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SOUTH AMERICA'S LAST COLONY: THE SOVEREIGNTY DISPUTE OVER THE MALVINAS ISLANDS BETWEEN ARGENTINA AND THE UNITED KINGDOM

Introduction

The Malvinas Islands are a group of islands located in the Southwest Atlantic, 600km away from mainland Argentina and 14.000 km away from the United Kingdom, consisting of two main islands: Isla Soledad (6.353 sq km) and Gran Malvinas (4.377 sq km)[1] and around 200 islets, an area of approximately 11.718 sq kilometers. According to the latest census carried out in 2021, the "totally usually resident population" is 3.662, mostly concentrated in the capital, Puerto Argentino with 2.848 inhabitants[2]. It marks an increase of approximately 50% from the last census done before the war, in 1980, which showed a population of 1813 inhabitants.

The islands, which have been an object of a sovereignty dispute between Argentina and the United Kingdom since 1833, recognized by the United Nations (UN) and the Organization of American States (OAS), among other international fora, have increased their strategic and economic importance since the end of the South Atlantic conflict in 1982. Firstly, because the islands are the gateway to Antarctica

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1 East Falkland and West Falkland respectively in the British toponomy

2 See "Falkland Islands Census Report", 2021.

where Argentina and Britain have overlapping territorial claims; secondly, the Mount Pleasant British military base built after 1982 is the most important British military presence in the South Atlantic and thirdly, because the exploration and exploitation of renewable and non-renewable natural resources have dramatically transformed the economy of the islands and the life of their inhabitants since 1987. The islanders increased their personal income in approximately 500% compared to 1980.[3] And last but not least, sometimes due to severe weather conditions, the Panama Canal is closed, or vessel traffic restricted. At the same time, since the war broke out between Hamas and Israel in October 2023, commercial western or Israeli vessels navigating the Red Sea are subject to Houthis missile attacks and kidnappings, the geostrategic importance of the Islands has been increased even more.

The Parties have opposing views on the controversy: Argentina considers it a sovereignty dispute, not a boundary one. Therefore, in Argentina's view, the dispute cannot be reduced to a mere (maritime) delimitation issue between neighbors, because it is essentially and foremost, a territorial one: the UK illegally occupied the islands in 1833 by an act of force, never acquiesced by Buenos Aires.Consequently, Argentina does not recognize the UK as a coastal State.

Britain for its part, especially after 1982, sees the question mainly as a self-determination, where the wishes of the islanders are paramount. Under this view, the 1982 war settled the territorial dispute and the only point to be discussed is the maritime boundaries between their overlapping, exclusive economic zones and continental shelves in conformity with the 1982 UN Convention on Law of the Sea. London is only willing to discuss the sovereignty issue, if and when the Islanders want to. According to the Constitution adopted in 2009, the islands are not a British Crown colony anymore but a "British Overseas Territory" (BOT) with an increasing degree of autonomy from London[4]. The islands with a GDP of approximately U$ 206.400.00 and a per capita income of U$ 70.800[5], higher than the UK income (U$ 55.210) are economically self-sufficient except for defense expenditures paid by UK which amount to over U$ 74.000.000, plus the recent refurbishment of the Mount Pleasant Base at a cost of U$ 8.500.000.[6]

Malvinas as a sovereignty dispute

In every sovereignty dispute, the essential question to be asked is the following: which of the two States claiming sovereign rights over the same territory, has the best legal title to it? Normally, in the discussion of a territorial dispute, States invoke

3 See Santa Cruz, D: "*Islas Malvinas: repunte económico en un territorio que está aún en disputa*", La Nación, 1 de abril de 2024.

4 The Islands have an elected "Assembly" of 8 members, 5 from the capital and 3 from the "camp".

5 Ver https://www.countryreports.org

6 "The Cost of colonialism: What could the Falklands pay for 60 million pounds? The Scot National, 22nd May 23.

not just one title, but a plurality of legal titles.[7] International law provides two main principles to determine which State has the best title to the territory: the principle of "intertemporal law" and the principle of the "critical date". According to the first one, in any territorial controversy the rights of the Parties must be assessed in accordance with the law in force at the relevant time, that is, when the dispute was consolidated, it's a sort of "time tunnel". The judge must determine the merits of the case, not in accordance with the law in force at the time the controversy is submitted to the tribunal but in conformity with the law in force at the critical date.The critical date sets the point of time at which the material facts of a dispute have occurred and after which the actions of the Parties can no longer affect the issue. It is the date on which a dispute over a territory "crystallizes". Figuratively, the critical date can be defined as the moment when the "hands of the clock stop". From that date onwards, the acts of the Parties cannot improve their legal positions, but their omissions (acquiescence) can certainly weaken them. That is the reason of the importance of consistent legal position of Argentina in protesting any unilateral act executed by Britain, be it a concession of illegal fishing licenses, oil exploration licenses or military exercises. These formal diplomatic notes of protest preclude Britain from invoking prescriptive acquisition.

