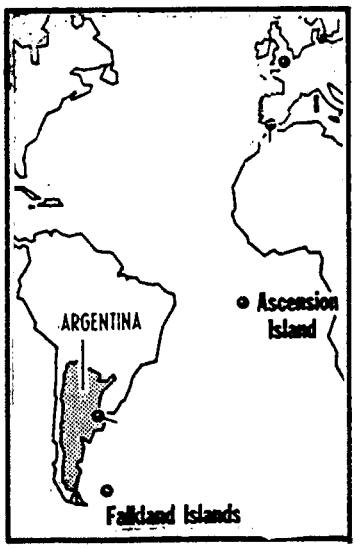

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SHARED SOVEREIGNTY: A SOLUTION FOR THE FALKLANDS / MALVINAS DISPUTE.

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The dispute between Argentina and Britain over the Falkland/Malvinas Islands is a dispute over sovereignty and it is in the field of sovereignty that a solution will be found. Of all the solutions that have been suggested, shared sovereignty comes nearest to meeting the requirements of the parties to the conflict. It offers an outcome with no victors and no vanquished, where the claim of the Argentines that the Malvinas are theirs and that of the Islanders that they are British could both be met. Shared sovereignty is a system with immense potential in the world for many different sorts of conflict over territorial jurisdiction. In the past, except in the case of Andorra, people have not believed that the system could be made to work to provide an equilibrium for the medium or for the long term. It is the purpose of this paper to describe the institutions and procedures, so that two or more co-domini, that is two or more authorities which jointly share sovereignty, can work together. They may well find it difficult to come to agreement on policy matters, but still be able to govern effectively through a Council of Co-Domini, a Governor with authority delegated to him and an elected council of the inhabitants. At the same time I shall examine the other suggested options for the Falkland/Malvinas and show why they are not so satisfactory.

Political Constraints

Certain political facts stand out in the complexities of the conflict. There are three parties concerned - Argentina, Britain and the Falkland Islanders. The views of all of them are of importance and all hold strongly to their opinions and principles. Those of the two principal parties are of such importance that any solution must seek to give at least partial satisfaction to both those views. The third party, the Falkland Islanders, cannot in my view cling on to the status quo indefinitely, but nonetheless any British government that could possibly come to power must seek to meet their fears and negotiate a settlement on their behalf which offers them justice and a satisfactory life, and which preserves their identity as a community.

The Argentine view is an old one and is deeply held by all sections of society. Generations have been taught that 'Malvinas son nuestras', (the Malvinas are ours), and have chanted the refrain 'Malvinas son Argentinas', (the Malvinas are Argentine). They believe that Argentina was wrongfully deprived of the Islands by force by Britain in 1833 and that it is a sacred task for them to restore the Islands to Argentina. The present government wisely forswears the road of violence and regards the invasion of 1982 as (in President Alfonsin's words), 'an illegal act in a just cause'. It nonetheless insists that, unless it is acknowledged that there is a sovereignty dispute, other measures to improve the relationship between Britain and Argentina will be difficult to achieve. There is a widely held belief in Britain that the Argentine government only wishes to talk about sovereignty. This is not true, but for the commencement of negotiations on bilateral questions to be possible, they wish to feel free to present their views on the subject of sovereignty without the British representatives walking out. It is now put officially that there must be "an open agenda without preconditions". I do not think that the Argentine government could deviate from this negotiating stance, and we must respect the Argentine view, but equal respect must be given to the British view.

The British government regards the matter more as one of the future of the Islanders than as one of the title to the land. It believes that the events of 1833 and preceding years were uncertain in their import for sovereignty, and that in any case the long period of British occupation and rule has created a prescriptive right. There is in the Foreign Office, and in the reports submitted to it over the years, a certain agnosticism on the issue of the right to sovereignty, but Britain is unwilling to accept the simple Argentine claim as of right. Britain has been willing to lower its flag over some fifty nations, comprising a quarter of the world's population, but always with the consent of the people concerned. This is the first instance, apart from Gibraltar and Hong Kong, where she has been asked to lower her flag over those who wish it to continue to fly.

The effect of this situation is not that Britain must forever continue to treat the Falkland Islands as a British colony under its exclusive sovereignty, or seek to preserve a small enclave of exclusively British identity off the coast of a vast South American continent. It does, however, mean that we cannot ignore the wishes of the Islanders as if they were mere tenants or crofters to be controlled by a laird, or peasants in need of a cacique. Furthermore, the invasion and battle of 1982 had political consequences. The mood of jingoism which accompanied and immediately followed the conflict has abated, and people in Britain seek and desire a just settlement with Argentina. But it is impossible for any British government to act in a way that is seen to 'betray the sacrifices of those who died in the battle', or to vindicate the act of Galtieri, nor could a British government simply abandon the Islanders to the discretion of the Argentine government's control.

Of course, the battle does not have consequences in the field of rights and wrongs, for governments cannot be in the business of punishment, nor can we, like the superstitious men of the Middle Ages, rely on a 'trial by battle' where the will of heaven is shown by the victory of one champion over another. The battle in 1982 removed the consequences of the 'illegal act' of Galtieri, (in President

Alfonsin's phrase), and established the principle that the map of the world can no longer be altered by force of arms. We are now in a new situation free from the 1982 conflict, and must get down to the work of negotiation which should go on until it produces a result. This is the view of almost all the nations of the world, as expressed in successive resolutions of the General Assembly - Securus judicat orbis!

We are forced, therefore, to consider solutions which transcend the category of exclusive national sovereignty. Let us examine them one by one.

Other Options

1. The simplest of these is *LEASE-BACK*. Under such a system sovereignty would be formally handed over to Argentina at the outset, but simultaneously 'leased back' to Britain for a stated period at the end of which the lease ends and total control would be handed over to Argentina. The only parallel for this in the past has been the status of the New Territories which comprise the largest part of Hong Kong. In that case, however, Britain never enjoyed sovereignty in the first place, but merely acquired a lease for a long period from a weak Chinese government. The attraction of the lease-back arrangement is its simplicity. It exonerates us from all the careful detailed thought about institutions that we need for devising the solution of shared sovereignty, for under lease-back the existing colonial institutions continue in their entirety until midnight on the day of the expiration of the lease, and then at one minute past twelve Argentina could begin to set up its own constitution to implement its undivided control. The danger is that the whole operation would be treated like a transaction in real estate and the Falkland Islanders could be treated as mere tenants, who fall under the control of a new landlord at the expiration of the lease.

