REFLEXIONS ON ‘THE CASE OF ANTONIO RIVERO AND SOVEREIGNTY OVER THE FALKLAND ISLANDS’

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Representing as it does one of the few academic discussions of the circumstances surrounding the assertion of British sovereignty over the Falklands in the 1830s, Richard Ware’s article, ‘The case of Antonio Rivero and sovereignty over the Falkland Islands’, published recently in the Historical Journal, is a welcome sign of growing academic interest in the early history of the islands.1 Ware quite rightly states that their invasion by Argentina in 1982 ‘made certain that the old argument about the right to possess the islands would be reopened’ (p. 961), but despite the welter of ‘instant’ histories and popular explanations of a usually very superficial nature, the early history of the Falkland Islands sovereignty dispute has so far failed to elicit the degree of serious academic discussion it deserves. The result of large areas of the Falkland past remaining shrouded in ignorance and uncertainty has been to hinder attempts to assess the policy options for both the present and future. The foreign affairs committee of the house of commons, which was set this very task, was very much aware of the necessity of placing the sovereignty dispute in a historical context, but they also became aware of the impossibility of satisfactorily doing so in the present state of historical knowledge.2 In their report of October 1984 they stated that, ‘The historical and legal evidence demonstrates such areas of uncertainty that we are unable to reach a categorical conclusion on the legal validity of the historical claims of either country’.3 In particular, they recognized that there were ‘significant disagreements...about the Islands’ early history, particularly concerning the crucial period between...1811 and the British occupation in 1833’.4 In view, then, of its importance to any appraisal of the ‘rights and wrongs’ of the present dispute, any serious attempt to clarify the events of the 1830s is to be welcomed. Ware does, however, make a number of statements and judgements in his article which necessitate a reply.

In the light of what has just been said, it would appear more than a little strange that Ware’s article should state at its outset that ‘the events of 1833 cannot have direct bearing on the present or the future’ (p. 961). While Ware is correct that a prescriptive right acquired over a period of a century and a half, and the right of the Falkland Islanders to self-determination, form powerful weapons in Britain’s legal armoury with respect to her claims to the sovereignty of the Falkland Islands, it would be well to remember that the foreign affairs committee was unable to reach a clear conclusion on the relative strength of the respective claims. Far from believing it to be of little more importance than ‘helpful to put the record straight’ (p. 961), they

2 House of commons foreign affairs committee, session 1983–84, fifth report and minutes of proceedings, Falkland Islands.
3 Ibid. p. xvi.
4 Ibid. p. xvi.
considered, ‘much of the historical argument...vital to an understanding of the tenacity with which the rival sovereignty claims are espoused in both Argentina and the United Kingdom’. For Argentina’s part, much of this tenacity is rooted in the events of the 1830s. The Argentine sense of grievance that in 1833 they were dispossessed of what was rightfully theirs has been, throughout the twentieth century, a souring factor in what has otherwise proved a generally cordial relationship with Britain. If the invasion of the Falkland Islands by Argentine forces in 1982 was a startling demonstration of the consequences a long-standing historical grievance can hold in store for the present, the continuing costs involved in maintaining the defence of ‘Fortress Falklands’ should be a constant reminder of the consequences it can hold for the future. However strong the arguments which Ware puts forward in favour of Britain’s title to the Falklands might be, as long as the Argentines continue to believe that they have been ‘robbed’ of their national heritage, Britain will have to continue to hold the islands by force. If not for any other reason then, the circumstances surrounding the physical assertion of British sovereignty over the Falkland Islands in 1833 are important because the Argentines believe them to be.

To turn now to the main content of the article, Ware suggests that it was a failing on the part of the British government not to have lodged a protest against Colonel Jewitt’s actions in taking possession of the Falkland Islands in the name of the United Provinces of South America. It should be remembered, however, that in 1820 Britain had not yet recognized the independence of the South American republics from Spain. It was unnecessary, then, for her to protest against Jewitt’s actions because any actions in the name of an independent Argentina were not considered legitimate.

