



Foreign and Commonwealth Office

London SW1A 2AH

15 April 1982

PUS DIST (16.4.82)

S Webb Esq
Private Secretary to
Sir Frank Cooper GCB CMG
MINISTRY OF DEFENCE

PSO/CDS
ACNS (O)
AUS (D Staff)
Hd of DS5
Hd of NL

Seen by DS15(L)

Yes Simon,

FALKLANDS: SINKING OF MERCHANT SHIPS

1. In connection with current discussions about Rules of Engagement for the Falklands Task Force, we thought you should see the enclosed note on the sinking of merchant ships, which has been prepared by our Second Legal Adviser, John Freeland. Sir Ian Sinclair has seen this note, and has said that he agrees generally with Freeland's assessment of the legal position.

2. I am sending a copy of this letter with enclosure to David Wright.

7336

Yours ever,

Andrews

R A Burns
Private Secretary to the
Permanent Under Secretary

① *DS5 Copy*

*DS15 (L)
DNW (ROK)*

② *Lite*

cc: DS500 Lite

1/18/4.

Sir I Sinclair

FALKLANDS: SINKING OF MERCHANT SHIPS

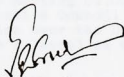
1. The traditional rule under the laws of war, based on the fundamental requirement that distinction should be drawn between combatants and non-combatants, was essentially that a belligerent was obliged to refrain from attacking enemy merchant ships so long as those ships abstained strictly from all active participation in hostilities, rendered no kind of direct assistance at sea to the military operations of a belligerent and refused to accept the protection of a belligerent naval force (eg in the form of a convoy). There were, of course, wholesale departures from this rule in both World Wars, justified in part as measures of reprisal and in part as resulting from the circumstances in which hostilities at sea were being conducted - in particular, the growth in the practice of arming merchant ships as a counter to use of submarines.

2. The sinking of merchant ships without warning featured among the charges in the indictment of some of the major war criminals before the Nuremberg Tribunal in 1946. The Tribunal partly acquitted the accused (Admirals Doenitz and Raeder) on the grounds that shortly after the outbreak of war the British Admiralty had armed merchant ships, that in many cases it convoyed them with armed escorts and that it issued orders to send position reports upon sighting submarines. The Tribunal also considered as relevant the fact that in October 1939 British merchant ships had been ordered to ram German submarines if possible.

3. Basically, in the light of the judgment of the Nuremberg Tribunal, the legal position now seems to be that a belligerent can reasonably claim to be justified in sinking enemy merchant ships at least when there is good reason to treat them as forming a part of the opposing belligerent's military effort at sea (see, in particular, Tucker "The Law of War and Neutrality at Sea", International Law Studies - US Naval War College 1955, pages 67 to 70). (Even in a case where a belligerent may be justified in attacking enemy merchant ships, however, it is of course obliged to comply with various limitative rules such as the requirement to cease the attack once active resistance has come to an end and to exert the utmost endeavour to search for and rescue survivors.)

4. In the present circumstances, in which the UK is not claiming belligerent rights but is acting in exercise of its right of self-defence, we certainly could not claim rights going wider than those to which a belligerent is entitled. But, applying what seem to be the relevant principles to be deduced from the rule under the laws of war, I think we could justify the sinking of an Argentine merchant ship in a case where the circumstances as a whole were such as to enable us to say that we could properly regard it as forming part of the Argentine military effort at sea. In the case

of an encounter within an exclusion zone declared by Argentina, a relevant circumstance might well be the terms of the declaration (I have not in fact seen the text of the declaration which the Argentines have apparently made). Apart from that, it would of course be a crucial factor in favour of our being able to treat an Argentine merchant ship as part of the Argentine military effort at sea if that ship was recognisably engaged in furthering the effort - for example, if it could be seen to be carrying supplies of arms or military matériel or if it was itself armed. Unless, however, the circumstances were such as to justify us in treating the ship as part of the military effort, we would in my view find it difficult, if not impossible, to claim plausibly to be entitled to sink it.



J R Freeland

15 April 1982