The disadvantages of this option are, in my view, many. The symbols of rule would, if the Hong Kong New Territory parallel is followed, remain exclusively British until the lease ends. On the other hand, the British government would have formally to hand over title to the Islands at the outset of the arrangement. Thus Argentina would have to wait until the end of the lease to see any visible sign of its presence on the Islands. Lease-back, unlike shared sovereignty, does not allow the Argentine flag to fly in the Malvinas until after a longish time. Conversely, the British government, which would continue to fear that some new Argentine government might come to power and seek to put an end to the lease by occupying the islands would have already handed over its full sovereign right. In such a case it would be difficult for a British government to launch a second task force in defence not of its sovereign territory but merely of its lease. One must hope and pray that Argentina will never revert again to the policies of the bad old days of military rule, but governments have to be cautious in measuring options when they give up sovereignty in negotiation.

A second and greater objection to the option of lease-back is that it would be in no sense an institution that 'teaches' the attitudes that we need to inculcate, as good institutions should do, in addition to their other functions. It does not provide any evidence of the reconciliation of the two adversaries, as would a solution of shared sovereignty where the flags would fly together and the anthems would be sung one

after the other. It would be in a sense a solution between enemies rather than one that in its own operation gives visible evidence of friendship. Lease-back fails also in the second teaching function which we require. The Islanders suffer from an unreasonable phobia of things Argentine, a phobia much reinforced by the invasion, (though one must, in fairness, record that although the invaders caused great destruction to property they did not take the life of a single Islander, nor cause any of them serious injury.) Some of those Islanders who have been to Argentina for schooling or hospital treatment in the period before 1982, have fond memories of Argentine kindness, but there is a vast work to be done in establishing links of friendship between Argentina and the Islands, and the institutions of shared sovereignty give a chance to foster that friendship, whereas those of lease-back in principle would not, for they involve separation until the end of the lease.

A third objection is to the very terminology of lease-back. It seems to reduce the Islanders to mere tenants in a transaction like that of an estate agent dealing in rented property. Argentine law in this respect tends to concentrate on land and territory; British thought tends to regard issues of people as having priority. There is value to both views, but the 'people element' is important, and for that lease-back is likely to be an unsatisfactory category. It is interesting that in the many other instances in which there is a conflict of sovereignties and a dispute over national identities, lease-back has not been mentioned as an option. Shared responsibility by Britain and Ireland has, for instance, been suggested in the 'New Ireland Forum' as an option for Northern Ireland, and it is probably the only one of the three suggestions of the forum that has the remotest chance of being accepted by the Unionist majority in the North. No one in his wildest dreams would think of suggesting lease-back for Northern Ireland. Gibraltar is, as we shall see, another area where thoughts are turning to solutions of two flags and shared sovereignty. It would be detrimental to the status of a small but effective democratic community in Gibraltar to suggest lease-back for them.

The fourth objection to lease-back is, in my view, the most serious. I doubt if any British government could contemplate a period of lease-back of anything under twenty-five or thirty years, and even that proposal would require a lot of courage for a British government to put forward. Before the 1982 conflict, a lease-back proposal was put to the Islanders and rejected, and Mr Ridley came under severe criticism from both sides of the House for putting it forward. It would be very hard for any British government to make a formal surrender of sovereignty in exchange for a lease-back of only a few years, while the memory of the battle is still fresh.

On the other hand, it would be hard for the Argentine government to accept lease-back as anything other than a short term stepping stone to full Argentine sovereignty. In order to satisfy Argentine public opinion its President needs, after the negotiation, to be able to show them an Argentine flag flying over the Islands. The fact that it flies side by side under shared sovereignty with that of Britain need not be an insuperable obstacle, for by then we shall have become friends. For these reasons I prefer shared sovereignty to lease-back.

2. The second suggested solution is *INTERNATIONAL TRUSTEESHIP*, (presumably under the United Nations). There would be attractions in the involvement of the United Nations. It is high time that an interdependent world made more effective use of the United Nations, since it is the only institution that we have to represent all the governments of the world in political and other matters. I believe that it would be possible, under the option of shared sovereignty, to make some use of the United Nations as a body to give its blessing and its advice on certain matters and to provide us with a slate of experienced and tactful administrators from which to choose the Governor. But I believe that full UN sovereignty suffers from insuperable disadvantages in this case.

The period for which UN would be willing to take responsibility for the Islands is likely to be far too short. When the UN was asked in the diplomatic exchanges after the Argentine invasion of 1982 whether it was ready, if needed, to take responsibility for the Islands, it offered to do so for some six months, after which the sovereignty would be disposed of by the UN to Argentina or Britain, presumably as the General Assembly decided. Such a period would be far too short to be of any value for a settlement acceptable to the British government. Furthermore, while the UN possesses many competent administrators and a Secretary-General of the highest calibre, it would be very difficult for them to operate in the capacity of a 'pure administrator' as required in the Islands. They would always be subject to the political will of the UN as a whole and in the Assembly, Security Council and Trusteeship Council the issue would be liable to be treated as one of political bargaining between members. The British government would not trust the Islands to an administration dominated by the members of the Non-Aligned Movement, to whom the issue would appear as a simple one of 'decolonisation' and Third World solidarity with Argentina.

A further objection to the option of UN trusteeship is that it may not prove to be adequate for the Argentine government, unless it were short term and resulted in the cession of the Islands to their exclusive sovereignty at the end of that term. Argentina has no quarrel with Britain, except over the issue of the Falkland/Malvinas sovereignty. It is not just the presence of British sovereignty over the Islands that is resented but also the denial of their own claim. In that respect UN sovereignty, by way of trusteeship, would be not be appreciably better than is that of Britain.