With regard to the events surrounding the British government’s deliberations in 1829, Ware’s chronological and factual errors contribute to a number of misjudgements. Contrary to Ware’s view that it was simply Vernet’s commercial activities which caused Britain to take an interest in the Falklands again, it would be well to note that what prompted Britain’s chargé d’affaire in Buenos Ayres to draw Lord Aberdeen’s attention to the islands was the apparent intention of the Buenos Ayrean government to establish a penal colony there. Such an establishment would have constituted an undeniably formal Argentine presence in the Falklands, and it was this possibility, together with other formal assertions of sovereignty, against which the British government reacted. Britain might not object to the presence of individuals on the Falklands, but any formal foreign activity in a ‘British’ possession constituted a challenge to her sovereignty which could not be allowed to pass without protest. The British government’s response to Vernet’s presence on the islands was, therefore, governed, not by his commercial activities or personal desire for a British ‘take-over’, but by the extent to which his presence was perceived to be a manifestation of Buenos Ayrean state activity. Only when he became identified as an instrument of the Buenos Ayrean state did the British government come to consider his presence on the islands to be something they could not allow.

It is curious that Ware should express the view that a ‘series of hurried consultations in London’ (p. 962) were sparked off by the news of the Buenos Ayrean decrees of 10 June 1829, which formally proclaimed the Buenos Ayrean claims to the Falklands and appointed Vernet political and military governor. The consultations within the British
government, some of which Ware describes, had begun already by 2 June 1829, that is, before the two Argentine decrees had been issued, over a month before Aberdeen consulted the king’s advocate for his legal advice, and over two months before the first orders were issued to Parish on how to proceed next. It does appear, therefore, to be somewhat of a misstatement to describe the British government’s consultations spanning the summer months of 1829 as in any way hurried. But what makes Ware’s view even more curious is the fact that the consultations described in his article took place in complete ignorance of the Buenos Ayrean decrees of 10 June. Historians of the early part of the nineteenth century would do well to appreciate that communications were not always as fast then as they sometimes are today, and news of the Argentine decrees did not reach the foreign office until 3 September 1829. In this context, the British government’s deliberations during the summer of 1829 were focused basically upon the possibility of the Argentine penal establishment being formed on the islands, and reflected their concern at the further information that a Buenos Ayrean government had made grants of land on the islands to individuals and granted to Vernet the right, along with certain privileges, to form a colony there.

The outcome of the British deliberations that summer was not – as Ware argues – that Wellington’s idea of a discreet warning was combined with Jenner’s legal arguments to produce the protest note of 1829, but rather the issue of instructions to Parish to inform the Buenos Ayrean government of Britain’s claims ‘in their full force’. It was essentially a preventative measure intended to forestall further encroachment upon Britain’s rights, and as such it was a full implementation of Wellington’s proposal for a quiet but firm verbal warning to Buenos Ayres. Only when the news of the Buenos Ayrean decrees of 10 June reached London, twenty-six days after those instructions had been dispatched to Parish, did the British government become aware that they had already been overtaken by events. In the light of this new formal assertion of Buenos Ayrean sovereignty over the Falkland Islands it was now clear that a formal protest was necessary if British rights were to be protected. New orders were issued to Parish on 17 September, instructing him to present a formal protest note to the Buenos Ayrean government. Realizing that his instructions to present a quiet warning had been rendered inapplicable by the decrees of 10 June, Parish awaited Aberdeen’s further orders, which he acted upon when he delivered the British protest on 19 November.

Ware’s statement that Vernet’s settlement was sacked by the United States warship Lexington in ‘reprisal for his attempts to protect his fishing monopoly’ (p. 963), is rather misleading. In 1831, Vernet arrested three American sealing vessels for allegedly illegal fishing around the Falkland Islands, but the attack upon his settlement was not a direct consequence of the seizures. It was rather more the consequence of the Buenos Ayrean government’s refusal either to avow Vernet as their officer – and in so doing take responsibility for his actions – or to disown him. This factor – coupled with the receipt of information that the captured vessels had, among other illegal acts, been plundered and that further captures of American vessels were intended – induced Commander

