REPLY TO REFLEXIONS ON THE CASE OF ANTONIO RIVERO AND SOVEREIGNTY OVER THE FALKLAND ISLANDS

RICHARD WARE

In response to John Muffty's critique of my communication concerning the case of Antonio Rivero, I would accept that my references to the whole document contained in P.R.O., HO 48/30 case 5 as 'the opinion' were misleading, given that most of it, as I noted in my original communication, consists of the presentation of the case. However, this is immaterial to the conclusion. The point is that the document contains statements which do not easily square with what was then the official British line on sovereignty over the Islands, namely that British sovereignty had been sustained ever since the evacuation of Port Egmont in 1774 by what Sir Herbert Jenner in 1829 had described as 'the symbols of property and possession', i.e. a single stone plaque. For example, the reference in the document to the attention of the British government having been 'altogether withdrawn' from the Islands between 1774 and 1829 seemed to me to suggest a sceptical view of Jenner's argument.

The statement which most clearly appears to contradict the official line reads as follows:

... it is submitted that after the possession taken by Commodore Onslow the Settlement in Berkeley Sound became a part of and within the Dominions of His Majesty and thus these individuals (altho' Foreigners and originally settled there under a Foreign Dominion) being resident within the King's Dominion and therefore entitled to the King's protection and owing allegiance to him became subjects of His Majesty within the meaning of the Statute.

Muffty argues that the reference here to 'Foreign Dominion' does not mean 'Foreign Sovereignty', but rather 'an intrusive foreign establishment on British islands' and that therefore 'became a part of and within the Dominions of His Majesty' is consistent with the settlement having been under British sovereignty all along. Perhaps he sees a parallel between the status of the Islands before 1833 and their status during April–June 1982.

There is no evidence to support this interpretation of the words in the document and every reason to suppose that if the authors had regarded the settlement as merely 'an intrusive foreign establishment' they would have said so, rather than use the phrase 'Foreign Dominion'. 'Dominion' in its legal sense means possession as of right. In Wheaton's Elements of International Law, published in 1836, the year after the drawing up of the Rivero opinion, 'dominion' is used interchangeably with 'sovereignty' (e.g. vol. 1, 225–7). In short this section of the memorandum appears to reflect a belief that Commodore Onslow's action had initiated British sovereignty over the settlement at Berkeley Sound, a belief which is inconsistent with the official view that the Falkland Islands, in their entirety, were a British possession long before Antonio Rivero was born.

2 Ibid. p. 963.
3 HO 48/30, case 5, 22.
In my original communication I did not seek, as Muffty claims, to build a strong hypothesis on this passage alone, but rather to set it in the context of other evidence, including the conclusion of the duke of Wellington when prime minister in 1829, ‘it is not clear to me that we have ever possessed the sovereignty of all these islands’.

I also cited the trend in international law in the first half of the nineteenth century towards non-acceptance of plaques and suchlike as sufficient evidence of possession. My general conclusion was that ‘there was no clear consensus within the British government as to the grounds on which sovereignty was claimed’. It is absurd for Muffty to pretend that these arguments ‘flounder upon the fact that all but 67 of the words in the document were written in the home office’. Was the home office in 1835 not part of the British government? For the reasons stated above I do not accept Muffty’s attempt to explain away the reference to ‘Foreign Dominion’ in the document. The truth appears to be, as Muffty himself acknowledges at the end, that ‘elements within the British government may indeed have perceived Britain’s title to the Falkland Islands in a shadowy and ill-defined way’. This was precisely the main point of my communication.

My other concern was to set out, for the first time, the facts of the Rivero case and to refute the legend, which had appeared in print as recently as 1981, that Rivero had been put on trial in England, but that the court had ruled that it had no jurisdiction.

As to the other points made by Muffty, some are useful but minor factual revisions (e.g. regarding the precise timing of events in 1829), some are irrelevant, and some mere nitpicking. For example, a lengthy paragraph is spent refuting the idea that, ‘the events of 1833 cannot have direct bearing on the present or the future’, whereas in my communication I merely noted by way of introduction that ‘any clarification which may be attempted of the events of 1833 cannot have direct bearing on the present or the future’ and went on to explain that ‘the historical facts’ are only one element in the question of the Falkland Islands as it stands now. Similarly, Muffty takes me to task for referring to ‘hurried consultation’ in London in 1829 (‘somewhat of a misstatement’), though the prime minister, the foreign secretary, the colonial secretary and the king’s advocate general were all drawn into discussion of the Falklands issue in the space of three weeks in July 1829. Another paragraph is devoted to demolishing the thesis that ‘it was simply Vernet’s commercial activities which caused Britain to take an interest in the Falklands again’, a claim which I did not make at all. On the contrary I was careful to mention other factors such as the evidence of growing interest in the Islands in Buenos Aires and the interest of the British admiralty in acquiring a South Atlantic staging post. As to Muffty’s paragraph concerned with Julius Goebel, this is all very interesting and it may indeed be ‘unclear to what extent Ware subscribes to Goebel’s thesis’, but I referred to Goebel only in passing and did not cite his argument that the decision to reassert sovereignty over the Falkland Islands was made with the acquiescence of the U.S.A.

One final point, like Mr Muffty, I welcome the growing interest in the history of the Falkland Islands and gladly acknowledge that he has supplied a few useful corrections to my account of the Rivero episode. At the same time I cannot see that the polemical tone which he chooses to adopt is appropriate either to the subject in general or to the content, such as it is, of his critique.

---

6 Ibid. p. 961.
8 Ibid. p. 432.