For these reason I prefer shared sovereignty to UN trusteeship.

3. The third option is that of *TRANSFER OF SOVEREIGNTY WITH TREATY OF GUARANTEE* , with a promise of a considerable level of autonomy to the Islanders to protect their local self-government and way of life. This option is, not surprisingly, very popular with the Argentine side. It amounts to a complete transfer of sovereignty and self-limitation of the Argentine government reinforced by treaty. It may well provide a long term solution to the problem of the Islands, but it would not be a practical option for any British government at the moment. It might, if the Islanders were reasonably well satisfied, follow on after a longish period of shared sovereignty but, in the short run, it would not be acceptable. It involves a severing of all links of formal British identity. The

Islanders would not be prepared for this at present and it also would require them to trust their destiny to the Argentine government. Although at the present moment the commitment to democracy of the government, the opposition and the society in general (excepting some very small fringe groups) is unreserved, the possibility of change in the future cannot yet be ruled out. A typical Island view was given to us in the South Atlantic Council some time ago - 'we need the strong right arm of the British government to ensure our liberties and protect us.' The Islanders cannot expect total colonial protection to last indefinitely, but they do require a situation in which, for a long interim after a British/Argentine agreement has been made, the British government would have a 'Locus Standi' to exercise protection on their behalf. Neither transfer of sovereignty with treaty and guarantee nor UN trusteeship provides such a 'Locus Standi' for Britain; the institutions of shared sovereignty between Britain and Argentina do provide it.

For these reasons transfer of sovereignty would not be a practical option in the short run.

SHARED SOVEREIGNTY: The need and the concept.

The concept of exclusive territorial sovereignty has been developed over the last four or five hundred years and applied to almost the whole of the land surface of the world. It has in general proved functional to world order, since it provides certitude and often allows for larger units for purposes of economic activity. However, we notice two things about the theory of exclusive national sovereignty.

First we see that in practice states have to accept decisions made by many supranational bodies, whether regulative or financial, applying conditionalities. Furthermore, within the state, power is limited by constitutions and by rights of individuals some of which can be enforced by courts at supranational level. On the occasions in which arrangements have been made in which there is no single focus of sovereignty, the happy anomaly seems to work well, as in Andorra, Antarctica, West Berlin since 1961, the high seas or outer space. Other examples, such as the Isle of Man, Liechtenstein, Monaco or the Vatican have not conformed to the standard pattern of sovereignty, yet nobody challenges their continued existence. In the case of the Vatican, His Holiness the Pope did not even put on trial the man who shot him, yet he has all the sovereignty needed for his spiritual role. In all this we depart a long way from the Austinian view of sovereignty as indivisible mastery.

But more important than this for our purposes we find that certain areas of the world continually and obstinately defy our attempts to keep them in the domain of one sovereign state or the other. For some 98% of the habitable surface of the globe the assumption of exclusive national sovereignty works reasonably well and we have no reason to depart from it in general, but for the remaining 2% it does not suffice. A human body can be totally poisoned by a single small part of it going septic, and similarly the relations between great powers can be poisoned by quarrels over relatively small areas of land. Shakespeare in Hamlet tells how the Poles and the Danes go to war over a plot of land, whose size is not sufficient to provide a burial ground for all who have been killed in the conflict over it. We have not become much wiser since the age of Hamlet. In these cases we cannot

find an answer within the confines of the concept of exclusive national sovereignty and the single flag. In seeking to do so we are like students presented with a problem in three dimensional geometry, which they seek to solve within a two dimensional frame; the problem just would not come out.

To find an answer we need a certain flexibility with flags. We need to be able to bring together two or more nations in the business of the government of one area, and since they may well not agree with one another sufficiently well to carry on the day to day business of government, we need to created very special institutions where their policy input would be channelled through a Council of the Co-Domini and where the main business of administration would be given by power of attorney to an administrator or Governor on their behalf, who acts as 'pure administrator and political officer' for the benefit of the area for which he is responsible. We can see the immense advantage in the world of a workable concept of shared sovereignty if we can invent and devise one that would work. Let us examine this problem

The possibility of shared sovereignty

Rousseau and the framers of the 'Rights of Man', Robespierre and the Jacobins, spoke of sovereignty as being indivisible. This is hardly surprising since so much of their activity was concerned with decapitating their opponents, and in the exercise of so much coercion one does not want to be impeded by divided authority. Others have continued the disbelief in the possibility of shared sovereignty, despite the fact that it has worked satisfactorily in Andorra for just over seven hundred years, over a population about ten times as big as that of the Falkland/Malvinas Islands. The opposition is based upon a confusion of thought. There is no 'law of political science' that says that sovereignty cannot be shared. There is a 'law' not only of political science, but of the commonsense of men of affairs, that an efficient business cannot have too many managers. Shakespeare puts this very succinctly in Henry V to describe the sad state of the kingdom under the weak rule of Henry VI:

> Whose State so many had the managing, that they lost France and made his England bleed, which oft our stage hath shown.

The import of this, however, is not that shared sovereignty is impossible, but that the co-domini must employ a manager and give him in many matters, administrative and political, a power of attorney.

Specific institutions would be needed to make shared sovereignty work. Their precise form and detail is all important and varies from case to case, where we seek to apply it according to the size and degree of homogeneity of the inhabitants to be ruled, and according to the relation between the co-domini. In general, however, all of them involve four key elements. First, a presence of both co-domini in the symbolic aspects of the government of the area through their flags, their anthems and through the possibility of ceremonial or celebratory visits, preferably in pairs together. Second, their participation through a 'Council of the Co-Domini', on which they would be equally represented and through which all their policy input is channelled for the area to be governed. Third, the Council membership could be brought up to an odd number for purposes of reaching a decision by the presence

on it of the administrator Governor. This officer would be the lynch pin of the system. He would be appointed by the co-domini for a given period and his role would be to act as a tactful administrator, under the authority of the Council of Co-Domini, which could give him advice or instructions as needed. The fourth element (wherever the area concerned is a populated one), is the Representative Council of the Inhabitants, to which as much administrative autonomy as is practical would be given, even though the formal legislative, executive and legal roles usually would be vested in the co-domini.

