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Cabinet Office Duty Officer

The enclosed note has been prepared by me in great haste following the request received this afternoon. It has not been cleared with the Attorney-General. It is designed simply to afford the very general guidance requested. It is, in my view, essential that, if we are to move onto a war footing, with all the international and domestic legal consequences which flow therefrom, we should have the benefit of the advice of the Attorney-General and indeed of the legal advisers to the major Whitehall Departments which would be principally affected.

Sir I Sinclair

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9 April 1982

cc: Falkland Islands Distribution
Mr Freeland, Legal Advisers
Mr Steel (Law Officer's Department)

Home Office (Duty Officer)

MOD (Defence Substantive Duty Officer)

D/Trade (Duty Officer)

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D/Transport (Duty Officer)



FORMAL CONSEQUENCES OF A STATE OF WAR BETWEEN THE UK AND ARGENTINA

Note by the FCO Legal Adviser

1. This note is based on the assumption that Argentina might formally declare war on the UK on 11 April, or make a statement on that date, possibly following a successful attack on an Argentine naval vessel in the maritime exclusion zone, indicating that a state of war now existed between the two countries.

Question 1. Do we need to respond by formally declaring war on Argentina?

No.

Question 2. Would we nonetheless be at war with Argentina following such a declaration or statement?

Yes. War may begin, first, by a declaration of war. Second, it may begin after the commission of an act of force against another State which that State elects to regard as creating a state of war. We did not so elect following the invasion of the Falkland Islands but are relying instead on our inherent right of self-defence. Argentina may elect to regard an attack upon one of her naval vessels in the maritime exclusion zone as giving rise to a state of war between the two countries. See also paragraphs 2 and 3 of my minute to Mr Fearn of 2 April (copy attached).

Question 3. What formal action would be required in the UK following such a declaration or statement?

In the UK, the power to declare war (and peace) rests with the Crown. The formal method of declaring war is by proclamation, passed under
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the Great Seal, coupled with a simultaneous delivery to the enemy state of the formal declaration. In the circumstances envisaged, this would not be necessary. There would however have to be a Government statement declaring or acknowledging that a state of war exists between the UK and Argentina. This would have to be cleared with the Palace.

Question 4. What is the essential distinction between a conflict which neither party regards as giving rise to a state of war, and the state of war itself?

The most noticeable distinction between a conflict not amounting to war and war itself is that the former is essentially limited, while the latter is not. Belligerents in a war may apply any amount and any kind of force, save only those means or methods forbidden by international law.

Question 5. What are the legal consequences that flow from a declaration of war or acknowledgement that a state of war exists?

- (1) Rupture of diplomatic relations (this has already occurred);
- (2) Suspension of most, but not necessarily all bilateral treaties to which the belligerents are parties (most multilateral treaties will continue to be operative);
- (3) Nationals of belligerents on enemy territory are liable to be interned;

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- (4) Trading with the enemy legislation becomes activated;
- (5) Contracts between nationals of the belligerents will, as a general rule, be abrogated: new contracts with enemies (in the sense of the Trading with the Enemy Act, 1939) become unlawful;
- (6) Enemy merchant vessels in harbour or on the high seas are liable to capture and condemnation as prize (Prize Courts will have to be set up);
- (7) Third countries uninvolved in the dispute become neutrals. They acquire certain rights and duties as such (see Question 6 below);
- (8) The four Red Cross Conventions of 1949 come into operation (in our view, the Fourth Convention at least is already operative).

See also paragraph 4 of my minute to Mr Fearn of 2 April. It should be stressed that these are by no means exhaustive lists of the legal consequences flowing from the existence of a state of war.

Question 6. Would a third (neutral) state be legally required to prevent use of its ports for supply of the UK task force?

A neutral state must prevent belligerent warships admitted to its ports from taking in /such



such a quantity of provisions as would enable them to continue their naval operations. As to the quantity of provisions which a belligerent warship may be allowed to take in, the UK has in the past (1904) supported the position that no more may be permitted than is necessary to bring them safely to the nearest port of their own country. The UK also stated (later in 1904) that even this rule should not be understood as applying to the case of a 'belligerent fleet proceeding ... to the seat of war; and such fleets were not to be permitted to make use of any British ports, roadsteads or waters for coaling either direct from shore or from colliers accompanying such fleets ...'. (This was in the context of the Russo/Japanese War of 1904.)

The principle that neutral ports and waters must not be allowed to be made the basis of naval operations and preparations applies to warships and to naval auxiliaries, but not to merchant vessels: the neutral state is not forbidden to permit the fuelling of merchant vessels even when they are suspected of unneutral supply to belligerent warships. The possibility cannot, however, be excluded that particular third states would invoke duties of neutrality as a justification for refusing to permit supply to any vessel involved in the UK task force.

Question 7. Would the existence of a state of war between the UK and Argentina affect the right of UK vessels (whether warships or merchant vessels) to transit the Panama Canal?