8 Parish to Aberdeen, 26 June 1829, F.O. 6/499, fos. 17–18.
10 Aberdeen to Parish, 8 Aug. 1829, F.O. 118/22, fo. 79.
11 Aberdeen to Parish, 17 Sep. 1829, F.O. 118/22, fos. 86–9.
Duncan of the Lexington to consider it his duty to proceed to the Falkland Islands and ultimately to treat the settlers as pirates.\textsuperscript{13}

It is unclear to what extent Ware subscribes to Goebel's thesis, that, following the breakdown of the negotiations between the United States and Buenos Ayres in September 1832, Britain seized her chance to capture the Falkland Islands in the knowledge that 'the situation was such that any diplomatic support of the Argentine Republic by the United States was unlikely'.\textsuperscript{14} Yet, that he should refer to the American envoy's 'clear hints to the British minister that the U.S.A. might welcome British action' (p. 963), without challenge or qualification, implies a degree of acceptance. While it might be convenient to believe, in the context of Goebel's broader thesis – that Britain's assertion of her sovereignty over the Falklands in 1833 was a product of her 'imperialistic designs' – that Britain's actions were influenced by the American envoy's remarks is a belief sadly lacking of any foundation in reality.\textsuperscript{15} The decision to dispatch a warship to the islands was taken in London, not in South America, and the orders upon which the Clio acted had already been issued by the end of August – before news of the collapse of the negotiations had reached England, and before the American envoy had uttered his remarks.\textsuperscript{16}

Turning to the incident with which Ware says he is principally concerned (p. 963), it is significant that the document to which he refers as the law officers' 'Opinion' (p. 965), and upon which he draws heavily for his evidence is in fact a home office memorandum (much of which, perhaps, originated from within the foreign office).\textsuperscript{17} The law officers' opinions are added, in a different hand, towards the end of the document. Thus, of 'twenty-three large sheets' (p. 965), the law officers' opinions account for no more than a mere 67 words on pages 22 and 23. That the document was drawn up, not by the law officers, but as a memorandum, is clearly evidenced by its docket. It reads: 'Case Respecting certain Prisoners lately brought from the Falkland Islands charged with Murder. For the opinion of the King's Advocate, the Atty. & Sol'r'.\textsuperscript{18} Ware's failure to appreciate this detail would seem to account for a number of his misjudgements and inappropriate speculations. It might also account for his apparent surprise that the document consists mostly of evidence, with no detailed argumentation (p. 965). Thus when Ware attributes arguments and statements to the law officers, he is in fact more often than not referring to the views of the British government departments as contained in the memorandum.

At one point Ware's argumentation becomes particularly confused. The last sentence of paragraph six on page 965 contradicts the first. To put the record straight, it is the last sentence which is factually correct. Referring to what he believes to be the law officers' opinion, Ware says:

It is said in the Opinion that the Falkland Islands became 'a part of and within the Dominions of His Majesty' when Captain Onslow took possession of them in 1833 and that previously they had been under 'a Foreign Dominion'...It is notable that they refer not to the Falkland Islands, but to the 'Settlement on Berkeley Sound'...having becoming [sic] part of His Majesty's Dominions in 1833.

\textsuperscript{13} Duncan to Hood, 4 Feb. 1832, F.O. 115/59, fos. 186–7.
\textsuperscript{17} Home Office memorandum, 2 June 1833, P.R.O., H[ome] O[ffice papers], 48/30, case 5.
\textsuperscript{18} Ibid. p. 24.
The arguments which Ware puts forward – to support his view that the document to which he refers as the law officers’ opinion provides sufficient evidence to demonstrate ‘that at the time when Britain was asserting its sovereignty over the Falkland Islands... there was no clear consensus within the British government as to the grounds on which sovereignty was claimed’ (p. 961) – flounder upon the fact that all but 67 of the words in the document were written in the home office. Far from containing sceptical hints from the law officers about the continuity of Britain’s title (p. 965), or making statements ‘inconsistent with the official British claim to sovereignty over the islands’ (p. 966), the memorandum is itself a carefully constructed official statement of Britain’s sovereignty claims. That this should be so is inherent in its nature. It was an official document produced by the home office for the law officers with the intention of providing the facts considered necessary to form a judgement on the questions put to them. In an official document of this nature there can be little room for sceptical hints or statements inconsistent with official claims.