These four institutions would be helped out by an independent judiciary appointed by the co-domini through their Council, and a police force and administration responsible to the administrator. If a military element were required it must be provided by a special agreement of the co-domini to set up a joint command which would liaise with the administrator, but would be independent of him in its command structure. Over and above these institutions it would be desirable for the administrator, in consultation with the representative council and the Council of Co-Domini where necessary, to enter into voluntary functional arrangements with suitable ministries in either of the co-domini, for each subject to be dealt with. These ministries could then supply services or personnel as required, under the general control of the administrator who would be the coordinating officer.

These institutions are designed to reduce the power conflict between the co-domini and to make the arrangement work smoothly. The essence of the system would be one where the two abandon the 'impulse to dominate', which St Augustine rightly saw as the leading motive in the follies of the 'Civitas terena', and participate instead in an equal sharing for the benefit of both and of the area concerned.

Existing examples of shared sovereignty

I cannot, in this paper, claim originality for the shared sovereignty 'invention', since there have been various prototypes, one of which, Andorra, was set up by the 'Pareage' (agreement) between the Bishop of Urgel and the King of France in 1278, and in October 1978 celebrated its 700th Anniversary. The arrangement has caused so little conflict between the co-domini that it appears that they only required to meet each other again on Andorran soil at the top level 700 years later, when the President of France and the Bishop of Urgel attended the septcentenary celebrations together! The Andorra instance has been most successful because the co-domini have no reason for conflict, and the people of Andorra are content to be left on their own, running their own administrative affairs for themselves through the 24 elected members of the 'Council of the Valleys' and the elected 'Syndic' who heads it. (The title of Syndic has recently been changed to First Minister or Prime Minister). The authority of the co-domini is exercised through two Veguers, appointed one each by each of the co-domini, to control the police and hear criminal cases. In addition, each of the co-domini appoints a Bayle to hear civil cases. The French prefect of Pyrenees Orientales Department attends meetings of the Council and exercises some supervision. The prefect's one sided role has caused some conflict with Andorrans from time to time. Through its special status,

Andorra was lucky enough to escape involvement in both world wars and in the Spanish civil war. The Andorran institutions work well in that particular situation, but in general it is far preferable to have one rather than two administrators to exercise power on behalf of the co-domini by their power of attorney.

Andorra, like every other community, has not been without its own political disagreements. Issues of citizenship, of police control of non-citizens, of the order of languages on the Andorran passport and of who will represent Andorra in foreign affairs have been the subject of debate within Andorra and between Andorra and its Co-Princes (especially the French), but they have not led to any disruptive political crises. Andorran political parties were formed recently to contest the elections, they include the Andorran Democratic Association, which seeks modernisation within the co-sovereignty structure. As President Pompidou said in 1978, "Andorra has experienced rapid and happy development. In the history of the Valleys, tradition has never meant immobility".

The example of the New Hebrides showed the disastrous effects of setting up a political system to be jointly administered by Britain and France with each of them having a High Commissioner involved, and each having a Resident Commissioner on the Islands. Instead of just having a ceremonial role or setting the broad framework for policy, the High Commissioners attempted to hold responsibility on a day to day basis. Unbelievably, there were even two police forces. Any first year student would have realised that such institutions would produce chaos and animosity between the co-domini, and this is exactly what happened. The painful experience of the New Hebrides seems to have prejudiced the Foreign Office against the system of shared sovereignty. They must realise that the failure sprang not from the system but from the deficient institutions. In contrast another example of shared sovereignty for the purposes of colonial rule, the Anglo-Egyptian Sudan, had a unified executive provided by Britain and was well run. In fact, however, the Egyptian element in the ruling of the Sudan was progressively reduced, and after the murder of Lee Stack and the mutiny of some Egyptian troops and their Sudanese sympathisers, the whole of the administration was British.

Germany after 1945 represents a complex and confusing history of an attempt to set up institutions of shared sovereignty. Initially the whole country after the war was supposed to be under the joint military administration of the four allies, the United States, the Soviet Union, Britain and France. However, in practice, each controlled a separate zone and pursued their own distinctive policies. They acted in their individual capacities and not through a Council of Co-Domini. Only in the case of the Anglo-American 'bizonia' was there any effective co-operation between co-domini. Furthermore there was no independent governor or joint administration under their control. No central administrative offices were set up under the Allied Control Council, which rapidly became deadlocked and ineffective. As a result the enmities of East and West were reflected in Germany itself and within five years two rival German states had arisen, whose relations with each other have only recently begun to improve. In practice they have operated as independent entities.

A separate system of shared sovereignty was also established for the former German capital city of Berlin. With the withdrawal of West Berlin representatives

from the common city council and the setting up by them, in West Berlin, with the consent of the Western allies, of their own political authorities with a 'Regierender Burgermeister' and a Chamber of Deputies, joint administration of the whole city collapsed. The joint council of the co-domini, the 'Kommandatura' of the Allies, rapidly ceased to function and in 1961 the building of the Berlin Wall completely divided the city. It is instructive to note however that the concept of shared sovereignty is sufficiently attractive and convenient to the four powers, despite the tensions of the Cold War, to have survived as a legal form. All four powers are most meticulous in preserving the joint military ceremonies and courtesies of their co-sovereignty in both West and East Berlin.

In West Berlin a vigorous local democracy flourishes under the elected mayor and council, who fulfill all the roles of a local governor, subject to the jurisdiction of the Federal Republic, in whose Bundestag Berlin is represented by its own elected members. As a genuflection to the legal fiction of the co-sovereignty of the four allied powers and the separation of Berlin, all the Berlin members of the Bundestag are chosen by a special procedure and West German laws only apply to Berlin when expressly accepted by the West Berlin Chamber of Deputies, which in practice has never refused this acceptance. West German military personnel do not appear in Berlin in uniform. The Berlin model is not that which we seek for the Falklands/Malvinas, but its continuance does show the vitality of the shared sovereignty concept and its compatibility with full local democracy.

