial administrative unit in 1829 which included the Falklands/Malvinas, Tierra del Fuego and adjoining islands and that, had the expulsion by the British not occurred, it is highly likely that the centre of this territorial unit would today be in the Falklands/Malvinas and not in Tierra del Fuego.



Figure 26 Matilde "Malvina" Vernet y Sáez. First registered person born under the sovereignty of a State in the Falklands/Malvinas islands

The British pamphlet curiously converts itself into a tenacious “defender” of native populations and accuses the Argentine Government of “genocide”. Without looking into the

role played by Great Britain in the subjugation of entire populations in all the continents of the world, the reality that the pamphlet refers to is different to the one presented.

The Desert Campaign started at the end of 1878 and ended in 1880, resulting in 1313 indigenous dead and approximately 11.000 prisoners.⁴⁵¹ The figure of 60.000 indigenous dead that Pascoe and Pepper attribute to Roca is incorrect. It is estimated that this is the total figure from 1820 until the end of Roca's campaign, with a similar number of men, women and children dead or enslaved by the indigenous populations.

The Argentine State did not conduct a campaign of extermination of the native populations. It had the support of various native communities, such as, among others, the Northern Tehuelches (Pampas, Hets), the Andean Northern Tehuelches (Puelches) and the Araucanian Northern Tehuelches (Querandies), the Boroanos that sought to fight against the attacks of the Araucanian tribes. The main chief of Eastern Patagonia, Casimiro “Biguá” Fourmantin, had been appointed Colonel of the Argentine Army. Biguá, together with five chiefs of other indigenous clans meeting in the Genoa Valley (Province of Chubut) formally recognised Argentine sovereignty on November 3rd 1869, when the Argentine flag was raised and the indigenous chiefs swore allegiance to it.⁴⁵²

Argentine history shows that the native populations were considered part of the Argentine people. The Independence Act 1816 was published in Spanish, Quechua and Aymara. Even the contact of native populations with the Falklands/Malvinas begins with Argentina. Pablo Areguati, appointed Commander of the Malvinas in 1823, was Guarani. In 1829, Luis Vernet, Political and Military commander of the islands, invited and received the Techuelche chief Maria la Grande (the Great), “Queen of the Strait”, in Port Soledad.

It may be worth recalling a point related to this subject that the writers of the pamphlet do not mention, but cannot ignore. The extinction of the Onas (Selknam) in Tierra del Fuego can be for the most part attributed to men such as Alexander McLennan (Scotland),

⁴⁵¹ Memoria del Departamento de Guerra y Marina of 1879.

⁴⁵² Marcial Galina, Alejandro Lanoël, *Iconografía histórica del Chubut. Los murales de la Casa de Gobierno*, Chubut, Publ. José Fontana, 1975, p. 8.

Alexander A. Cameron (New Zealand), Samuel Hyslop (England), John McRae (Scotland) and Montt E. Wales (England), among others, who gained one pound for each dead “Ona”, and obtained even greater “profits” if they sent their heads to the “Anthropological Museum of London” that paid eight pounds for each.⁴⁵³



Figure 27 Tehuelches bearing the Argentine flag, celebrating on May 25, 1899, together with the Governor of the Province of Santa Cruz

Nowadays, the recognition and protection of indigenous populations is inscribed in the Argentine National Constitution, which recognises the ethnic and cultural pre-existence of said populations and in which the State is committed: “To guarantee respect for the identity and the right to bilingual and intercultural education; to recognize the legal capacity of their communities, and the community possession and ownership of the lands they traditionally occupy; and to regulate the granting of other lands adequate and sufficient for human development; none of them shall be sold, transmitted or subject to liens or attachments. To guarantee their participation in issues related to their natural resources and in other interests affecting them. The provinces may jointly exercise these powers.”⁴⁵⁴

The aim of the British pamphlet is to attempt to place Britain’s use of force of 1833 and the subsequent arrival of British settlers on an equal footing with supposed Argentine actions in

⁴⁵³ Gusinde, Martín, *Hombres primitivos en la Tierra del Fuego (de investigador a compañero de tribu)*, Sevilla, Escuela de Estudios Hispano-Americanos de Sevilla, 1951, p. 100.

⁴⁵⁴ Article 75, para. 17 of the National Argentine Constitution.

Patagonia and the development of Argentine society on the basis of foreign immigration over the end of the 19th century and the first half of the 20th century. Of course, these are two different situations. One thing is a country with a generous migration policy, as Argentina was and still is, and another is a colonial power that forcefully takes part of the territory of another State with which it has peaceful and friendly relations. It also cannot be compared to the establishment of the population in Patagonia. Even if we were to consider the description in the British pamphlet to be correct, the situation would still be different: Argentina would not have a native State to which it could restore those territories. The United Kingdom does: Argentina.

P. The South Georgia and South Sandwich Islands

The British pamphlet also refers to the dispute over the South Georgia and South Sandwich Islands and analyzes it together with another existing dispute over a section of Antarctica. Once again, several omissions are present in Pascoe and Pepper's pamphlet. They will be briefly outlined here.

The South Georgia Islands were not discovered by Captain Cook, but by Spanish sailors. A map of South America published in 1790 in London by the renowned cartographer Thomas Bowen describes South Georgia as having been discovered by the Spanish in 1756 and explored by Cook in 1775. This contradicts the British statement of the island's likely discovery by De La Roche in 1675 and its "re-discovery" (sic) by Cook in 1775.⁴⁵⁵ This is an official map. It states: "Published by Royal Authority" (see Figures 28 and 29).⁴⁵⁶

⁴⁵⁵ United Kingdom Application against Argentina, Antarctica Cases, I.C.J. Pleadings, p. 11.

⁴⁵⁶ An Accurate Map of South America from the best Modern Maps and Charts, by Thomas Bowen, included in Bankes, *Thomas, New System of Geography*, London, 1790.

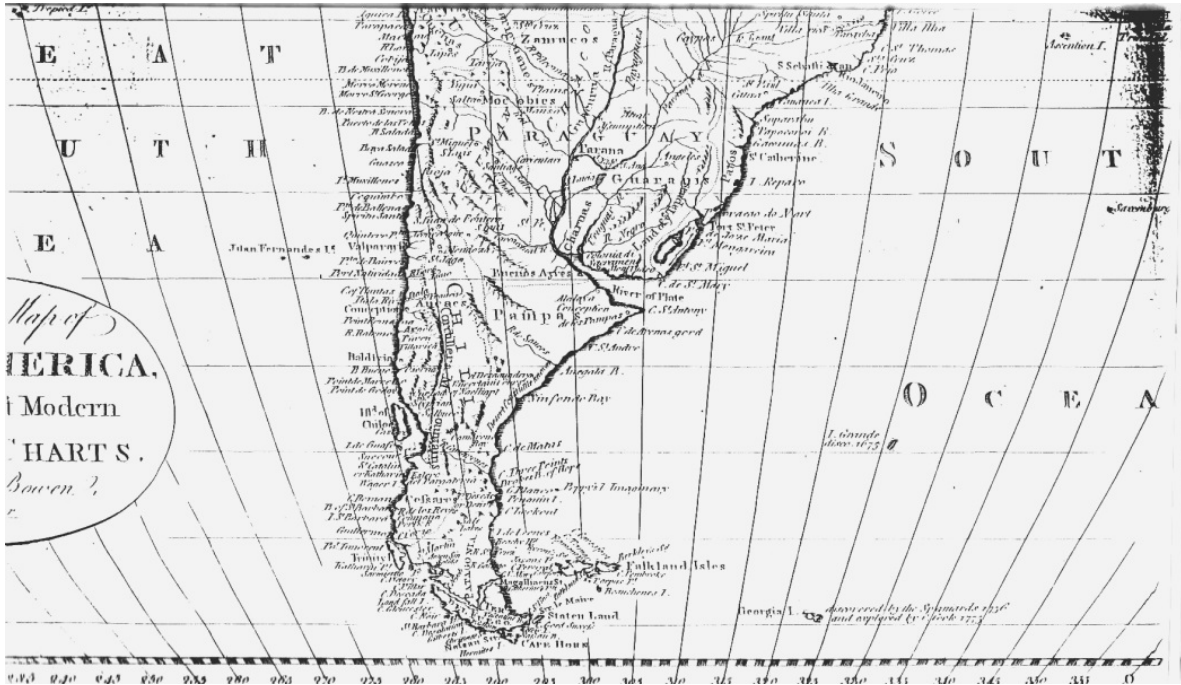


Figure 28 Map of South America of 1790 performed by Thomas Brown. This is a British official publication