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No. Article II and III(e) of the Treaty of 1977 provide for the neutrality of the canal 'both in time of peace and in time of war' and for vessels of war and auxiliary vessels to be entitled 'at all times' to transit the canal.

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Mr Fearn

FALKLAND ISLANDS: IMPLICATIONS OF A DECLARATION OF WAR AGAINST ARGENTINA

1. Understand that the Secretary of State would like a brief note about the implications of our declaring war on Argentina in the context of an invasion of the Falkland Islands.

2. Traditional international law maintains a strict and clear-cut dichotomy between a State being at peace with another State or at war with it. According to McNair and Watts (Legal Effects of War):-

"Being "at war", however, is a technical concept referring to a state or condition of affairs, not mere acts of force. It is a state to which international law attaches far reaching consequences, and it confers upon States who might be affected by it a distinct legal status: this applies not only to the States party to the war, but also to third States, since where a state of war exists it gives rise to the collateral state of neutrality for non participants in the contest with all its attendant rights and duties."

A state of war may perfectly well exist even if no armed force is being employed by the opposing parties and no actual hostilities between them are occurring. Conversely, force may be used by one State against another without any state of war arising. In this latter instance, the parties will, as a matter of law, still be at peace although their relations will be strained to a greater or lesser extent.

3. The existence of a state of war depends essentially upon the determination of the parties to the conflict and can arise where only one of the parties to the conflict asserts the existence of a state of war, even if the other denies it or keeps silence. For a state of war to exist one at least of the contenders must so assert. This has enabled conflicts, even if militarily extensive as between the parties, to stay essentially limited rather than to entail the overall dislocation which would accompany the escalation of those conflicts into a state of war.

4. Where a state of war is declared or held to exist, the following consequences would ensue:-

- (1) All those resident or carrying on business in territory owned or occupied by the enemy State become "alien enemies" for procedural purposes of English law;

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- (2) Enemy nationals in British territory who have complied with any requirements and restrictions imposed upon them as a matter of general policy (e.g. internment) are deemed to become enemies "in protection";
- (3) Alien enemies in the territorial sense (i.e. those resident or carrying on business in territory owned or occupied by the enemy State) have no right of access to the English courts;
- (4) Generally speaking (and subject to certain exceptions) any contract made before the outbreak of war insofar as not completely performed is regarded as having become abrogated as from the outbreak of war where one of the parties is in this country and the other becomes an alien enemy in the territorial sense. The effect of abrogation is to destroy the contractual relationship and to preclude and prohibit any further performance of the contract. Abrogation does not necessarily destroy any accrued right of either party;
- (5) Trading with the enemy legislation would have to be activated. Trading with the enemy becomes a criminal offence, a cause of illegality and nullity in a contract or other transaction, and a ground of condemnation by a Prize Court. Trading with the enemy covers, as well as trading in the sense of ordinary commercial transactions, intercourse which may have nothing commercial about it. Under the Trading with the Enemy Act 1939, the definition of "enemy" is very wide. Enemy character attaches not only to alien enemies in the territorial sense but also to any UK company or company carrying on business in any place, if and so long as the company is controlled by a person who is defined as an enemy;
- (6) Another normal consequence of the outbreak of war is that enemy merchant ships in UK ports can be seized and requisitioned;
- (7) Finally, it is the general rule that bilateral treaties between belligerents become suspended on the outbreak of war between them. The position as regards multilateral treaties is more controversial; some are clearly designed to operate in time of war, such as the Protocols on International Humanitarian Law in Armed Conflict (although they equally operate in the case of armed conflict falling short of war in the technical sense).

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These are a few illustrations of the immediate consequences of a declaration of a state of war or acknowledgement of the existence of a state of war. It will be seen that the consequences are very far reaching. For this reason, recent State practice has been in the direction of eschewing acknowledgement of the existence of a state of war in the technical sense even where fairly extensive hostilities have occurred or are in the process of occurring. For example, in the case of the Suez operation in 1959, there was no formal declaration of war, nor indeed did either party acknowledge the existence of a state of war in the technical sense.

5. Of course, many actions can be taken by a State which is the victim of an armed attack even without acknowledgement that this armed attack has given rise to a formal state of war between the belligerents. Under Article 51 of the United Nations Charter any State which is the victim of an armed attack has the "inherent right of individual or collective self defence" until the Security Council has taken measures necessary to maintain international peace and security. This right of self defence clearly comprehends any military or naval action which might be necessary to repel or expel any invading force. As the right is an inherent one, it need not be accompanied by a formal declaration of war. Other measures, such as the breaking off of diplomatic relations, the suspension of air services or the taking of certain economic measures against the other party, would also be permissible to a State involved in resisting an armed attack against its territory by another State. The temporary freezing or sequestration of assets is, for example, the kind of measure which has been taken in the past in circumstances of armed hostilities falling short of war. Whether it would be advisable to envisage measures of this kind in the present circumstances is of course a matter of policy and not strictly one of law.

2 April 1982

Ian Sinclair
Ian Sinclair
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