Under the Antarctic Treaty areas of disputed sovereignty have since 1959 been subject to a co-operative regime, which works well by the various claims being suspended. Legally this is not shared sovereignty, because none of the claims have been surrended to a joint authority. In practice in is difficult to imagine any political circumstances in which the individuals claims could be pursued and widely recognised by other states. Effectively the meetings of the Consultative Parties to the Antarctic Treaty constitute a Council of Co-Domini. Joint policy has been established for scientific research, conservation of the living resources and mineral exploitation. The political problems have been greatly simplified by there being no permanent inhabitants in the region.

As pressure for economic development of the resources of Antarctica increases there will be a need for a more formal structure of shared sovereignty, with a 'Administrator Antarctic' working under a council of co-domini of the Consultative Parties, or alternatively of the United Nations. The administrator must be given the power to settle disputes between would be developers and also to preserve the unique environment of the sub-continent. Above all we must avoid a relapse to the situation where the rival countries sought to cut up the Antarctic like a cake and to build empires in the ice.

An important domain over which the world has seen the need for shared sovereignty is that of the control of the resources of the sea-bed beyond the limits of national jurisdiction. The long and laborious negotiations of the Third United Nations Conference on the Law of the Sea resulted in a convention covering all aspects of the use of the seas. It provides for an International Sea-Bed Authority to be based in Jamaica, which will control the exploitation of the mineral resources

of "the Area", which is considered to be "the common heritage of mankind". The convention also imposes an obligation on the governments of fleets involved in fishing on the high seas to establish regional fishing organisations for joint control of the conservation and management of particular stocks of fish or particular areas of the seas. Several such fishing organisations already exist, though they do not always have adequate authority to exercise effective control. The convention had attracted 35 ratifications by October 1988 and needs 60 to come into force.

We have something, therefore, to learn from these instances and from their success and failure, but in general we shall need to devise our institutions on the general pattern I have suggested, modified in a particular way to suit each case.

The general applicability of shared sovereignty to different kinds of conflict over sovereignty

Before returning to the main business of the paper, the detailed examination of the application of shared sovereignty to Falkland/Malvinas, I will give a brief outline of the potential of the concept to other areas in conflict. Unlike lease-back, the option would not be a one-off solution for the Falklands but a concept of great potential for wide application if we can develop it properly in practical detail for each case. By this means we seek for a 'flexibility with flags' so that two or more could fly over one territory at the same time; we seek to use the services of a trusted and skilled administrator or adjudicator with a high level of power of attorney from the co-domini and subject to their political will only when they meet together in the Council of the Co-Domini. This would have application to situations where a small area is inhabited by people who hold strongly the identity of a distant country but are close to another country of different culture which strongly resents their separation from the geographical entity of that country. Falkland/Malvinas and Gibraltar are the two instances of this. It also applies to islands with great ethnic or religious cleavage where the larger part of the population holds strongly to the identity of a more distant country and the smaller to that of a closer one. The two examples of this are Cyprus and Northern Ireland. In the Cyprus case the role of Greece and Turkey should be, not so much one of co-domini, as of protectors and God-parents for a settlement that would reunite the island. In the Northern Irish case the shared sovereignty option, suggested by the Kilbrandon Report in a modified form and also in the New Ireland Forum, has to be seen as an 'equilibrium solution' and a plateau of institutions destined to last at least for the medium term and not just as a brief stepping stone to a United Ireland. The present Anglo-Irish Agreement leads logically to full shared sovereignty. I have dealt with this case at length in a study for the Keele Conference on 'The Feasibility of Consensus in Northern Ireland'. This has just been published in a volume edited by Professor C Townshend, *Consensus in Ireland: Approaches and Recessions*, (OUP).

Shared sovereignty is also applicable to areas where the desire for separation from the country of which they form a part has led to prolonged wars, and where the people can no longer to be satisfied with a normal federal status. An obvious example of this is the Ogaden, where the inhabitants identify themselves as

Somalis but the area is part of Ethiopia. In the cases of Eritrea and Western Sahara bloody and prolonged civil wars have occurred, as a result of failure to 'show flexibility with flags' and to devise new categories of shared power, between the government of Ethiopia and the people of Eritrea and between the government of Morocco and the people of the Western Sahara. Shared sovereignty could have relevance also for Gaza where the Prime Minister of Israel has suggested a condominium between Israel and Egypt. It might apply to the Holy places in Jerusalem, which are of too much significance throughout the world for any one state to own them exclusively. They need to be administered on behalf of all the worshippers of the three great faiths, whose sacred places are there.

An obvious instance of an opportunity for a shared sovereignty settlement to help make peace concerns the Eastern half of the 'Shatt el Arab' waterway between Iran and Iraq, which is still in dispute between these two nations, the Iranians insisting that this half was ceded to them under the Algiers Agreement of 1975 and the Iraqis claiming the whole river as their own. This territorial element remains after the ideological causes of the war have abated and there is danger that both sides would deny themselves the use of the waterway by not allowing it to be cleared of wrecked ships. Such a situation would fulfill Aesops fable of the two animals who are foolish enough to allow the food over which they fight to fall into the water and be lost to both of them. A shared sovereignty solution where both flags fly jauntily over the disputed part of the passage, while the ships of both nations use it, directed by an independent waterman chosen by both of them and responsible to their Council of Co-Domini would easily solve this dispute, which is one of prestige rather than of substance.

Detailed application of shared sovereignty to the Falklands/Malvinas

The concept of sovereignty, so often treated as an indivisible whole, in fact consists of at least five separate elements - the glory of the possession of the area, the right to be the rule making authority in the last resort, the right to head the general administration, the right to adjudicate legal conflicts arising in that area and the right to enjoy any benefit accruing from the productivity and resources. As we shall see, the institutions and practice of shared sovereignty would deal with each of these in a different way.