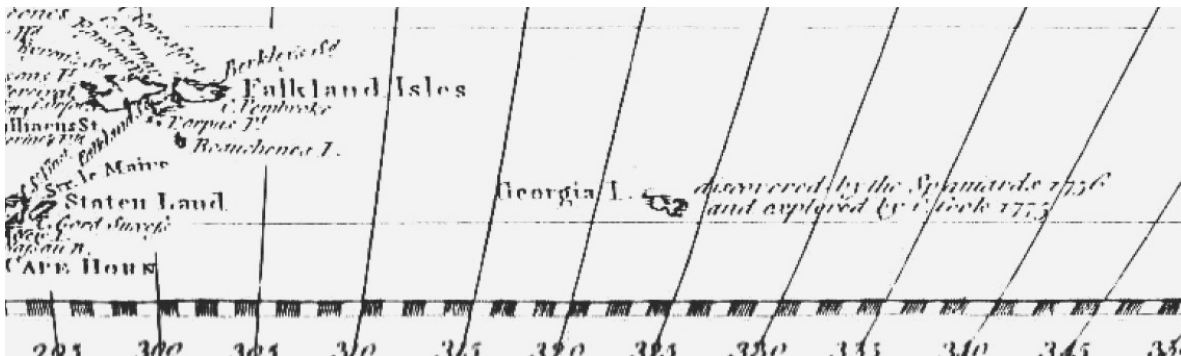


Figure 29 Enlarged part of the Georgia island where it states that they were discovered by the Spaniards in 1756

A contemporary Spanish map used the nomenclature “Island of San Pedro or New Georgia” and attributes the discovery of some other – in-existent- islands to De La Roche.⁴⁵⁷ One of the first recorded official activities concerning South Georgia is the dispatch, by Political and Military Commandment of the Malvinas Commander of the

⁴⁵⁷ Mapa general de América o Hemisferio Occidental that includes the new discoveries and corrections of previous ones, by Tomás Lopez, *Géografos de los Dominios de S.M.*, Madrid, 1792? (Atlas attached to the Counter-Memorial of Chile in the Beagle Canal case, 1974, No154).

Falklands/Malvinas, Luis Vernet, of a team to rescue castaways who found themselves in South Georgia. This happened between August and October 1829.⁴⁵⁸

Aside from a lengthy period of visits by whalers and seal hunters of various nationalities, the first formal activity related to South Georgia was the creation of the “Compañía Argentina de Pesca” (Argentine Fishing Company) by Norwegian businessmen in Buenos Aires in 1904. Their aim was to settle in South Georgia, and with that aim the business was set up under Argentine legislation. Once settled, they received the assistance of Argentine war ships that for decades supplied fuel to the islands without any British reaction. Argentina also installed a telegraph station, and members of Argentine military crews conducted various deployments on the island, without ever being disturbed by British authorities.⁴⁵⁹

As with the Falklands/Malvinas, once again the British Government acted only when Argentina carried out concrete activities in a southern territory, this time South Georgia. It was thus that, taking advantage of their control over the Falklands/Malvinas, they imposed on the Argentine Fishing Company the obligation to seek permission and pay taxes to the British authorities established in the Falklands/Malvinas. This time, the British authors follow the official position declared in the claim over Antarctica, in which the United Kingdom emphasises the lack of Argentine protest over the obligation imposed on the Argentine Fishing Company. Another estoppel can be opposed to the United Kingdom. The British government did not consider that its silence over the Argentine concessions of 1823 and 1828 in the Falklands/Malvinas prevented it from reclaiming its sovereignty. The Argentine Government had every reason to believe that, if the British Government were coherent in its conduct, a protest would be unnecessary. The fact is that Argentina continued to exercise acts of authority over South Georgia during the period in question, for

⁴⁵⁸ See for example, the chronicles of August 16th and October 20th, 1829 in Mrs Vernet’s diary. The original is held in AGN. There are many publications of this book. It is published for the first time in Gómez Langenheim, A., *op. cit.*, T. I, pp. 266-284. There is an English-Spanish edition, annotated and commented by her great grandson Ernesto Greenleaf Cilley Hernández, *María Sáez de Vernet, cronista de nuestra soberanía en Malvinas*, Buenos Aires, Ed. Port Luis, 1989.

⁴⁵⁹ Fitte, Ernesto J., *La disputa con Gran Bretaña por las islas del Atlántico Sur*, Buenos Aires, Emecé, 1968, p. 93.

example through the aforementioned presence of war ships, its declaration before the Universal Postal Union in 1927, considering that it exercised *de jure* and *de facto* sovereignty over South Georgia, and the dispatch of an official of the Ministry of Inland Revenue in 1947. It was only in 1950 that the United Kingdom seized the Argentine meteorological station.⁴⁶⁰

As far as the South Sandwich Islands are concerned, it is Argentina who can invoke the earlier and greater, *effectivités*, such as the establishment of beacons in 1950, the establishment of the Teniente Esquivel shelter in 1955 and the Corbeta Uruguay scientific station in 1976, which was only objected to by the British Government in 1978 and expelled by force in June 1982. Until the present day, no other State can invoke a greater physical presence in the South Sandwich Islands than Argentina.

Furthermore, the South Georgia and South Sandwich Islands are part of the Falklands/Malvinas issue, as acknowledged by the British Government – for instance, in accepting that the 1971 Communications Agreement relating to the Falklands/Malvinas extended to the archipelagos. The British Government itself, in an application before the International Court of Justice against Argentina over Antarctica – over which the Court did not have any basis for jurisdiction – considered that the Letter Patent of 1843 for the establishment of a Government in the Falkland Islands and its Dependencies extended to South Georgia and South Sandwich.⁴⁶¹ Therefore, any British claim regarding these two archipelagos is subordinated to its purported sovereignty over the Falklands/Malvinas. If it does not have sovereignty over the Falklands/Malvinas, it also does not have sovereignty over the other two archipelagos.

Q. The 1955 British application to the ICJ in the *Antarctica* cases

The British pamphlet is also silent over two key elements of the claim presented by the United Kingdom against Argentina before the International Court of Justice in 1955 in the

⁴⁶⁰ Ibid., pp. 123-125.

⁴⁶¹ Antarctica Cases, ICJ Pleadings, p. 13.