Argentina's Titles

Argentina invokes discovery by Esteban Gomez, a member of the Magallanes Expedition in 1520, effective and uninterrupted occupation by Spain from 1767 to 1811 and bilateral treaties signed between Spain and Great Britain in the XVI and XVII centuries establishing areas of influence in their respective colonial possessions in the Americas. In 1816, when Argentina declared its independence from the Spanish Crown, it became Spain's legal successor in application of the principle of the "uti possidetis iuris". This is an essential point. In 1820, Argentina formally and publicly declared its possession of the Islands. This formal and pubic act of possession was followed in 1823 by concessions of lands and fishing licenses. In 1829 Luis Vernet was appointed the first Governor of the Islands exercising effective acts of jurisdiction. In 1825, Argentina and Great Britain signed a "Treaty of Friendship, Commerce and Navigation", which in the XIX century was interpreted as a recognition of the newly independent State. On that occasion, Britain did not make any reservation concerning Malvinas. On January 3rd, 1833 (critical date) Capitan Onslow took the island by an illegal act of force on behalf of King George III and expelled the legitimate authorities. At the same time, British settlers were transferred to the Islands and Argentine citizens were forbidden from legally residing in the Islands. In a word, for Argentina it is a sovereignty dispute in the context of decolonization.

7 For a thorough discussion on the issue of sovereign titles, See Vinuesa, R. "El Conflictopor las Islas Malvinas y el Derecho Internacional", Centro de EstudiosInternacionales, Buenos Aires, 1985

British Titles

Britain claims discovery by John Davis in 1592, a member and alleged deserter of the Thomas Cavendish' second expedition to the South Atlantic, and Richard Hawkings in 1594 in the service of Queen Elizabeth I of England.[8] The first landing was attributed to John Strong in 1690 and the occupation of Port Egmont in "Islas de las Cruzadas", close to Gran Malvina in 1765[9]. From the territorial point of view, the official British position is pretty basic: prior discovery and subsequent occupation. This was the position adopted by Viscount Palmerston in January 1834 in response to Argentine's earlier diplomatic note of protest. This is the British official line to this day.[10]

Legal Assessment

Let's dwell briefly on some of the territorial arguments invoked by the British to determine their actual legal relevance. First of all, like we said at the beginning of this article, the Parties to a controversy normally invoke not just one legal title but a plurality of legal titles to a disputed territory to back their respective positions. Consequently, in international law, the key factor is to determine which State has the best title among the different titles being invoked. This is when the principles of intertemporal law and critical date interplay.

According to the "Island of Palmas" case[11], in the XV and XVI centuries, discovery had become an inchoate title, that is to say, an imperfect one, which had to be perfected by a subsequent effective occupation within a reasonable period of time. In view of this arbitral award, discovery by itself is not the preeminent title.

Actually, the first ones to settle in the Islands were neither the Spanish nor the English but the French in 1764, headed by Captain Louis de Bouganville who departed from the Port of Saint Maló in France, giving its name to the Islands, "Malouines". He established the capital in Port Louis, in Soledad Island, not far from the present capital, accompanied originally by 29 men. After Bougainville's third visit to the Islands, the population increased to 130. When the news of the French occupation of the Islands reached Madrid, diplomatic tension aroused between Madrid and Paris but finally, in 1767, the French Bourbons recognized the prior and sovereign rights of the Spanish Bourbons, and the Islands were duly restituted to Spain. In 1769, by orders of the Spanish Governor of Buenos Aires, the British Garrison was expelled from Port Egmont. Both countries were on the brink

8 See generally Goebel J,:"*The struggle for the Falkland Islands*", pp. 34-37 (1927)

9 In British toponymy it will be "Trinity Island" and "West Falkland" respectively

10 See Palmertson to Moreno,*22 British and Foreign State Papers* (1833-1834) at 1385-86 (1836)

11 Reports of International Arbitral Awards (Netherlands v. USA), 4 April 1928 (Vol. II pp. 829-871)

of war. The location of the Malvinas Islands was strategic then as it is now, since up to the construction of the Panama Canal in 1904, the Strait of Magellan was the only natural passage between the Atlantic and the Pacific. Finally, in conformity with the Masserano-Rochefort Agreement, signed between Britain and Spain in 1771, Spain made a partial restitution to Britain (only of Port Egmont). The reinstatement of the British garrison at Port Egmont, together with Spanish disavowal of the use of force, was effected for the purpose of repairing the offense caused to the British King. However, this was conceded under an express qualification which the English accepted: such restoration "cannot nor ought in any way affect the question of the prior right of sovereignty over the Malvinas Islands, otherwise called Falkland Islands"[12] After a period of just 3 years, the British abandoned the islands in 1774 invoking economic reasons and leaving just a lead plate, claiming possession for King George III, who two years later, would lose his 13 American colonies.

In summary, the evidence indicates that a) the British did not discover the archipelago, and even if for the sake of argument, we concede they had, no acts were performed, symbolic or otherwise, manifesting the intention (animus) to acquire the islands until 1765, b) the occupation of Port Egmont in 1765 was not the first one (the French had already occupied Soledad Island in 1764), c) it was partial (only Port Egmont, a small island close to Gran Malvina), d) it was clandestine until they met the French, and most importantly ,it did not endure through time since Britain abandoned the Islands in 1774, only to return in 1833. Again, in international law, the prevalent element is not the invocation of "just" a territorial title, but the evidence of the "best title". A mere lead plate cannot prevail against effective occupation[13].