The glory of possession is the major element on the Argentine side. It is expressed in the presence of their flag to which they attach so much importance that a whole day is devoted to honouring it each year. The Union Jack is also of importance to the Islanders. The two flags are not like prima donnas that cannot bear to see each other on the same stage. We fly flags together in joyous celebration at the Olympics, at the UN or on state visits, we could do the same in the Islands as a sign of friendship and condominium. The logo of the administration would be the two flags crossed over, (as on my Britain Nigeria Association tie!) The two anthems would be sung together on state occasions, Argentina's first on grounds of the alphabet and not of superior status.

The status of shared sovereignty would also be shown in the constitution. The existing constitution could be retained with certain key alterations. The preamble

should be altered from 'Her Majesty by virtue and in exercise of the powers vested in her, by the British Settlements Acts 1887 and 1945' to 'Her Majesty and the President of Argentina having reached a solemn and binding agreement to put an end to their enmities and to participate equally in the government of the Falkland/Malvinas as co-sovereigns ... order as follows', (or words to that effect). Wherever in the constitution the Governor is required to refer to or accept the orders of the Secretary of State, this must be altered to the Council of the Co-Domini. Where the preamble to the present constitution reads 'whereas all peoples have the right to self determination ... and whereas the right to self determination must be promoted', the new constitution must just guarantee the rights of the people to have respect for their liberties and way of life and to be assisted freely to pursue their own economic, cultural and social development. The fundamental individual rights set out in the present constitution must be retained. I suspect that they are not very different from those set out in the constitution of Argentina. Section 23 of the present constitution, giving citizenship to all Commonwealth citizens over the age of 21 resident in the Islands must be amended to include Commonwealth and Argentine citizens and must require a residence period of seven years to qualify for the vote. It would not be politically possible to allow unrestricted immigration from Argentina since this could create an artificial majority to change the status of the Islands by popular vote. A quota of 200 each for British or Commonwealth and for Argentine citizens each year might be suitable. The economy of the Islands would benefit from absorbing more inhabitants.

The symbolic aspects of co-sovereignty must be carefully fostered in the constitution. The title of the Island would be Falkland/Malvinas and it would be described as a condominium. The currency might have to be linked on a one for one basis to the pound rather than to the Argentine Peso, for the pound has retained its value better, but the actual notes must bear the insignia of Argentina as well as of Britain, and also some symbol of the Islanders; they would be called Falkland/Malvinas pounds. The distinctive and profitable stamps issued by the Islands would continue to be produced but would bear the sign of Argentina as well as the Queen's head. This should make them all the more valuable to philatelists as the only example of 'condominium stamps'. (Andorra issues both Spanish and French denominated stamps).

The constitution would also provide for the main institution of shared sovereignty - the Council of Co-Domini. This would be the sole body through which Britain and Argentina would have a policy input (other than an advisory one through specialised ministries, by invitation of the Council or of the Governor). There would be a complete bar to direct intervention from London or from Buenos Aires, though of course they would choose their representatives on the Council, could give them advice or instructions, and could change their representatives. The representation of each of the co-domini would be equal - presumably one member each. It is desirable that they should be of equal status and seniority, though of course the level could vary with the occasions. If the two Foreign Ministers were able to meet at least once a year, they would compose the Council of Co-Domini

for that meeting. The Council would need to meet at least once every two or three months, preferably in the Islands.

It is important that it be firmly established that no member of the Council of Co-Domini would have any power in his personal capacity. It is only the Council as a whole that could advise or instruct the Governor or the Island Legislative or Executive Council. There must be no permanent delegates of either of the co-domini on the Islands, (on the Andorran or New Hebrides model), as such delegates would inevitably see their individual role as that of acting as a veto group on the Governor on behalf of the supposed interests of their country. The result would be a divided and acrimonious administrative process. The Council of the Co-Domini would not be a cabinet and no member would have a portfolio. Its role is more that of a supervisory and legitimating body. The Board of Governors of a school or the (largely lay) Council of a University provide a parallel in terms of operation though not of national status.

A Council of equal representation from each of the co-domini would have no majority, and although one hopes for a consensual style, the result might be deadlock. To provide against this it would be desirable for the Governor, who would be appointed initially by the Council for say five years from a list of distinguished international civil servants, should be included in the voting membership of the Council. In the event of deadlock he would have a casting vote but could be mandated by the co-domini, if they agree with one another. Certain very important decisions involving a change in the constitution could be entrenched to require the support of both co-domini.

The views of the Islanders themselves would of course come before the Council direct or through the Governor, and it would be a foolish Council that failed to take account of them, for it is part of the business of government to create a climate of consent. If, however, those views were against the interests of co-sovereignty or prejudicial to the legitimate interests of Argentines, under the constitution, the Governor and the Council would ignore them.

Senior political figures from Argentina as well as from Britain could of course visit the Islands, for the connection of the Islands with Britain would have little meaning if visits from British ministers were forbidden, and Argentina's sense of re-establishing their political presence on the Islands would not be a reality if their President and ministers could not visit. Such visits, however, would be celebratory rather than for the purpose of giving orders, for official decision-making would come only from the Council of Co-Domini. If possible, British and Argentine political leaders should visit in pairs, to symbolise shared sovereignty.

One of the most important duties of the Council of Co-Domini is to appoint the Governor or Administrator. (The precise title could be worked out when a settlement between Britain and Argentina has been made). The appointment would best be made from a list of names of distinguished international civil servants supplied by UN. It would initially be for five years with security of tenure for that period. At the end of five years the Council of Co-Domini would renew the appointment or make another as they saw fit. If they could not reach agreement, they would seek the good offices of the Secretary-General of the UN.