Antarctica case. For the avoidance of doubt and of any potential Argentine action in that respect, the British application states very clearly that the United Kingdom accepts the jurisdiction of the Court only over the so-called “Falkland Islands Dependencies” and not the Falklands/Malvinas themselves. These two notes are part of the application: “*It results from the present Application that the United Kingdom Government accepts the jurisdiction of the Court in respect of the questions hereby submitted to it, and in particular that of the title to sovereignty over the islands and lands of the Falkland Islands Dependencies. The present Application does not constitute a submission to the jurisdiction of the Court in any other respect, or as regards the title to sovereignty over any territory outside the Dependencies.*”⁴⁶² “*It will be understood that although, for reason of convenience, the territories to which the present Application relates were constituted Dependencies of the Falkland Islands for administrative purposes, the British title to them is a separate and independent one, which in no way derives from or depends on the title to the Falkland Islands themselves.*”⁴⁶³

It is hard to conceal the awareness of the weakness of British title that emerges from these two notes in Britain’s Application.

The British pamphlet also ignores the main reason invoked by Argentina for refusing the British offer to submit those territories to the decision of the Hague Court: the absence of any reference to the issue of the Falkland/Malvinas Islands. In the Note that the Argentine Ministry of Foreign Affairs sent to the British Embassy in Buenos Aires on May 4, 1955 in response to the British proposal, it is highlighted that: “*(...) Her Majesty’s Government excises the bottom issue, as if all could be reduced to a single aspect, mentioning as the sole problem that needs solution the one referring to the Antarctic territories it demands and those that qualifies as dependencies of the Malvinas Islands (...) The Argentine Government cannot conceive nor accept as friendly nor juridical a proposal that has as its heart to sustain that usurpation (...). Consequently, while there is no resolution in the indicated direction on the pre-existing issue that has just been mentioned, it is not correct*

⁴⁶² *Antarctica Cases*, ICJ Pleadings 1955, p. 8, note 1.

⁴⁶³ *Ibid.*, p. 9, note 2.

to propose, as Great Britain does, the subject of the issue to the International Court of Justice in Hague or an ad hoc arbitration tribunal."⁴⁶⁴

Conclusion

This chapter has thoroughly demonstrated not only how unjustified Pascoe and Pepper's analysis of the situation after the British seizure in 1833 is, but also the lack of scientific rigour of their publication, to say the least. Argentina's attitude since 1833 has been clear and coherent in maintaining its sovereign rights. Even during periods of lessened activity, between 1850 and 1884, its conduct demonstrates the absence of abandonment of its claim or of acceptance of a transfer of sovereignty. The British attitude of imposing its position of power and its "*fait accompli*" policy is also patent. Its persistent denial has been what has kept the issue pending since 1833. Its political and diplomatic officials, even the most high-ranking, have recognized that Argentina maintained its claim, even at times when the authors of the British pamphlet considered that it had abandoned it. It is also clear that the argument based on the Arana-Southern Treaty has no grounds, historical or legal. There was no Argentine acquiescence, and the argument of prescriptive acquisition cannot validly be invoked. Instead of proving the opposite, the cartography used by Pascoe and Pepper strengthens Argentina's position. Their omissions, highlighted in this chapter, not only prove the constancy of Argentina's claim over time, but also an identical British insistence on keeping the issue open indefinitely by reason of its territorial control. There is no doubt that it is the British Government who bears responsibility for this dispute continuing to be unresolved.

⁴⁶⁴ Id., p. 92.

Chapter VI

The population of the islands and the right of peoples to self-determination

Introduction

The British pamphlet ends with three sections, addressing "self-determination", "the people", and "the Falklands dispute in the international field". The present chapter deals with these three topics, and with the alleged "self-government" of the islands. As in previous sections of the pamphlet, its authors make an effort at revisionism to enhance the credibility of the applicability of the right of peoples to self-determination to the population established by the United Kingdom in the Falkland/Malvinas Islands, despite the fact that the competent bodies of the United Nations have never applied this principle to the British residents of the territory in dispute between Argentina and the United Kingdom.

A. "The people"

In line with the latest British strategy, the pamphlet goes to great lengths to demonstrate that the population established by the United Kingdom in the islands is not British, but "multinational". This is in flagrant contradiction with the description of the situation previously made by Great Britain. In 1982, the British representative to the United Nations, Sir Anthony Parsons, affirmed that "*the British people of the Islands* had lived peacefully in British territory for a century and a half".⁴⁶⁵ The official analysis accompanying the figures from the census carried out by colonial authorities in 2001 asserted that: "*the inherent British nature of the Islands remains practically unaltered*".⁴⁶⁶ But there is no longer a concern to point out the British character of the population. The aim is to attempt to detach the population from Britain's use of force and its consequences, in order to justify

⁴⁶⁵ United Nations doc S/PV.2360, May 21st, 1982, p. 10, par. 102.

⁴⁶⁶ Malvinas Islands Census of 2001, abridged report.

erroneously applying the right of peoples to self-determination to the case of the Falklands/Malvinas.

The pamphlet mentions that the population of the islands “slowly increased; several people who arrived in the early 1840s still have descendants in the islands now in the 7th or 8th generation. They have become the natural population of the Falklands”.⁴⁶⁷ What the authors forget is that this “natural population” was essentially the result of the arrival of new British citizens from the metropolis after the colony was officially constituted in 1843, the concession of lands to British subjects only, and the appointment of officials from Great Britain. Any temporary South American workers were never considered part of the permanent population. The presence of *gauchos* from the Río de la Plata, mostly employed by the British subject Withington, who had originally received a concession from Vernet and Lafone, another British subject, decreased as cattle was mostly replaced by sheep as the main form of livestock farmed on the islands. The British governor Moody advised the settlement on the islands of populations coming from Northern Scotland and Ireland.⁴⁶⁸ British legislation also clearly distinguished between His Majesty’s subjects and “foreign” inhabitants.

The pamphlet also fails to mention the fact that the British government prohibited Vernet, the person who had made the greatest effort to bring civilization to the Falklands/Malvinas, from returning to the islands. In a note from the Colonial Office to the Foreign Office from 1836, the prohibition is sharply reaffirmed:

In the month of March last, H. M. Govt. having received information, which led them to believe that Mr. Vernet was at that time preparing himself to proceed to the Falkland Islands, instructions were given to the Rear Admiral Commanding on the S. American Station to dispatch a Naval Officer to those Islands for the express purpose of warning Mr. Vernet to desist from trespassing on the property of the

⁴⁶⁷ Pascoe, Graham and Pepper, Peter, *op. cit.*, p. 21.

⁴⁶⁸ Tatham, David, *The Governor’s Year. Moody at Port Louis*. Port Stanley: Printed at the Government Printing Office, 1993, pp. 25-26, cit. in Pastorino, Ana, Álvarez, Maximiliano and Rosa, Gabriel, *Colonialismo en el Siglo XXI*, Buenos Aires, Edulp, 2015, p. 13.

British Crown, which, in consequence of the information contained in Your Desp. will now be repeated to the Rear Adm. I have therefore to direct you to state to Mr. Vernet that any attempt on his part to carry into execution the intention announced to you of returning to the Falkland Islands will be useless, as H. M. Govt. have determined not to permit him to do so.⁴⁶⁹

Great Britain's current omission to mention this prohibition, which prevented Vernet from continuing with his enterprise in the islands, is quite enlightening. What the British pamphlet tries to deflect attention from is that the 1833 use of force put an end to the greatest development of civilization in the entire history of the islands, to be replaced by British colonisation. This original defect in itself defeats all British arguments concerning the alleged application of the right of peoples to self-determination to the population that the United Kingdom established as a consequence of its seizure of the islands.

