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+ Political implications?

Taking war to Argentina?

Mr Fearn

FALKLAND ISLANDS: IMPLICATIONS OF A DECLARATION OF WAR AGAINST ARGENTINA

1. I 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):-

So? "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;

- (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 1956, 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.

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2 April 1982

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