The effective and continuous occupation by Spain from 1767 to 1811, materialized by an uninterrupted succession of 32 Spanish resident Governors who depended on either from Buenos Aires or Montevideo is of the utmost importance, since Argentina is the legal successor of the Spanish titles in application of the principle of the uti possidetis iuris. The principle, widely used in the decolonization of Latin America, was invokedand explained 150 years later, by the International Court of Justice in the context of the decolonization of Africa and is presently considered a norm of customary international law[14]. It means that the newly formed sovereign States maintain the internal borders of the former colonial power. The administrative borders of the Viceroyalty of the River Plate, became therefore, Argentina's international borders, including the Malvinas Islands. This principle guarantees the stability of international borders and minimizes territorial conflicts.

12 For the full text of the declaration, see Hope, A: "*Sovereignty and Decolonization of the Malvinas (Falkland Islands)*", Boston College International & Comparative Law, Vo.VI, Nº 2, footnote 48.

13 In 1776 the Spanish Captain Juan Callejas found this singular object and took it to Buenos Aires. Some thirty years later, Colonel Beresford, who led the first of the two full- scale "English Invasions" of Buenos Aires in 1806 allegedly took the lead plate to London after his defeat. See Goebel, op.cit.supra note9at 410

14 Case concerning the Frontier Dispute (Burkina Faso v. Mali), ICJ judgment 22 December 1986

Bilateral treaties, mainly the Treaty of Madrid (1670)[15], the Treaty of Utrecht (1713) and the Treaty of Nootka Sound (1790)[16], negotiated and signed between Britain and Spain in the context of European conflicts, distributed areas of power and influence of Madrid and London in relation to their colonial possessions in the Americas. According to these treaties, never contested by Britain, both coasts of North America were a sphere of power and influence of the United Kingdom while conversely, both coasts of South America were a sphere of power and influence of the Kingdom of Spain.

Can Britain invoke prescriptive acquisition? Certainly not. In international law, prescriptive acquisition requires the fulfillment of certain basic requirements such as pacific, public and continuous occupation. Buenos Aires formally protested the British occupation by a diplomatic note presented to Mr. Parish, the British Consul in Buenos Aires at the time, exactly 13 days after the occupation took place, on January 16th, 1833. The lack of awareness of Mr. Parish of the situation proves that the Argentine reaction was almost instantaneous. Argentina has protested British illegal occupation periodically and consistently ever since. That is why Britain has seldom invoked prescriptive acquisition. Furthermore, the United Nations General Assembly resolution 2065 (XX), explicitly recognizes the existence of a sovereignty dispute between Argentina and the UK over the Malvinas Islands, nullifying the argument of prescriptive acquisition or adverse possession.

Can Britain invoke "conquest" since acquisition of territories by force was not forbidden in 1833? To correctly answer this essential question, we must first determine, according to the rules of international law in force in the mid XIX century (intertemporal law), what the legal requirements for conquest were. There are two situations: the first one is partial territorial annexation. It needed to be ratified by a peace treaty; the second one is total annexation. Neither of the two hypotheses did occur: Firstly, Argentina did not sign a peace treaty with the then British Empire. On the contrary, it presented diplomatic notes of protest at regular intervals, never consenting to the illegal occupation of its territory. Secondly, Argentina continued to exist as an independent, sovereign State maintaining full diplomatic relations with the UK.

And lastly, can it be alleged that the 1982 "South Atlantic Conflict" solved the dispute forever and that the only issues to be discussed are practical ones, to "normalize" relations between the islands and continental Argentina? Not at all. The United Nations Resolution 37/9 adopted in November 1982, just five months after the end of the war, is crystal clear on the subject: it calls upon Argentina and the UK to

15 This treaty, also known as the American Treaty, was an extension of the Peace Treaty of 1667 which had terminated the war between England and Spain. It confirmed the Spanish recognition of the English colonies in North America. However, as a counterpart of this recognition, Article 8 thereof provided that the subjects of the British Crown shall not navigate nor engage in commerce in ports and places held by the Catholic King and vice versa.

16 An additional article clearly states: "*It is further agreed with respect to the eastern and western coasts of South America and the islands adjacent, that the respective subjects shall no form in the future any establishment on the parts of the same coast and of the islands adjacent already occupied by Spain…".* Spain had effective occupation of the islands since 1767.

solve the "sovereignty dispute" peacefully. It means that the war did not put an end to the controversy, even less, settle it. The resolution is fully consistent with article 2:4 of the UN Charter, considered a peremptory norm of international law, which prohibits the acquisition of territories by force and article 2:3 which establishes the obligation for Member States of peaceful settlement of international disputes.

Malvinas as a self-determination case

In order to properly discuss this issue, we must adequately interpret the two main United Nation General Assembly resolutions on decolonization: the Resolution 1514 (XV) which proclaims the right of all peoples to free themselves from colonial rule and Resolution 1541 (XV), which defines the "subject" of the right of self-determination and how to implement that right. Both resolutions were adopted by the General Assembly in December 1960 and became norms of customary international law.