Ever since its 1833 occupation, Britain's strategy has been clear: using the population as a political instrument. First, by evicting Argentine settlers and leaving behind a minimum population, mostly foreigners, to ensure that the existing livestock and the minimum navigation services provided by the islands did not go to waste. The artifice currently used, arguing that the twenty-odd people who remained on the islands after the Argentine eviction were the original nucleus of the present-day population, is completely unfounded. In 1851, 18 years after the dispossession, the population was of 287 people, most of whom had arrived in at the close of the previous decade, upon the establishment of the British colony in 1843.

The numbers are informative as to the composition of the islands' population. According to the 2012 census,⁴⁷⁰ the population currently numbers 2.840 (including 369 civilians serving at the United Kingdom's military base at Mount Pleasant).⁴⁷¹ According to the 1911 census, the number of inhabitants totalled 2.272, meaning that in a one hundred-year span the population only increased by 8%. If we take the example the Province of Tierra del Fuego,

⁴⁶⁹ Stephen to Mandeville, No12. Foreign Office, November 2nd, 1836, *PRO, FO 6/501*, fs. 205-206.

⁴⁷⁰ Falkland Islands Census 2012; Statistics and Data tables, April 2013.

⁴⁷¹ Pastorino, Ana *et al.*, *op. cit.*, p. 112.

which has similar geographic and climactic conditions, its population increased from 2.504 inhabitants in 1914 to 127.205 in 2010.⁴⁷² According to the 2012 census, the number of persons born and residing on the islands was 1.339, while 798 were born in the United Kingdom (excluding the military and civil staff of the Mount Pleasant base). In a 66-year period (1946-2012), the number of people born in the Falkland/Malvinas Islands decreased by 33% (from 2001 inhabitants to 1339), while those born in the United Kingdom over the same period increased by 386% (from 164 inhabitants to 798).⁴⁷³ A similar growth pattern can be observed in the group of people born in British overseas territories and Commonwealth countries, with 3.660% (10 inhabitants in 1953 to 366 in 2012).⁴⁷⁴ In sum, taking as a basis the 2.840 inhabitants of the islands, the number of people born on the islands represents only 47.1% of the population, that is to say, less than half the current inhabitants of the islands were born there, whereas most of them (52.9%) come from other countries.⁴⁷⁵

Every year, between 10 and 25% of the population leaves the islands, and a similar proportion replaces these the following year. For the last 20 years, according to census data for the period 1991-2012, the percentage of inhabitants who resided in the Falklands/Malvinas for less than 10 years was 37%, with peaks of 41%.⁴⁷⁶ In the last decade (2001, 2006 and 2012 censuses)⁴⁷⁷ 1.172 people who lived on the islands in 2001 were no longer living there in 2012, whereas only 168 people had died. Therefore, 1.004 people emigrated from the islands in those 10 years, that is to say 35% of the population of the islands emigrated in a decade. A similar change in population every ten years can hardly constitute a separated “people” in the international legal sense of the term.

The United Kingdom implements migration policies to ensure that emigrants are constantly replaced.⁴⁷⁸ The 2012 census indicates that 1.741 people had been living in the islands for

⁴⁷² Statistics of Tierra del Fuego Province in Pastorino, Ana *et al.*, *op. cit.*, p. 113.

⁴⁷³ *Ibid.*, p. 115.

⁴⁷⁴ *Ibid.*, p. 117.

⁴⁷⁵ *Ibid.*, pp. 118-119.

⁴⁷⁶ *Ibid.*, p. 131.

⁴⁷⁷ See: Falkland Islands, Report of Census 2001, 8th October 2001; Falkland Islands, Report of Census 2006, October 2006 y Falkland Islands Census 2012: Statistics and Data Tables, April 2013.

⁴⁷⁸ Pastorino, Ana *et al.*, *op. cit.*, p. 134.

over 10 years, and 1.099 came to live there in the last decade. If we subtract from this figure the 306 births of the period, we come to the conclusion that 793 people immigrated to the islands in the last 10 years, that is, 28% of the entire population.⁴⁷⁹ Therefore, in a 10- year span, 1004 people abandoned the islands and 793 arrived, which means a changeover of almost a third of the entire population of the islands. A significant part of the population work as public servants, for which personnel is brought from the metropolis. The second main “village” of the islands, excluding military personnel, is the civil staff of the military base: 369 people (14.87% of the population). The Mount Pleasant base has a military staff of approximately 1500 individuals – the highest rate of soldiers per inhabitant in the world.

The less profitable jobs are carried out by immigrants from Chile and Saint Helena. However, only British citizens have the right to vote. What is more, Argentine citizens are discriminated against. Immediately after the 1982 war, Argentine residents on the islands who worked in the oil and transport services were expelled. For 17 years no Argentine passport holder had the right to visit the islands, not even as a tourist. An unwritten law forbids Argentines from owning property, to the point that Argentine heirs were obliged to sell the property they had inherited.⁴⁸⁰

With the aim of concealing the fact that the overwhelming majority of the population is British and that only a minority was born on the islands, the 2012 census included for the first time a question about people’s “national identity”. This was the first information to be made public, instead of the figures regarding nationality and place of birth, as in previous censuses. 59% considered themselves “Falkland Islanders”, and 29% “British”. Evidently, many of those who answered “Falkland Islanders” are in fact British citizens who emigrated from the United Kingdom. In reality, many have frequently been the supposed “spokespersons” of the islanders, whether members of the government or legislature, or pundits in the islands’ media.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ This was the case of the Hamilton family, whose ancestors arrived in Patagonia from the Falklands/Malvinas.

The population of the Falkland/Malvinas Islands is mainly temporary, constantly renewed, and has a completely artificial demographic growth. Despite the efforts made to create a “national” identity on the islands, a population with these characteristics does not make up an ethnically and culturally distinct group to the administering power, a separate people subject of the right to self-determination.

Of course, it cannot be denied that islands have their own traditions, although many of these are shared with the continent. The traditions of the countryside (called “the camp”, similar to the Spanish word “campo”, instead of “countryside”), especially those that are horse-related, and the use of the word “chey” (in Spanish “che”), as well as the taste for *mate*, which existed until recently, recall a past that bore a strong continental influence. There are also notable differences between the real islanders and those who arrived from the metropolis. As we shall see, these specificities, as the same that might occur in the various regions or localities of the same country, do not make the territory and its inhabitants subjects entitled to the right of self-determination. We will first analyse the alleged “self-government” of the islands.

B. The alleged “self-government”

Pascoe and Pepper attempt to prove that the islanders govern themselves in a modern democracy and that their links to the metropolis are almost non-existent. They maintain that the popular vote is of great influence for decision-making and that the Governor, who is elected from London without the participation of the islanders, barely intervenes in decisions.⁴⁸¹

The so-called “Constitution of the Falkland Islands”, approved in November 2008 by Her Britannic Majesty, is the cornerstone of the colonial regime the United Kingdom maintains in the Falklands/Malvinas. Article 11 reserves the absolute power for the Queen to pass

⁴⁸¹ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 36-37.

laws for “the peace, order and good government” of the islands, as well as to amend legislation currently in force.⁴⁸²

The legislative assembly is composed of eight members elected for a four-year term; two members elected by the Governor (“Chief Executive and Director of Finance”) who can take part in procedures and have no voting rights, and the “Commander of the British Forces and the Attorney General”, who are both from the United Kingdom, like the Chief Executive and Director of Finance. In order to have the right to vote and be elected to the assembly, the requirements are to be over 18 years of age and have “Falkland Islands status”.⁴⁸³ This status, granted by the governor, requires British nationality and is the instrument used by the British government to control who can vote and be elected on the islands.⁴⁸⁴ For the past 20 years, almost 40% of positions in the assembly have been filled by people born in the United Kingdom.⁴⁸⁵

The judiciary is presided over by the “Chief Justice”, who is the President of the Supreme Court, resides in the United Kingdom and visits the islands at least once a year. There also exists a “Court of Appeals” and a “Senior Magistrate”. The Chief Justice, the President of the Court of Appeals, the Appeals Judges as well as the Senior Magistrate are appointed and removed from office by the Governor of the islands. All come from the United Kingdom.