Although Ware argues that the reference to foreign dominion over Port Louis before 1833 was inconsistent with Britain’s official stance on sovereignty, it is unlikely that the writers of the memorandum, or the law officers, considered there to be any such inconsistency. In 1835 it was an official British claim that the Falkland Islands Group had constituted a British possession prior to 1833, but it was also accepted that the Port Louis settlement, and those who lived in it, existed under foreign dominion prior to the visit by the Clio. Lord Palmerston, as foreign secretary, had recognized Vernet in 1832 as an officer of the Buenos Ayrean state. Following the attack of the Lexington on Port Louis, he was informed that it was intended to put one of the settlers, an Englishman, on trial in the United States for piracy. He responded by instructing the British minister in Washington that if this was indeed the intention, he was to make a formal protest on the grounds that the Englishman, Matthew Brisbane, ‘was acting under an authority given by a regular and acknowledged Government’.19 The official British line was, then, that Port Louis constituted an intrusive foreign establishment on British islands, and that all that was newly taken possession of in 1833 was the settlement and its inhabitants. A further indication of this view is to be found in Captain Onslow’s orders. He was instructed that, should he find inhabitants engaged in peaceful pursuits, he was to inform them that they were henceforth to hold themselves as British subjects and that those who refused to accept these terms were to be allowed to depart.20

Ware’s speculation, then, that the law officers’ reason for not recommending a prosecution of the murderers was because, although ‘technically British subjects’ (p. 965), they were not British when they settled on the islands, is not as suspicious as he imagines. Nor is he wholly accurate. It appears unlikely that murderers, once it was established that they could be prosecuted, would be allowed to go free, after having murdered British subjects who originated from the British Isles, unless there was a greater reason for feeling sympathy for them than simply as victims of a legal technicality. It seems more likely that a number of other stronger considerations influenced the law officers’ decision, and in this context it is important to note that the colonial office had already decided that it was undesirable to prosecute even before the murderers had been brought to Britain.21 To prosecute might provide the occasion for a further diplomatic confrontation with Buenos Ayres. There was also the detail that in his reports of his actions at the Falkland Islands, nowhere does Onslow say that he

20 Baker to Onslow, 28 Nov. 1832, F.O. 6/500, fos. 96–100.
21 Hay to Elliot, 5 Aug. 1834, C.O. 78/1, fos. 92–4.
informed the settlers of their new status as British subjects. What is more, he clearly stated that the gauchos had wanted to leave the islands but that, with great difficulty, he had persuaded them to remain for the purpose of supplying the settlement and visiting ships with meat.22 And the home office’s memorandum itself makes a notably direct effort, partly written in the margins, to plead mitigating circumstances. It suggests that the murdered Britons had brought their deaths upon themselves: 'It is alleged that they were all harshly treated by Brisbane and Dickson who refused to pay them according to agreement for a pen which they had erected for the retention of the Wild Cattle in the catching and slaying of which they were chiefly employed'.23

Given these circumstances, the memorandum seems to be implying that it might only be expected that, being little more than savages, and in the obvious absence of any legal form of redress, the killers should have recourse to murder:

It should be observed that three of the Prisoners…appear to be of the lowest cast of South American Indians nearly approaching to savages.

The fourth, Antonio Rivero, appears to be of a somewhat higher order of being tho’ probably he was in his origin a Wild Spanish South American. None of them understand the English Language but speak a species of base Spanish.24

In view of these factors, then, there would appear to be little need to search further afield for reasons to explain why the law officers should have felt that a sentence passed for murder could not be justly carried out in this particular case. One can only conclude, therefore, that while elements within the British government may indeed have perceived Britain’s title to the Falkland Islands in a shadowy and ill-defined way, Richard Ware’s attempt to prove this, by demonstrating a difference – which did not in fact exist at all – between the official British line on sovereignty and the law officers, is a somewhat misdirected investigation.

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23 Home Office memorandum, 2 June 1835, H.O. 48/30, case 5, p. 22.
24 Ibid. p. 22.