The role of the Governor is crucially important. He is the lynch pin of the administrative arrangement and makes the system work. He is a PAPOPA - a pure administrator and political officer with power of attorney. Roger Fisher of Harvard has shown that many issues in international relations, which cause immense conflict if dealt with as political matters, can easily be settled when taken as matters of administration. Questions like the side of the road on which to drive, the precise number of hours to be devoted to teaching Spanish in the schools, hospital arrangements and secondary school arrangements in Argentina or Britain etc. would be settled by the Governor as administrative not political problems. He would be a pure administrator in that he would take no political orders except from the Council of Co-Domini and he (or she) would have no political agenda, except to make the relationship of the two co-domini closer and to do what would be good for the Islands and the Islanders and for their environment. He would, however, be a 'political officer' in the sense in which the term was used in colonial parlance, that is to say, he would be the doctor of the body politic whose mandate would be to 'heal the land' by creating unity and removing sources of discord, in consultation with all concerned. This calls for the skills of the diplomat as well as of the pure admininistrator.

He would have a power of attorney to carry on with the business of government in an effective way without interference from the Council and without having to refer the day to day issues to them. The lynch pin of Island administration has always been the Governor. His powers have been great, although in practice he has tried to identify with the Islanders and act on the advice of their Legislative and Executive Council. The stream of advice and instruction which he has received from London has been sometimes a help and sometimes a hindrance to him. The Governor, under shared sovereignty, would have to assume more personal responsibility and require less instruction, though he would, of course, exert himself to the utmost to bring together the views of the Council of the Co-Domini on which he himself sits.

The Governor would have to be a person of high calibre. He must be a person 'Uberrimae fidei' (of the very greatest trust), as the legal phrase denoting the role of lawyers with power of attorney for their clients describes it. He needs also to be able to identify with the Islands and the Islanders in everything except their anti-Argentinianism. He would exercise tireless pressure on the two co-domini and on other organisations for the interests of the Islands. He would have to identify with the Islands so well that the Islanders would come to regard him as *their* Governor. I have found from my own colonial experience as a district officer among the Tiv and elsewhere in Nigeria that one can achieve this, even if one is of a different race with a different cultural upbringing. The outsider, if he identified with the people, would have some advantages. It would be important that the Governor should identify with the people in their hopes and fears and have a real love of the land which he would be called to govern. He should be a friend and protector of the people, a servant and not a martinet. A good Governor would not find it too difficult to win over Island opinion, if he does justice, seeks for useful development and loves to discuss farming over a pint of beer. He needs to earn the

respect of a rugged rural community and to relate well to the isolated settlement culture of the Islands.

The Governor would be the law and order authority, just as the district officer was in most of the colonial world and as governors or prefects are in many independent states and as the two Veguers in Andorra also look after law and order. But he seeks to keep law and order by persuasion and authority, with coercion to be used only in rare instances of last resort. He needs to use discretion. He would appoint the police chief as under the present constitution. He would have power to expel visitors from the Islands, if it were necessary for (hopefully rare) security reasons.

The Governor would continue to be head of the administration as under the 1945 constitution, and they would be his team. He could draw on Islanders whenever suitable people were available but otherwise he would have discretion with the advice of the Council of Co-Domini, to find his specialists from any source. For reasons of cultural affinity people from Britain or the Commonwealth are likely to be most suitable for any police post and probably for education, though an Argentine would help with the teaching of Spanish as a second language. Doctors could come from anywhere, for the skills and dedication of medicine are universal. Specialists in agriculture could well come from Argentina, for there is also the problem of infertile soils and of high levels of acidity in Patagonia and there is experience with the problems of sheep farming. There is a clear need for commercial contact between the Islands and Argentina. Considerable income could be earned from tourism from South America, if there were a cheap air link to Argentina as in the past.

The Governor and the Island authorities, with the advice and consent of the Council of Co-Domini, could enter into any voluntary arrangements or agreements with ministries in either Argentina or Britain. These arrangements would not imply any governance or power content, but only an arrangement for co-operation. Beneficial agreements could also be made, if available, with outside companies. It is interesting that Andorra, which has become very rich under its shared sovereignty status, makes free use of device of the 'lie ou paceries' (commercial agreements) made direct with foreign companies for mutual benefit, which cut across all national political considerations. One of the major problems of the Governor would be that of relations with the Falklands Islands Company which has large holdings in the Islands both of land and stores. The issue would be fraught with political danger, unless it were handled with skill in a pragmatic way. In general it would be desirable for the Co-Domini through the Council and the Governor to work towards greater participation in ownership either by acquiring shares in the company and appointing both Argentine and British directors, or by takeover of parts of its properties with compensation. It would be necessary also to continue the process of encouraging individual Islanders to acquire ownership of their farms from the company.

The Governor also would have the duty of appointing the magistrates and, with the advice of the Council of the Co-Domini, the Chief Justice of the 'Supreme Court' on the Islands. It would be necessary to establish an appeal procedure

presumably to some occasional court consisting of one Argentine judge, one British and one outsider (perhaps from the UN). The judges involved would hold their office during 'good behaviour' and not at the discretion of Governor or Council of Co-Domini. They would have the task of enforcing the constitution and especially its fundamental rights against the executive, if it were to act unlawfully. The existing law of the Islands would remain valid unless and until it had been changed by new law, made by the Legislative Council or the Governor, with the consent of the Council of Co-Domini. A community like the Falkland/Malvinas does not need extensive legislative action. As the camel can go a long way on one drink of water, so a remote rural community can operate smoothly without continual legal change.

The 'British identity' which the Falkland Islanders cherish has a great deal to do with the ideas of law and liberty. Though they are not lawyers they do feel that there is a heritage of English common law and its liberties, which they do not want to abandon. The Governor would need in a very special sense to act as the protector of the liberties of the Islanders.

The final element in the institutional structure is, of course, the representative institution of the Islanders, the elected Legislative Council, over which the Governor presides, but in which neither he nor any official would have a vote, and the Executive Council elected by "LegCo". The shared sovereignty institutions must allow at least as much autonomy to the Islanders as at present, and at least as much as Argentina would envisage, if they were ever to acquire full sovereignty under their current proposals for the transfer of sovereignty with autonomy and a treaty of guarantee. The success of Andorran shared sovereignty rests largely on the fact of the actual autonomy of the 'Council of the Valleys', in running the local affairs for which it is responsible. In theory all legislative, judicial and executive power is given in Andorra to the two co-Princes; but in practice there is relatively little interference on those questions which have been delegated to the Common Council - that is social security, business rights, telephone, fire brigade and local regulations.