1. - Resolution 1514 (XV)

Considered the "Charter of Decolonization", it proclaims the need to end colonialism in all its forms and manifestations. It defines external self- determination as the right of colonial peoples to freely determine their political status and to freely pursue their economic, social and economic development. In another words, it is the right of a "people" to freely choose the sovereignty under which they wish to live. But the right of self-determination, like every right, is not an absolute one. It does have limits. The limit is the territorial integrity of existing States, which means that "any attempt aimed at the partial or total disruption of the unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"[17]. We must recall once more that Great Britain recognized Argentina's independence in 1825 without making any reservation concerning the sovereignty of the Malvinas Islands.

2. - Resolution 1541 (XV)

It defines the "subject" of the right of self-determination, indirectly through the definition of "non-self-governing territories" incorporated in Chapter XI of the UN Charter. It contains a geographical element and a human one. The "non-self-governing territory" must be geographically separated from the metropolis and its population must be differentiated from the "colonizers". It must be ethnically and/or culturally distinct from the Administering Power. And here comes into play the vital concept of "people" since not every "population" constitutes a "people" in the sense of international law. Only a "people" in the sense of international law, is entitled to the right of self-determination. There are here three important elements

17 A/RES/1514/XV op. par. 6º

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to take into account regarding the definition of "peoples" who can enjoy the right of self-determination:

Firstly, a shared identity, that is to say, a common ethnicity, religion, and language among other traits. Additional elements may be inter alia, of an administrative, political, juridical, economic or historical nature. Secondly, there must be a difference between the "colonizer" the "settler population" and the "colonized population", the "indigenous population". And thirdly, do every "people" have the right of self-determination? Resolution 1514 (XV) is very clear in that respect: only the peoples subjected to alien subjugation, domination or exploitation have the right of self-determination.[18]

Legal assessment

Contrary to what is generally believed, "decolonization" and "self-determination" are not synonymous. In effect, not all cases of "decolonization" are settled by the application of the principle of "self-determination". One such case is Malvinas, where the General Assembly in Resolution 2065 (XX) has recognized the existence of a "sovereignty dispute" between Argentina and the United Kingdom. The right of self- determination, when it applies, can be implemented through three options, enunciated by Resolution 1541 (XV): independence (the majority option), free association with an independent State (Puerto Rico) or integration with an independent State (French Antilles).

In the Malvinas case, we cannot distinguish between "colonizer" and "colonized". There is no "native" population as such. It is an "imported", population "transplanted" from Britain in the mid to late XIX century. It is mainly a population of "settlers". Only 44 % of the 3.000 inhabitants of the Islands were born in the islands. Moreover, it's an "artificial" population, in the sense that no foreigner can acquire land or reside legally in the Islands without the express approval of the Governor General appointed directly by the Crown[19]. The status of "Falklander" can only be granted by the Governor. Argentines cannot legally reside or buy property in the Islands. It is interesting to note that in 1982, the UK Permanent Representative at the UN affirmed that "the British people of the Islands has lived peacefully in British territory for a century and a half"[20].Moreover, in the 2001 census, it is asserted that: "the inherent British nature of the Islands remains practically unaltered."[21] In the census of 2012 and 2021 however, with the aim of concealing that the majority of the population is of British origin, a new question is included in the census "national identity".

18 A/RES/1514/XV op. par. 1º

19 Of all the 14"British Overseas Territories" (BOT), Malvinas is the only one where the Governor is not elected. The 14 BOT are inhabited by over 300.000 citizens and cover a combined area seven times that of the UK

20 United Nations doc S/PV 2360, May 21st ,1982, p.10, par.102

21 Malvinas Islands census of 2001, abridged report.

In the 2021 census, 54 % of the residents identified themselves as "Falklanders"[22]. This is a clear attempt by the islanders to create a "differentiated identity" not only from Argentina but fundamentally, from Britain in order to claim the right to self-determination. Though the census goes at great lengths to demonstrate that 71 different nationalities live in the Islands, it has no other option but to admit that the predominantly foreign nationality is British. On top of that, only 1530 persons were born in the islands, the equivalent of 44.6% of the total population. Besides, all of them, since 1983, have been considered full British citizens.

As we see from Resolution 1514 (XV), the element of "discrimination", of "subjugation" is of the essence. There are no such elements in the Malvinas case. Moreover, since 1983, as we have just said, the islanders are British citizens. So, we conclude that Malvinas is a case of a "colonized territory" rather than a "colonized people". The United Nations Resolution 2065 (XX) settles the issue. It clearly characterizes the "Malvinas Question" as a special colonial case where the principle of self-determination does not apply because there is an underlying sovereignty dispute between the UK and Argentina that must be solved by the two countries taking into account the "interests" of the population. Here there are some key elements that, taken together, clearly exclude the application of the principle of self- determination: a) "sovereignty" dispute; b) peaceful solution of the dispute by the two Parties to it, namely and exclusively, the UK and Argentina (therefore there are no three parties: Argentina, the UK and the islanders)[23]; c) the controversy must be solved taking into account the "interests" of their islanders but not their "wishes". The latter word is synonymous of self-determination in international law. To support this statement, it must be emphasized that none of the 10 resolutions adopted by the General Assembly or over the 40 resolutions adopted by the Special Committee on Decolonization specifically on the "Malvinas Question", incorporate the principle of self - determination. Moreover, two attempts by Britain to introduce amendments in 1985 to include the principle of self-determination in the General Assembly resolutions were rejected by vast majorities.