The Governor of the islands, elected in London by the Foreign Office, is a British career diplomat who occupies the position for an unlimited duration. He has broad political power

⁴⁸² Pastorino, Ana *et al.*, *op. cit.*, p. 57.

⁴⁸³ This status grants the right to vote and the possibility of being elected as part of the legislative assembly, to acquire lands or property in the islands, to enjoy an individual fishing quota and to register ships in the Falklands/Malvinas. It also grants, among other rights, the right to the colonial government’s support for higher education, to not be subjected to immigration controls, to family benefits, to be selected for housing granted by the colonial government and free medical care. The requirements to access this status are to be a “citizen” by birth whose father or mother are permanent residents at the time of the birth and/or hold the “Falkland status”. A “citizen” is every “person who bears the British citizenship, a British citizen of overseas territories or a British citizen of overseas, or who for a certain period has been a citizen of the United Kingdom and Colonies or British citizen of the territories.” This status was previously available to citizens of the Commonwealth, but this possibility was abrogated. The status is granted by the Governor on the advice of the Executive Council.

⁴⁸⁴ Pastorino, Ana *et al.*, *op. cit.*, pp. 71-72.

⁴⁸⁵ *Ibid.*

in the executive, legislative and judiciary, namely: a) the power to dissolve the legislative assembly,⁴⁸⁶ b) draft bills passed by the assembly are not in force until he approves them at his discretion,⁴⁸⁷ c) he may also, at his sole discretion, pass any draft bill or motion presented or put forward in a session of the assembly that the assembly itself has not approved,⁴⁸⁸ d) he can act at his sole discretion, even against the opinion of the islands' executive council (the advisory organ of the executive power, partly composed of members of the legislative assembly),⁴⁸⁹ e) he is in charge of appointing and removing the higher-level judges of the islands,⁴⁹⁰ f) he can grant and dispose of land concessions on behalf of Her Britannic Majesty,⁴⁹¹ g) he has broad emergency powers based on an almost eighty-year old legal instrument, the "Emergency Powers Order in Council 1939", created to apply in the colonies, protectorates and domains that the United Kingdom held in the 1930s. This ordinance grants him a number of powers, including those to detain, deport and refuse entry to individuals, to seize properties and land on behalf of the Queen and to reform, suspend, or apply any law, including by amendment,⁴⁹² h) he is in charge of selecting the most important civil servants, such as the Chief Executive, Chief of police, the Attorney General and the official Commander of the islands' defence forces,⁴⁹³ i) the only limits to his legislative function are set by the Queen and not the islanders.⁴⁹⁴

In sum, the alleged self-government of the islands is nothing more than the old British colonial system under a different guise. British power is so pervasive and influential on the islands that even the constitution itself openly enshrines British supremacy over the islands and their inhabitants in the political, administrative and institutional arena.⁴⁹⁵

⁴⁸⁶ Article 34, "The Falkland Islands Constitution Order 2008".

⁴⁸⁷ Article 52, inc. 1, *Ibid.*

⁴⁸⁸ Article 55, *Ibid.*

⁴⁸⁹ Article 67, *Ibid.*

⁴⁹⁰ Article 88 and 90, *Ibid.*

⁴⁹¹ Article 73, *Ibid.*

⁴⁹² Article 22 in Pastorino, Ana *et al.*, *op. cit.*, p. 69.

⁴⁹³ Article 83 and 84, "The Falkland Islands Constitution Order 2008".

⁴⁹⁴ Article 54, *Ibid.*

⁴⁹⁵ Pastorino, Ana *et al.*, *op. cit.*, p. 87.



Figure 30 *Inauguration of Stanley Airport, builded by the Argentine Air Force, 1972*

A clear example of Great Britain's real power over what are currently known as the "British overseas territories" is that of the Turks and Caicos Islands in the Caribbean. In August 2009, the government in London decided to dissolve the democratically elected government of the islands "due to the high probability of systemic corruption." It disregarded the forceful protests of the Caribbean Community (CARICOM) and indefinitely postponed the democratic election of a new government. The governor appointed by London fulfilled both the executive and legislative functions. The truth is that the British government still exercises close control over its colonial territories, and manipulates the right of peoples to self-determination to invoke it when this suits it best, to

avoid putting an end to the ongoing territorial disputes it is involved in through its occupation of the territories of other States.⁴⁹⁶

C. The manipulation of the right of peoples to self-determination by history's principal colonial power

Pascoe and Pepper briefly mention the principle of the right of peoples to self-determination.⁴⁹⁷ It is remarkable how few words they devote to what is supposedly Britain's main argument by which the current present *de facto* situation, and the opposition to engaging in negotiations with Argentina, are justified. It is interesting to observe that they suffer the same shortcoming as the British thesis: they fail to point out the reasons why the islanders should be considered a separate people entitled to the right of self-determination.

The principle of the right of peoples to self-determination is a fundamental principle of contemporary international law. Thanks to this principle, numerous oppressed peoples were able to create their own independent States during the process of decolonisation that took place in the second half of the 20th century. For a number of years, the United Kingdom and other colonial powers denied the legal – and therefore binding – nature of the principle of self-determination. They only recognised the importance of this right in the 1960s, when the independence process of their ex-colonies was essentially over. In the case of the United Kingdom, this recognition had the aim of justifying its position with respect to the cases of the Falklands/Malvinas and Gibraltar.

This is the view of the principle of self-determination that the British government itself gave in the arbitral proceedings brought by Mauritius against the United Kingdom in the case of the Chagos Marine Protected Area: “In November 1965, there was no rule of international law concerning self-determination (and a fortiori no such rule of *jus cogens*)

⁴⁹⁶ “CARICOM condemns British takeover in Turks and Caicos”, <http://www.stabroeknews.com/2009/archives/03/25/caricom-condemns-constitutional-disruption-in-turks-and-caicos/>

⁴⁹⁷ Pascoe, Graham and Pepper, Peter, *op. cit.*, pp. 36-37.

binding on the United Kingdom such as would have precluded the establishment of the BIOT [British Indian Ocean Territory]”.⁴⁹⁸

They explain their position as follows:

“The United Kingdom had consistently, throughout the 1950s and 1960s, objected to references to a “right” of self-determination in United Nations instruments, including in the drafts of the International Covenants of 1966. It did not, in 1965, accept that the principle of self-determination had hardened into a legal right, still less that the “prohibition of the denial of the right to self-determination” was a rule of *jus cogens*.”⁴⁹⁹

Resolution 2625 (XXV) of the General Assembly of the United Nations was adopted in 1970 and contains the Declaration on Principles of International Law. Among these principles, it includes that of the right of peoples to self-determination. At the time, the British position was as follows:

“although the principle of self-determination is a formative principle of great potency, it is not capable of sufficiently exact definition in relation to particular circumstances to amount to a legal right, and it is not recognized as such either by the Charter of the United Nations or by customary international law.”⁵⁰⁰

In the case of the Falklands/Malvinas, the principle of the right of peoples to self-determination is manipulated and wrongly invoked by the British government with two main objectives: to maintain Britain’s presence in the South Atlantic and to avoid settling the dispute over sovereignty with Argentina that has existed since 1833.