The present system in the Falklands gives very great reserved powers to the Governor. He can disallow a 'law' passed by LegCo., he can on his own sole authority introduce and pass a law whether or not they support it. He can disregard the views of the Executive Council on matters which he considers essential. In practice he uses these powers sparingly. It would be well to continue with this present practice.The financial affairs of the Islands would only involve small sums of money, far smaller than the one hundred million plus pounds being spent each year by Britain on defence of the Islands at present. The two co-domini must share equally in any net costs or net benefits arising from the Islands, but the Falkland/Malvinas Legislative Council and Governor would continue to prepare their own budget and control their own expenditure as at present. The Governor would retain reserve powers over finance as at present but one trusts he would rarely have to use them. The fishing licence revenue which has recently accrued in the Island budget would continue to be used for the benefit of the Islanders themselves. Given the agreement of both Britain and Argentina, a full 200 mile

zone could be declared to increase revenues by licencing fishing to the north of the current zone. However, it is possible that the co-domini, who would have to assist jointly in the policing of the fishing zone, would make charges for this or take some of the fishing revenue.

The military presence on the Islands is now, of course, British, and would continue to be so until by separate agreement with Argentina it would have been reduced. No doubt this would only occur when the British government sees that the civil aspects of the condominium are working harmoniously and that there is no danger of a second invasion like that of Galtieri. The British government would retain its right to intervene again if Argentina were unilaterally to repudiate the agreed status of shared sovereignty or the constitution, which the two powers would work out for the Islands at the time of establishing the shared sovereignty regime. In due course, as the friendship and understanding between Britain and Argentina increase, the splendid airfield built for military purposes would, I trust, come to be used by the armed forces of both countries under a single airbase commander and a joint command structure.

The imposition of the shared sovereignty regime which I have described would have an effect upon the Islanders, although if it were properly set up it would not interfere with their liberties and way of life. Nonetheless, it would be equitable for Britain to pay each adult Falklander at present on the Islands substantial compensation for the change of status. The 'lump sum' and other compensation paid to colonial service officers when the colonies in which they served became independent provides a sort of parallel. It should be paid both to those who elect to leave and to those who elect to stay. The sum should be in the range of £50,000 to £70,000 per head (at today's value of money), with a further sum payable if the Islands ever pass under exclusive Argentine sovereignty. Such a payment would amount in total to only some £50 to £70 million. (There are almost exactly a thousand names on the Falklands electoral roll). Depending on the estimates used, that would be only a quarter to a half of the yearly defence cost of the present fortress Falklands policy. The prospect of the payment of compensation, which would be a just entitlement and not a bribe, would go a long way to make the settlement more acceptable to the Islanders.

One of the most difficult problems to be faced in the negotiations to establish the shared sovereignty settlement would be the question of its duration. Clearly it should not be regarded as a brief stepping stone to exclusive Argentine sovereignty; nor should it be seen as a perpetual unchanging status. It would be best seen as for the medium term, and after a period of hard bargaining the two parties must agree on a period for which the constitutional settlement would operate and after which both parties would consult with each other and with the Islanders to review it, and to make any changes which the two co-domini would then wish. The period of operation before review would probably best be settled at the outset, otherwise one side would devote its energies to making the period shorter and the other to making it longer and neither would be concentrating on making it work. The exact period would be settled by negotiations but I envisage a period of somewhere between twelve and twenty years. There is reason to suppose

that such a period of successful operation of shared sovereignty would make any further changes easier to negotiate at the end of it. This shared sovereignty status would be less than the total exclusive sovereignty which many Argentine nationalists have sought, but politics is the art of the possible and compromises have to be made. Argentina would enjoy the glory and status of a co-sovereign presence on the Islands and the fact that it would be shared with Britain (a country which Argentina would in time come to regard as a friend) would not negate that sovereignty. Argentina's acceptance of a medium term shared sovereignty agreement of agreed duration is, of course, without prejudice (as the lawyers say), to their claims to eventual exclusive sovereignty at the end of that period. The British acceptance of the same shared sovereignty agreement equally does not commit them to any particular form of settlement at the end of that period. The options of both sides for the far future remain open and would depend on how the shared sovereignty period works. Only time would tell whether it would be an interim arrangement or a permanent equilibrium solution. The more harmoniously the shared sovereignty worked the more ready would the Islanders be to accept eventual Argentine sovereignty. Equally, the more harmoniously it worked the more likely Argentina would be content with its continued existence in place of unilateral sovereignty.

Shared sovereignty is not a new concept for Argentine thought. It was, we are told, suggested by Senor Robledo to Mr Callaghan when he was Prime Minister. Recently senior Argentine political leaders are reported to have suggested to certain British politicians that Argentina would accept a regime of a trusteeship council, or a number of powers, and perhaps even a British Governor under such an umbrella. This also could be fitted neatly into the co-sovereignty institutions. It would raise the number of co-domini from two to five or so. The status of the other trusteeship powers could be somewhat different to that of Britain and Argentina, whose role must be equal and symmetrical. I have perforce gone into detail in the description of the institutions and operation of the system of shared sovereignty since detail is all important. I do not pretend that my blueprint is the only one, or that it would be satisfactory in every detail. Every first invention requires massive development and improvement. I hope, therefore, that serious discussion will take place between sincere and practical peacemakers on both sides on these issues, so that when the negotiators of both sides come to discuss them under the pressure of the bargaining process they will find the land well charted out for them, and be able to see signposts to a good road to peace. May the two great nations of Britain and Argentine soon begin to explore this road, and may they at one and the same time find an acceptable solution to their own conflict, and a new political system of value to the world for solving other problems of dispute over sovereignty. Thus would our struggle be seen in the model of a 'Felix Culpa, quae tantem et talem meruit redemptorum' - 'Happy fault which produced so great a redemption'. We shall have repaid our debt to the rest of the world, which has had to endure the stress of our sad conflict with one another.

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