Negotiations between 1966 and 1982

After the adoption of Resolution 2065 (XX) in December 1965, a fruitful and intense period of negotiations started between Argentina and the United Kingdom over the substance of the issue: that is the sovereignty over the Islands. And this marks a very important difference with the negotiations that have been taking place from 1990 onwards, when full diplomatic relations were reestablished after the armed conflict of 1982. The latter deal with practical issues such as fisheries conservation, oil

22 Op.cit Note 3

23 The fact that in the bilateral meetings between Argentina and the UK, representatives of the islanders participate, it does not mean that there are three parties to the negotiations. They participate exclusively as members of the United Kingdom delegation.

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exploration and exploitation and communications between continental Argentina and the Islands, etc. but the issue of sovereignty was seldom addressed due to the systematic refusal of the United Kingdom, despite Argentina's best good faith efforts and the repeated calls from the international community.

1. - The "lease back": In 1968 Argentina and Britain initialized (not signed) a Memorandum of Understanding (MOU) according to which, London as a "final solution" to the question of sovereignty recognized the Argentine title to the territory in exchange for a transitional period to be agreed upon, of British administration as a guarantee that the islanders' "way of life" would be preserved. At the end of the mentioned period, Argentina would exercise full sovereignty. It was a short term "lease back", based on the distinction between "legal title" to a territory and the "exercise of sovereign powers" over a territory. Once the Argentine titles to the territory were recognized by Britain, Argentina, as sovereign, would then lease the territory to the UK for a fixed period of time. Once that period was concluded, Argentina would have both the title to the territory and the exercise of sovereign powers over it. When the news of the Memorandum became known to the islanders and particularly to the "Falkland Islands Company" (FIC), the colonial style company which owned 90% of the land until 1983 and was the only source of private employment in the islands, the MOU collapsed. The powerful FIC lobbying in London was quickly activated and, in the end, Westminster did not approve the agreement. It was a lost opportunity.
2. - The condominium: In 1974, London proposed an Anglo-Argentine condominium. The idea was received positively by the Argentine Government. A counter proposal was swiftly presented by Argentina in order to discuss and seek a negotiated solution. Buenos Aires offered the alternative of a "joint administration" instead of "shared sovereignty", and for that purpose, it took the main points of the British proposal, namely two flags, passports, administration, legal system and complemented it with other important issues which had not been included, such as nationality, languages, currency, et al. In the end, for different reasons, the proposal failed.
3. - Long term leaseback: In 1980, during the Thatcher Administration, the idea of a long-term lease back was floated but it encountered strong resistance from the Islanders who were informally sounded on the idea. For the population, the only acceptable option was the freezing of the sovereignty dispute. Consequently, the UK abandoned any proposals on lease-back. [24]

The war broke out on April 2nd, 1982. A ceasefire agreement was signed on June 14th, 1982. During those long 74 days, mediation efforts firstly led by US Secretary State Alexander Haig, then Peruvian President Fernando Belaunde Terry and finally by United Nations Secretary General Javier Perez de Cuellar, did not bear fruit.

24 For a detailed account of the negotiations during this very interesting period, see: "The diplomatic negotiations over the Malvinas Question" https://www.argentina.gob.ar/sites/default/files/2023/malvinas_negotiations_1966-1982_pdf

The substantive differences between the Parties concerning the future status of the Islands could not be bridged. The sinking of the "Crucero General Belgrano" on May 2nd, 1982, outside the self-proclaimed British 200 nautical miles exclusion zone around the Islands, annihilated any chance of a ceasefire and of a transitional arrangement. Britain commenced its final and massive attack on 21 May 1982.

Negotiations during and after the 1990's

The eight years of non-diplomatic relations were only interrupted by a failed meeting in Berne in 1983, where the positions of the Parties were far apart.

The "Madrid Joint Statement" of 19 October 1989 (Madrid I), which reestablished consular relations, was followed on 15 February 1990 by the second "Joint Statement"(Madrid II) which reestablished full diplomatic relations between London and Buenos Aires and launched a new negotiation dynamic.

The main initial aim was to gradually recover confidence and trust between Argentina and Britain, including the islanders. Consequently, a series of confidence building measures were agreed upon. Argentina's ultimate aim was to gradually restart the sovereignty discussions interrupted by the war in 1982.

The "Madrid Agreements" established the "sovereignty formula", informally called the "sovereignty umbrella", according to which any understandings reached between the Parties, on practical issues, such as air links, fisheries conservation; oil exploration, demining, etc., do not imply any change on the respective positions of either Argentina or the UK over the sovereignty of the Islands or of their respective maritime surrounding areas.[25] The formula is also important for two other reasons: it is the first time after the end of the war, that the UK explicitly recognizes the existence of a sovereignty dispute and London also admits that the dispute encompass not only Malvinas Islands but also South Georgia Islands, South Sandwich Islands and the surrounding maritime areas, which at the time of the adoption of Resolution 2065 (XX), were Malvina's dependencies.