In international law, not every human community established in a given geographical territory holds the right of self-determination. This is why the law distinguishes between

⁴⁹⁸ Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Counter-Memorial of the United Kingdom, July 15th, 2013, par. 7.14.

⁴⁹⁹ *Id.*, par. 7.17.

⁵⁰⁰ *Id.*, par. 7.27.

“peoples” and “minorities”, no matter whether national, religious, linguistic, ethnic, etc. While the first group is entitled to the right of self-determination, the second is not, although minorities are entitled to a set of rights aiming at guaranteeing and preserving their identities within the territorial context of the State they live in.⁵⁰¹ Indigenous peoples are also distinguished as a separate category to whom the Declaration of the United Nations recognises a right to self-determination,⁵⁰² but only in its internal aspect. The self-proclamation of a “people” and a subsequent claim of entitlement to the right to self-determination are also insufficient. In this regard, the International Court of Justice, in the *Western Sahara* case, stated that:

“The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of people, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. *Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination, or on the conviction that a consultation was totally unnecessary, in view of special circumstances.*”⁵⁰³

None of the more than 40 resolutions passed by the General Assembly and the Decolonization Committee of the United Nations⁵⁰⁴ has recognized the existence of a

⁵⁰¹ GA Res. 47/135. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

⁵⁰² GA Res. 61/295. United Nations Declaration on the rights of indigenous peoples.

⁵⁰³ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 33, para. 59.

⁵⁰⁴ General Assembly Resolutions 1514 (XV), December 14th 1960, 2065 (XX), December 16th 1965, 3160 (XXVIII), December 14th 1973, 31/49, December 1st 1976, 37/9, November 4th 1982, 38/12, November 16th 1983, 39/6, November 1st 1984, 40/21, November 27th 1985, 41/40, November 25th 1986, 42/19, November 17th 1987, and 43/25, November 17th 1988; the Resolutions of the Special Committee A/AC.109/756, September 1st 1983, A/AC.109/793, August 21st 1984, A/AC.109/842, August 9th 1985, A/AC.109/885, August 14th 1986, A/AC.109/930, August 14th 1987, A/AC.109/972, August 11th 1988, A/AC.109/1008, August 15th 1989, A/AC.109/1050, August 14th 1990, A/AC.109/1087, August 14th 1991, A/AC.109/1132, July 29th 1992, A/AC.109/1169, July 14th 1993, A/AC.109/2003, July 12th 1994, A/AC.109/2033, July 13th 1995, A/AC.109/2062, July 22nd 1996, A/AC.109/2096, June 16th 1997, A/AC.109/2122, July 6th 1998, A/AC.109/1999/23, July 1st 1999, A/AC.109/2000/23, July 11th 2000, A/AC.109/2001/25, June 29th 2001,

separate people on the territory of the Falklands/Malvinas, and these resolutions have therefore taken other paths regarding the manner in which to proceed to the decolonization of the islands. The position of the United Nations as to how to put an end to the colonial situation is negotiation between Argentina and the United Kingdom to solve the dispute over sovereignty, taking into account the interests of the population of the islands.⁵⁰⁵ Not only, but it is worth remembering that when the United Kingdom attempted to incorporate an express mention of the right to self-determination in what *a posteriori* became Resolution 40/21 of November 27th, 1985, the General Assembly rejected it outright. The reason is simple: unlike ordinary cases of colonialism, that is, the oppression of an entire people by a European power, the Falklands/Malvinas case concerns the eviction of a newly born independent State from an insular, scarcely populated portion of its territory lacking any original population, by the most powerful colonial nation of the time.

Unlike what occurred in other regions of the world, such as the Caribbean, in which the colonial power massively imported a population of slaves that gave rise to the formation of a new people, in the case of the Falklands/Malvinas the scarce population brought to the islands by the British government were British settlers. At the same time, the possibility of entering into negotiations with Argentina was flatly denied, in spite of the latter's protests – a clear example of a policy of strength.

The fact that the present-day inhabitants of the Falklands/Malvinas do not constitute a separate people holder of the right of self-determination does not mean they do not enjoy other rights. They are of course entitled to human rights, both individually and collectively. Argentina has committed itself in its Constitution to respect the inhabitants' way of life.⁵⁰⁶ Quite simply, sixteen hundred and fifty British citizens do not have the right to decide a

A/AC.109/2002/25, June 19th 2002, A/AC.109/2003/24, June 16th 2003, the Resolution passed on June 18th 2004, the Resolution passed on June 15th 2005, the Resolution passed on June 15th 2006, the Resolution passed on June 21st 2007, the Resolution passed on June 12th 2008, the Resolution passed on June 18th 2009 and the Resolution passed on June 24th 2010, Security Council Resolutions 502 (1982), April 3rd 1982, and 505 (1982), May 26th 1982.

⁵⁰⁵ General Assembly Resolution 2065 (XX), December 16th 1965.

⁵⁰⁶ First transitional disposition, Constitution of the Argentine Republic, 1994.

dispute between Argentina and the United Kingdom which involves more than three million square kilometres of land and sea, a surface bigger than continental Argentina and twice as big as the United Kingdom.

Many territorial disputes exist throughout the world, many of them involving inhabited territories. Some have been brought before the International Court of Justice. The Court has decided the sovereignty of these territories on the basis of the titles invoked by the parties, and not their inhabitants' nationality or wishes. In the *El Salvador/Honduras* case, between 10.000 and 30.000 Salvadorean citizens found themselves on the Honduran side of the boundary laid down by the judgment.⁵⁰⁷ In the case of *Cameroon v. Nigeria*, more than 100.000 Nigerians inhabit a territory which the Court recognized as belonging to Cameroon.⁵⁰⁸ The Court did the same in its judgment in the *Burkina Faso/Niger* case.⁵⁰⁹ In all these situations, the Court reminded the parties of their obligation to respect the rights of the inhabitants of the territory in dispute, but never subjected its decision to the will of the inhabitants. Other examples may be given. At the end of World War I, France asserted that it was not required to hold a referendum in Alsace-Lorraine, since from 1871 – the year the territory was transferred to Germany – thousands of French residents had preferred to leave the territory rather than live under German sovereignty, while thousands of Germans had settled in the territory. When the Swedish population of the Aaland Islands, which were under Finnish sovereignty, claimed self-determination to be integrated with Sweden, the answer was that they were entitled to broad autonomy, but under Finnish sovereignty.

The British pamphlet mentioned in passing the principle of territorial integrity. It recognizes that the Declaration on decolonization contained in Resolution 1514 (XV) “also contains a limitation”: paragraph 6, which condemns any attempt aiming at disrupting national unity and territorial integrity. The pamphlet states that Argentina's argument “is weak”, and reiterates its historical manipulation of the absence of Argentine sovereignty or

⁵⁰⁷ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras - Nicaragua intervening)*, judgment of September 11th, 1992.

⁵⁰⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria – Equatorial Guinea intervening)*, judgment of October 10th, 2002.

⁵⁰⁹ *Frontier Dispute (Burkina Faso/Niger)*, judgment of April 16th, 2013.

its “concession” [*sic*] by means of the Arana-Southern Treaty.⁵¹⁰ Britain’s official position has recognized the importance of paragraph 6 of Resolution 1514 (XV). In its Counter-Memorial in the aforementioned *Chagos* case, the United Kingdom affirms that this paragraph “was aimed at securing the political objective of precluding demands for decolonization leading to the dismemberment of the territory of a sovereign State”.⁵¹¹ If neither the General Assembly of the United Nations, nor its Decolonization Committee have applied the principle of self-determination to the current inhabitants of the Falkland/Malvinas Islands, is precisely because they have correctly interpreted the applicability of Resolution 1514 (XV) to that particular case. On the one hand, they take into consideration the respect for Argentina’s territorial integrity; on the other, they do not determine there is a human community entitled to the right of self-determination in the case of the Falklands/Malvinas.