In "Madrid I" the two governments noted that all hostilities between them had ceased. It was a de facto ceasefire since there had not been a formal declaration

25 See Joint Statement 19 October 1989: "Both Governments agree that:
Nothing in the conduct or content of the present meeting or of any similar subsequent meetings shall be interpreted as:
"A change in the position of the United Kingdom with regard to the sovereignty or territorial and maritime jurisdiction over the Falkland Islands (Malvinas), South Georgia and the South Sandwich Islands and the surrounding maritime areas;
A change in the position of the Argentine Republic with regard to the sovereignty or territorial and maritime jurisdiction over the Malvinas Islands (Falkland), South Georgia and South Sandwich Islands and the surrounding maritime areas
No act or activity carried out by the United Kigndom, the Argentine Republic or third parties as a consequence and implementation of anything agreed to in the present meeting or in any similar subsequent meetings shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or the Argentine Republic regarding the sovereignty or territorial and maritime jurisdiction over the Falkland Islands (Malvinas), South Georgia and the South Sandwich Islands and the surrounding maritime areas"

of war and more importantly, both countries undertook not to pursue any claim against each other in respect of loss or damage arising from hostilities. They renounced to claim war damages. In the Joint Statement agreed on 15 February 1990 ("Madrid II"), full diplomatic relations were reestablished, and the UK lifted the 200 miles exclusion military zone imposed during the armed conflict. A number of confidence building measures were also agreed and implemented through four annexes[26].

As a result of the "Madrid Agreements", a "Joint Declaration on Fisheries Conservation" (1990), a "Joint Declaration on Cooperation over offshore activities in the Southwest Atlantic" (1995), a "Joint Declaration on Communications" (1999) between the islands and continental Argentina and a "Joint Declaration on Private flights" (2001) were agreed among others. The "Joint Declaration" of 1995 was denounced by Argentina in 2007 due to Britain's unilateral granting of oil exploration licenses in violation of the understanding reached in 1995. The rest of the joint declarations are in force.

In 2016 Argentina and the UK signed an agreement, called the "Humanitarian Project Plan", entrusting the International Committee of the Red Cross (ICRC) with the forensic identification of the Argentine soldiers buried in the Darwin Cemetery unidentified. The families of the Argentine soldiers identified through this process were subsequently able to visit and name their relatives' graves. It was the first substantive agreement signed with Britain concerning the Islands in 15 years. It had exclusively humanitarian purposes. It was considered by the Red Cross as a "leading case" of cooperation between the two Parties despite the ongoing dispute over the territory. The event was widely and positively reflected in the international press.

A new stage in the negotiations started then after long eight years of diplomatic silence. But there is a fundamental difference between the negotiations carried out before and after 1982: during the first period, the negotiations dealt with the substance of the issue, that is to say, the sovereignty dispute. After the war, the negotiations focused mainly but not exclusively, on practical issues, in order to restore peace and normality in the Southwest Atlantic, postponing for a certain period of time, the principal discussion: the sovereignty over the Islands. For Argentina, this transition deemed essential for confidence building after the war, was always conceived as means to achieve an end: to restart, when the time was ripe, the discussion on sovereignty. However, Britain seemed (and seems) comfortable with the status quo. London conditions any discussion on sovereignty to this day to the consent of the Islanders. The Foreign Office does not reject any discussion on sovereignty flatly, but quite smartly, argues that it will only do so, when and if the Islanders wish so. This line of thought is dangerous because it purports to introduce a third party with a veto power in a dispute which has been defined by all United Nations resolutions as a bilateral one.

26 See Joint Statement of 15 February 1990: Anex I Interim Reciprocal Information and Consultation System; Anex 2 Safety Measures for Naval and Air Units when operating in proximity; Anex III Maritime and Air Search Rescue and Anex IV Safety of Navigation.

Possible alternatives

We will briefly refer now to some possible alternatives. Some of them imply a definitive solution to the sovereignty dispute while others are transitional arrangements.

"Lease back" for a pre- established period, as discussed in the seventies. Hong Kong is valid and useful model. In accordance with the Joint Declaration of the Governments of the United Kingdom and the People's Republic of China on the "Question of Hong Kong", the latter recovered full sovereignty over the territory on 1 July 1997 and created an "Administrative Special Region" with a high degree of autonomy, except for defense and foreign relations. China assumed the obligation to maintain Hong Kong agreed status for 50 years.[27] In the case of Malvinas, the status of the British military base at Mount Pleasant must be addressed.

The "condominium" is the exception to the rule according to which two or more sovereignties cannot coexist over the same territory. In the case of Malvinas, it will imply accepting the sovereign titles alleged by Britain. For this reason, we are of the opinion that a "Joint Administration" while negotiating sovereignty is a better option. This is an example of a transitional arrangement.

"Free Associated State": the best example is Puerto Rico. Argentina would retain control of defense and foreign affairs while the islanders would enjoy an ample degree of autonomy. This is not an alternative in the case of Malvinas because the "Free-Associated State" is one of the options available under resolution 1541 (XV) for the exercise of self - determination. It would recognize the Islanders as a "people" with the right to self-determination. Besides, the option is not final. In the case of Puerto Rico, several referenda have been taking place since 1952. In the case of Malvinas, there is the risk of independence or free association with Britain.

Interim United Nations Administration: was an option discussed during the 1982 War to allow more time for negotiations, but nowadays is no longer valid. The situation on the ground is different.

A regime of protection of minorities with international safeguards:It has two requirements: the granting of special rights to the minority and the establishment of an international procedure in case of violations. It will mean a larger degree of autonomy than the one enjoyed presently by Argentine provinces within our federal republican system. We may call it "autonomy plus".

Aland Island solution: The Aland Islands were, along with Finland, a part of the Kingdom of Sweden but became part of the Grand Duchy of Finland in 1809 when

27 During the XIX century the British Empire signed three treaties with Imperial China in relation to Hong Kong: a) Treaty of Nanking (1842) according to which the island of Hong Kong was transferred to Britain perpetually, b) Treaty of Pekin (1860) the southern part of the peninsula of Kowloon and Stonecutters Island were also transferred perpetually, c) Convention of 1898: the so called "New Territories" which make for 98% of the total aera, were transferred to London for 99 years, starting on 1July 1898 for free.

Sweden was forced to relinquish Finland and the Aland Islands to the Russian Empire. In 1917, when Finland gained its independence, the representatives of the Aland's municipalities sought reunion with Sweden, but Finland refused. In 1921 the League of Nations granted Finland sovereignty over the Islands but was placed under the obligation to guarantee to the population of the islands their Swedish culture, language, local customs and the system of self-government.[28]

Conclusions

1. - The "Malvinas Question" is essentially a sovereignty dispute in a colonial context. Therefore, the resolution of the issue of sovereignty must necessarily and inevitably precede any discussion regarding the rights of the Islanders because it calls into question the legitimacy of the British presence itself on the Islands. It is also important to bear in mind that Argentina's claim is not based on the proximity of the Islands to Argentina, but on title. Argentina has consistently demonstrated to have the best titles to the Islands. This is an argument that is strong enough for the inapplicability of self-determination. British titles are defective, therefore, any claim by or on behalf of the Islanders to self-determination is incapable of displacing Argentine's sovereignty arguments[29].
2. - One of aspects to remark is that the dispute has remained alive, and it gained intensity especially after the adoption of resolution 2065 (XV). For Argentina, the "Malvinas Question" is a State policy independent of the political party in power. All Argentine democratic governments, naturally with varied approaches and tactics, have been consistent in urging for a negotiated solution to the sovereignty dispute, putting a special emphasis on the "interests" of the population.
3. - The islanders do not constitute a "people" in the sense and with the consequences that such a category has in international law. They are not an "indigenous population". Therefore, the referendum that was carried out in the Islands in 2013 is null and void and not opposable to Argentina for the following reasons: according to the UN Charter, Malvinas is one of the 17 "non-self- governing territories" undergoing the process of decolonization. Any such referendum must be organized under the auspices of the Committee on Decolonization and supervised by UN observers. None of that happened. Besides, the exercise of the right of self-determination, by definition, as set out in resolution 1541 (XV) implies options, choices. In the case of this referendum,

28 For a detailedanalysisof definitive solutions and transitionalarrangements, SeeKohen, M: "*Alternativas para la solución del conflicto por las Islas Malvinas"*, Revista de Estudios Internacionales, Vol. 7, Nº 4, Octubre-Diciembre1986, pp. 1145-1163

29 See Trinidad, J: "*Self- Determination in disputed colonial territories"*, Cambridge Studies in International an Comparative Law, 2019, pp. 133-156.

there was only one question: "Do you wish the Falkland Islands to retain their current political status as an Overseas Territory of the United Kingdom? YES or NO". [30] The way the question was drafted points to two key aspects of the referendum. First, Argentina is clearly targeted as the "factor" that made the referendum necessary. Secondly, the promoters of the referendum seem to have no doubt about the outcome. What is at stake is merely the maintenance of the status quo. The result was 99.8% in favor of remaining a "British Overseas Territory".[31] For all these reasons, the results are not opposable to Argentina and have not been taken into account by the Decolonization Committee, as it is clear from the resolution adopted by consensus on 18 June 2024, urging Argentina and the United Kingdom to resume negotiations on the "sovereignty dispute"

4. - The peculiar nature of this colonial case must be clearly exposed in the international fora, and careful attention should be given to the recent tendency of the Islanders to present themselves as having a "differentiated identity" as reflected in the census of 2012 and 2021. Along the same lines, the increasing lobby being exercised by the Islanders through "public diplomacy" dealing directly with foreign officials in the United States, Canada and Trinidad & Tobago among other countries, is also a matter of concern. In the same context, in the last 20 years, there has been a growing tendency by Britain to delegate competences in key areas such as the granting of fishing and oil exploration licenses, and civil aviation administration in the "local government", in contrast to the situation before the war where most of the jurisdictional competences remained in the hands of the colonial authorities.
5. - Considering the wording of the Special Committee on Decolonization resolutions on the Malvinas Question "a special and particular case of decolonization", the negotiation strategy must follow two simultaneous tracks mutually complementary and reinforcing: a multilateral one and a bilateral one.
6. - The Malvinas Question is one of the few sovereignty disputes arising out of the XIX century which is still debated annually at the United Nations, the Organization of American States (at the level of Foreign Ministers), the G-77 + China and other relevant international fora.
7. - The United Nations General Assembly has adopted 10 specific resolutions on the Malvinas Question, while the Special Committee on Decolonization has adopted over 40 resolutions calling both Parties for the peaceful settlement of the sovereignty dispute. We will recall four of them.