If the United Kingdom wishes that its citizens in the Falklands/Malvinas should decide the fate of the territory they inhabit, that territory should be British. On the contrary, there is a dispute over sovereignty with Argentina. According to Rosalyn Higgins, former British judge and former President of the International Court of Justice: “Until it is determined where territorial sovereignty lies, it is impossible to see if the inhabitants have the right of self-determination”.⁵¹² In other words, according to the distinguished British jurist, the Anglo-Argentine territorial dispute must first be solved, in order to know whether the British inhabitants can decide what they want for their territory. This clearly means that the alleged “self-determination” of the British inhabitants cannot be imposed to Argentina, nor can it constitute an excuse to leave the dispute over sovereignty unresolved.

The British argument of self-determination in the case of the Falklands/Malvinas is also seriously undermined by the United Kingdom’s indisputably inconsistent policy. There was no “self-determination” when they expelled two thousand native inhabitants from the

⁵¹⁰ Pascoe, Graham and Pepper, Peter, *op. cit.*, p.39.

⁵¹¹ Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Counter Memorial of the United Kingdom, July 15th 2013, par. 7.21.

⁵¹² Higgins, Rosalyn, “International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law”, *Hague Academy of International Law Collected Courses*, 1991, vol. 230, p. 174.

Chagos archipelago. In 1966, the British government leased Diego García Island in the Chagos archipelago to the United States, for it to build a military base on the island.⁵¹³ In 1967, the British government bought most of the plantations on the island, closing them down soon after and depriving the population of basic means of survival such as food and medicine, forcing them to leave the island. Then, the inhabitants were informed that they would be evicted, with no prior notice or consultation. Armed men organised the islanders and these were sent in groups to Mauritius and the Seychelles. In 1971, the United Kingdom ended this process by issuing an Immigration Ordinance forever prohibiting the Chagos islanders from returning to their homes.⁵¹⁴ The British diplomat Colin Roberts, “Governor” of the Falklands/Malvinas since 2014, said to American diplomats that the real aim of creating the Chagos Marine Protected Area was to prevent the Chagossians from returning home.⁵¹⁵

There was also no “self-determination referendum” when Margaret Thatcher’s government returned Hong Kong to China, its legitimate owner. Even less did it grant full British citizenship to the five million Chinese residents in the territory, as happened with the two thousand inhabitants of the Falklands/Malvinas whose origins were European. In other words, self-determination is a specious argument being used to maintain one of the last vestiges of the British Empire, with no legal basis whatsoever. The population is a simple adjustment variable to maintain their colonial remnants around the world. When the population becomes an obstacle, it is expelled, as occurred in Diego García and Banaba Islands; when it can be used as a tool to legitimise occupation, a supposed right to self-determination is invoked, as in the case of the Falklands/Malvinas.⁵¹⁶

Conclusion

Britain’s manipulation of the principle of self-determination is clear for a number of reasons: 1) because the General Assembly of the United Nations, and not the colonial

⁵¹³ Pastorino, Ana *et al.*, *op. cit.*, p. 30.

⁵¹⁴ *Id.*, p. 31.

⁵¹⁵ Wikileaks, HMG Floats proposal for marine reserve covering the Archipelago (British Indian Ocean Territory), 15th May 2009, in Pastorino, Ana *et al.*, *op. cit.*, pp. 33-34.

⁵¹⁶ *Id.*, p. 140.

power, is the body in charge of determining the procedures to be followed in order to put an end to a colonial situation, and the highest organ of the United Nations has never applied such a principle to the current inhabitants of the islands; 2) because this is a special case of colonialism in which the victim of the colonial action was a recently established State; 3) because after the dispossession of Argentina, the British government established their own settlers; 4) because since then, it has controlled the migration policies of this isolated and scarcely populated territory; 5) because the current residents do not constitute a separate “people” who is a victim of colonial actions; 6) because the United Kingdom, after evicting Argentina and introducing its own settlers, rejected all proposals to negotiate and arbitration put forward by Argentina, while consolidating its presence in the islands.

Accepting that the British subjects living in the islands may themselves decide the Anglo-Argentine dispute would mean a flagrant and arbitrary example of imposing a *fait accompli*. If there is a people who is a victim of colonialism to whom the principle of self-determination can be applied here, that people is the *Argentine people*.

General Conclusions

The sole purpose of this work is to refute the distortions and cover-ups of the British pamphlet and to lay bare the clear manipulation of history and law carried out by Messrs Pascoe and Pepper. The British pamphlet is useful to show the fallacy of the arguments used by the British Government in taking the islands from Argentina. The argument of discovery is false. The argument of occupation equally so: neither was the fort in Port Egmont the first human settlement in the islands, nor did Great Britain have exclusive possession of the latter. According to the British pamphlet, the British-Hispanic agreement implied a mutual reservation of sovereignty. If that was the case, it is hard to see how the British Government can invoke this agreement as Spanish recognition of British sovereignty, as it attempted to have the Argentine Government believe in the only replies it gave to Argentina's protests in the 1830's.

The simple truth is that the British Government only "remembered" about the Falklands/Malvinas when Argentina's significant effort in the islands that had lasted a decade was beginning to bear fruit. Its aim was strategic and its excuse was to revive a claim that had been dead for 55 years. It took advantage of its power as the main colonial and naval authority of the time to confront a young State mired in fratricidal struggles that could not confront it militarily but that nevertheless protested immediately. Once again, imperial arrogance was the only reply to Argentina's attempts at diplomacy.

No prior warning was given to Argentina by the British Government before its use of force, in spite of it having protested less than two months before dispossessing Argentina of the Falklands/Malvinas. There was no British proposal to resolve the issue through negotiations or any other means, in spite of the existence of diplomatic relations and a Treaty of friendship, commerce and navigation in force. The British protest of November 1829 was not followed by any action, in spite of the serious incident of the Lexington in 1831 and the dispute between Argentina and the United States regarding an issue that directly involved the exercise of the sovereignty over the Falkland/Malvinas Islands. For

two years, the Falklands/Malvinas issue was the subject of discussions between Argentina and the United States without Great Britain stating its claim. The British Government simply took advantage of the situation and imposed its power through a unilateral act of force. This attitude, especially considering the bad faith of its arguments, explains why third States have been supportive of Argentina from the moment the islands were seized. Bad faith and the attempt to impose a *fait accompli* undermine the basic elements of law that regulate the relationships between States:

The issue can be summarized as follows:

- 1) England did not discover the Falklands/Malvinas, as the British pamphlet admits.
- 2) The islands were discovered by Spanish sailors from Magellan's expedition. The first European presence in the islands in 1540 was Spanish, 52 years before Britain's purported "discovery".
- 3) The Anglo-Spanish treaties of the XVII and XVIII Centuries prevented any British navigation and occupation of Spanish territories – which applied to the Falklands/Malvinas.
- 4) When Spain asserted its sovereignty over the Falklands/Malvinas in 1749, England refrained from visiting the islands.
- 5) France can invoke the right of first occupant.
- 6) The right of first occupant belongs to Spain after the transfer of possession from the French to the Spanish Crown.
- 7) Spain was in effective and uninterrupted control of the islands from 1766 to 1811 and on an exclusive basis from 1774 to 1811.
- 8) The Anglo-Spanish agreement of 1771 only concerned the return of the possession of Port Egmont: Spain reserved its sovereignty, unlike England.
- 9) There is sufficient evidence to show that the English withdrawal of 1774 was the result of a promise made to Spain. Great Britain did not notify any reservation regarding the issue of sovereignty to Spain in withdrawing, nor did it authorise Spain to remain in the territory, as it should have done if it considered itself sovereign.
- 10) The only remnant of a claim of sovereignty left by Great Britain in Port Egmont was removed by Spain, when it destroyed the British settlement without any reaction whatsoever on the part of London.

- 11) At the time of Argentine independence, Spain was in possession of and had sovereignty over the Falkland/Malvinas Islands and Great Britain had committed to respect that possession and sovereignty through the Treaty of 1790.
- 12) In virtue of a well-known rule of international law, whether it is called *uti possidetis iuris* or State succession, Argentina inherited the Falkland/Malvinas Islands from Spain.
- 13) From the moment of its independence, the Government of Buenos Aires considered the Falklands/Malvinas its own.
- 14) The taking of possession of 1820 was a public act executed by an Argentine public official of which the British Government was fully aware, and to which it did not react in any way.
- 15) During the 1820s Argentina exercised various acts of sovereignty over the Falklands/Malvinas with no British protests whatsoever.
- 16) Not only was there no “British authorisation” given to Vernet in 1828, but on the contrary, the British consul in Buenos Aires certified the authenticity of the concessions made by the Argentine Government without the slightest British reaction.
- 17) The British protest of November 1829 was late, based on false arguments, made in bad faith and motivated by strategic reasons. Great Britain had forgotten any whim of sovereignty over the islands for the previous 55 years.
- 18) Without any prior notice, Great Britain expelled Argentina from the islands. As a result, two thirds of the population left the islands, and efforts to restore the settlement to normality were prevented. Vernet was never again able to return to the islands.
- 19) Argentina immediately protested and it maintained its protests. Great Britain refused to settle the dispute, in a typical show of a policy of force.
- 20) The British Government created the Colony in 1843 and had control over migration to the territory.
- 21) In 1849 Palmerston recognised that Argentina still maintained its claim.
- 22) The Arana-Southern Treaty of 1849 bore no relation to the issue of the Falklands/Malvinas. The text of the treaty, its context, object and purpose show that it was created to end the blockade against Argentina and Uruguay and to recognise the internal nature of the rivers of both South American countries. The pretence of the British pamphlet

that the treaty implied an Argentine renunciation was not put forward by the United Kingdom until 2013.

23) A month after the conclusion of the 1849 Treaty, the Government of Buenos Aires once again reiterated in crystal-clear terms its claim of sovereignty in its annual address to the Legislature.

24) Various acts carried out between 1850 and 1884, in spite of the internal and international political changes occurring at the time, show that Argentina maintained its position and did not give up sovereignty.

25) Argentina proposed arbitration to resolve the issue and the British Government insisted in its refusal to resolve the dispute, thereby keeping it open.

26) The cartography presented in the British pamphlet is a coarse manipulation: the maps and books referred to, as well as official cartography, all show the Falklands/Malvinas as Argentine territory.

27) On the contrary to what is stated in the British pamphlet, from 1888 to 1940 there were a number of Argentine expressions of its claim to sovereignty, including by direct diplomatic contact and before international instances.

28) At that same time, the British Government admitted that Argentina maintained its claim.

29) Spain, and not Great Britain, discovered South Georgia. Argentina carried out sovereign acts. Great Britain only reacted belatedly and took advantage of its position of strength in the Falklands/Malvinas. Argentina is the country that has most *effectivités* in the South Sandwich Islands. The United Kingdom recognised that the fate of South Georgia and South Sandwich Islands is linked to that of the Falklands/Malvinas.

30) British attempts to apply the right of peoples to self-determination to the current citizens of the Falklands/Malvinas is unfounded, it is not recognized by the relevant organs of United Nations and is in complete contradiction with British policy. The United Kingdom is therefore in a legally untenable position. Any attempt at justification entails a contradiction. If it states that the islands were *terra nullius* in 1811 or in 1833, it contradicts the thesis advanced in 1829 that the islands were British. If it states that the whole of the archipelago was British, it is difficult to imagine a clear answer to the question of knowing how and when the British Government obtained sovereignty over

Soledad/East Falkland Island, considering that it never possessed it and that the island was always in the hands of another State. If the islands were British in 1811, 1820 or 1833, this plainly contradicts Britain's constant thesis on territorial matters, in which the main criterion for the acquisition of sovereignty is effective possession. Such a statement provides a powerful argument for Argentina to declare that it maintained its title to sovereignty despite losing possession in 1833. If it states that Spain abandoned the islands in 1811, this would be the same as saying that Great Britain did likewise in 1774. If it states that Spain had, at most, sovereignty over Soledad/East Falkland Island, it puts itself in an impossible position to claim anything more than Saunders/Trinidad Island or Gran Malvina/West Falkland. If the United Kingdom attempts to deny any effect to Argentine possession of the islands after the protest of November 19th, 1829, it is implicitly accepting this as the critical date. If it attempts to invoke conquest for its 1833 actions, it implicitly admits bad faith and the absence of any previous title, and bases its title on a use of force – which also contradicts its thesis that there was no use of force.

The truth is that the taking of the Falklands/Malvinas and the continuing British occupation can only be based on a policy of power. As was written by the influential Argentine jurist and diplomat Carlos Calvo in 1862:

The British Government has created a Public Law that applies especially to weak States, called the Right of Force (...) It is not sufficient for the American Governments to offer to submit their differences to a third party, to have in their behalf the opinion of British judicial experts, or even of its own supreme tribunals; it is not enough, simply, to be right; no, it is necessary for the weak to suffer the consequences of its weakness, and that all those considerations become silent upon the very eloquent argument of Armstrong's cannon (...). Thus the history of British diplomacy in Latin America registers a sum of abuses and violence that myriads of volumes would not be enough to contain. Sometimes with no previous war declaration nor the slightest precedent to authorize it, it bombards a town, such as Paranagua, in Brazil; in other times, it takes possession of a vast territory, like the Falkland/Malvinas, without paying the slightest attention to the claims of the

*dispossessed nation (...) and, in summary, thousand of similar acts, that even though we cannot repel by force, they remain impressed in the spirit of every American.*⁵¹⁷

We can conclude that the British pamphlet is an extremely poor manipulation of the Anglo-Argentine dispute that no British professor of international law would have dared sign. It unintentionally confirms what British Government officials have intimately recognized at all moments of the conflict. For example, the Chief of the Americas Department of the Foreign Office, John Troutbeck, (in a similar position to that hold by the current “Governor” of the Falklands/Malvinas, Colin Roberts) wrote in October 1936:

*"The difficulty of the position is that our seizure of the Falkland Islands in 1833 was so arbitrary a procedure as judged by the ideology of the present day. It is therefore not easy to explain our possession without showing ourselves up as international bandits"*⁵¹⁸

We might go further and say that the occupation of the Falklands/Malvinas in 1833 was also difficult to explain without looking like international bandits at the time it occurred. Two centuries should not have to pass since the event for the United Kingdom to return to a path of justice and good faith in its relations with Argentina, Latin America and the rest of the international community.

⁵¹⁷ Calvo, C., *Colección completa de los tratados, convenciones, capitulaciones, armisticios y otros actos diplomáticos de todos los Estados de la América Latina comprendidos entre el Golfo de México y el Cabo de Hornos desde el año 1493 hasta nuestros días, precedidos de una memoria sobre el estado actual de la América*, París, Durand, 1862, T. I, pp. XV-XVII.

⁵¹⁸ FO 371/19763, f° 349.

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