30 See Falkland Island Executive Council of 21 November 2012.

31 The results are: a) Ballots paper issued: 1522, b) votes cast at the referendum:1518, c) rejected ballots papers: 1, d) valid ballots papers 1517,d) turnout at the referendum 92%, e) "Yes" votes cast: 1513 (99.8%), f) "No" votes cast: 3 (0.2%). For a complete analysis of the Referendum, See Fourches, M: *"Self-determination, sovereignty disputes and dependent territories: An analysis of the 2013 referendum in the Falkland Islands"*, Archive ouverte HAl.

7.1. The adoption of resolution 2065 (XX) in December 1965[32], was instrumental in launching the substantive negotiation process that took place from 1966 to 1982. It provided, as stated above, the essential legal framework for the diplomatic negotiations.

7.2. At Argentina's initiative, the General Assembly declared in 1973 through resolution 3160 (XXVIII) "the need to accelerate the negotiations between the Governments of Argentina and the United Kingdom ...called for in General Assembly resolution 2065 (XX) in order to arrive at a peaceful solution of the conflict of sovereignty between them..."[33].

7.3. Another important resolution was adopted by the General Assembly in December 1976.Resolution 31/49 calls upon the Parties to refrain from taking unilateral actions that preclude the outcome of the dispute. This is of particular relevance in relation to the exploration and exploitation of natural resources, in particular due to the granting of illegal fishing and oil exploration licenses by the local authorities" in the Islands[34]. The Southwest Atlantic is the largest remaining fishing ground for "illex squid" in the world. The so called "Falkland Island Conservation Zone" (FICZ) together with the "Falkland Island Outer Conservation Zone" (FOCZ), extending to 200 nautical miles around the Islands, are obviously not recognized by Argentina, and have been duly protested. The policy adopted by the local "government" to grant long term fishing licenses (25 years) is contrary to resolution 31/49. Revenues from fisheries amount for approximately 45% of the Islands budget.

7.4. Finally, Resolution 37/9 adopted by the General Assembly in November 1982, five months after the end of the South Atlantic conflict, is important for two issues in particular.

In the first place, operative paragraph 1° requests both Governments "to resume negotiations in order to find as soon as possible a peaceful solution to the sovereignty dispute relating to the Question of the Falkland Islands (Malvinas"), which clearly means that the war neither put end to the sovereignty dispute nor even less solved it. The word "resume" is important, because it means that there were negotiations before 1982.

In the second place and equally important, operative paragraph 2° "requests the Secretary-General on the basis of the present resolution, to undertake a renewed mission of good offices in order to assist the Parties in complying with the request made in paragraph 1 above (settle the sovereignty dispute) and take the necessary

32 Resolutions 2065 (XV) and 3160 (XXVIII) were the only two General Assembly resolutions that the UK did not vote against butabstained.

33 See A/RES/3160/XXVIII

34 Paragraph operative 4º of Resolution 31/49 "*calls upon the Parties to refrain from taking decisions that would imply introducing unilateral modifications in the situation while the islands are going through the process* (of decolonization)"

steps to that end".[35] This mission could not materialize due to British refusal.

As we have already mentioned, multilateral diplomacy will not solve the issue, but it gives it the proper legal framework and keep a XIX century dispute alive on the international agenda, which is relevant for the success of bilateral negotiations.

8. - On the bilateral front, Argentina must persist and insist on resuming sovereignty negotiations as called upon by the UN resolutions, as all Argentine democratic governments have done since 1983. It will take time, a concerted effort and a systematic and consistent approach. Argentina must prove that it is a trustable partner, and consequently, that the future of the Islands lie with continental Argentina rather than with a faraway Power. Confidence-building measures and a serious strategy of rapprochement with the Islanders are part of it. In principle, all "practical" issues under the "sovereignty formula" can and should be included in the negotiations: fisheries conservation, oil exploration and even exploitation, with appropriate safeguards and agreed areas of application. Communications and closer links with continental Argentina should be encouraged, as in the seventies, but at the same time, no issues should be excluded: that is a comprehensive and bona fide discussion on the sovereignty dispute. This is a sine qua non condition. Argentina must not cave in to the British demand to discuss all issues, excluding sovereignty.
9. - Any viable solution must include a proper and mutually agreed scheme of international safeguards to preserve the "interests" and the "way of life" of the Islanders in compliance with General Assembly Resolution 2065 (XX) and Argentina's own Constitution.
10. - The Aland Island or Hong Kong models, among others, might well be revisited. A return to the status quo ante, though desirable, may prove objectively difficult due to the developments in the Islands since 1982. Transitional arrangements should be discussed constructively at the negotiating table. A building blocks strategy may be useful to generate mutual trust, but the final purpose of the negotiations should be, as prescribed in Argentina's Constitution, the full recovery of our sovereignty over the Malvinas Islands, South Sandwich and South Georgia Islands and the surrounding maritime spaces[36].

35 See A/RES/37/9

36 Temporal Clause 1: "The Argentine Nation ratifies its legitimate and non-prescribing sovereignty over the Malvinas, Georgias del Sur and Sandwich del Sur Islands and over the corresponding maritime and insular zones, as they are an integral part of the national territory The recovery of said territories and the full exercise of sovereignty, respectful of the way of life of the inhabitants and according to the principles of international law, are a permanent and unrelinquished goal of the Argentine people"

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