

ENCLOSURE No. 2

EMM

An... ..

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LOOSE MINUTE

D/DS11/10/6

CGRM
DS5
DS15 (L)

OK - but remember that Arg's leaving info to their press + don't want hostages in Arg. when anything happens. don't let it get beyond 15th

THE MISSING MARINES

File.
~~DS 15~~

1. I attach self-explanatory FCO correspondence about the captured members of the Armed Forces, which argues that although there is a good case for now invoking the Geneva Conventions, we should give the "softly-softly" approach a day or so longer.

2. I think we must be guided by the FCO on tactics but our clear aim must be to find out where they are, how they are and, if possible, obtain their release as quickly as possible. I am therefore inclined to agree to hold off for a day or so but to impress on the FCO the importance of finding out something soon. Grateful for any contrary views as soon as possible.

DH Powell

16 April 1982

D H POWELL
DS11
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D.S. 5
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19 APR 1982
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CONFIDENTIAL
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*Pl. copy 3 pages
to David Parrell
etc,
DS 11, MOD
(By Fleck Tute).
Careful to have
MOD's views
PS - Hod
15/4*

Mr Fearn

THE MISSING MARINES

1. I understand that Mr Onslow has suggested that we might make public use of the fact that we consider the Argentine action in not releasing information about the Marines still missing to be a breach of the Geneva Convention.
2. I attach a minute from Mr Aust which sets out the complicated legal position surrounding the Geneva Conventions. It confirms that we regard the four Geneva Conventions as applicable to the Argentine invasion of the Falklands. The underlying assumption of the Conventions is that the protected power shall have access to information about captured members of the Armed Forces, though this is not explicitly spelled out. On this basis we could claim that the Argentines had breached the Convention by not releasing information to the Swiss. This is, however, probably the only breach that we could claim at this stage.
3. It is questionable whether it will be wise at the present time to make public reference to the Geneva Convention. The Argentines do not accept its applicability since neither side has declared war. In their view the period of armed conflict is over. In view of this, the Swiss would probably prefer to be allowed to adopt a softly-softly approach in pressing for information from the Argentines, and think this more successful than provoking a public row over Geneva Convention obligations. To refer to the Geneva Conventions might, by provoking a public Argentine denial of the applicability of the Conventions, undermine the position of the ICRC, whose assistance we have sought.
4. I suggest we might, however, consider warning the Swiss that if no firm news of the Marines has been received by, say, 17 or 18 April, we might have to put pressure on the Argentines by calling on them to fulfil their Geneva Convention obligations.

7356

K. Himsworth

14 April 1982

Miss K J Himsworth
Emergency Unit

Mr Fearns

THE MISSING MARINES

1. I refer to my minute to Mr Hulse of 14 April. If the next Swiss approach (FCO tel no 48 to Berne refers) to the Argentines yields no satisfactory results, you may wish to consider asking the Swiss to make a further demarche on more formal lines. The points they might make could be as follows:

(a) The Government of United Kingdom consider that the First and Third Geneva Conventions apply to the Marines since they were captured as a result of an armed conflict between Argentina and the United Kingdom, both of whom are parties to the Conventions. This is without prejudice to the United Kingdom's contention that the Fourth Geneva Convention also applies to civilians on the Falkland Islands.

(b) We (the Swiss) in exercise of our rights under Article 8 of the First and Third Conventions as Protecting Power for the United Kingdom formally request that we be informed of the whereabouts of the Marines, their living conditions and health; of the measures taken to carry out the provisions of Section V of the Third Convention; and when they will be repatriated pursuant to Article 118 of the same Convention, active hostilities having ceased.

(c) If the Argentines decline to accept that the Conventions apply, the Swiss should, making clear that it is without prejudice to the United Kingdom's contention that they do apply, ask for the same information, and consular access, pursuant to Article 45 of the Vienna Convention on Diplomatic Relations under which the United Kingdom has entrusted the protection of its nationals to the Swiss Government.

Tom Aust

A I Aust
Legal Advisers

15 April 1982

cc Mr Williams (UND)

Mr Hulse

THE MISSING MARINES

1. We would regard the Four Geneva Conventions as being applicable to Argentine invasion of the Falklands. Article 2 (which is common to all four Conventions) provides that the Conventions apply in all cases of declared war or of any other "armed conflict", even if a state of war is not recognised by one of the parties, or the occupation of territory. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict for these purposes. It makes no difference how long the conflict lasts; it suffices for the armed forces of one State to have captured, inter alia, members of the armed forces of the other State. Even if both Parties deny the existence of a state of war, the Conventions probably apply since their paramount purpose is the protection of individuals. (See Pi-tet's Commentary on the Third Convention at p 23.)
2. Without knowing the whereabouts of the marines or their condition it is impossible to say whether Argentina has broken any of the Conventions. However, the Third Convention (treatment of POWs) applies until their release and repatriation. Under Article 69 of the Third Convention Argentina is obliged to inform the Protecting Power, immediately after capture, of the measures taken to carry out the provisions of Section V of the Convention. These measures include enabling each POW to send within no more than a week of his capture a "capture card" to his family informing them of his capture, address and state of health. The other measures include the sending and receiving of correspondence, parcels, etc. Article 118 provides that POWs shall be released and repatriated "without delay after the cessation of active hostilities". Although renewed hostilities are clearly possible, there are no active hostilities at present.
3. Although there may be political reasons why we have not pressed for information about the marines, if we decide to do so this should be done through our Protecting Power. For the purposes of the Vienna Convention on Diplomatic Relations this is Switzerland. The Protecting Power under the Geneva Convention does not have to be the same, but it might be convenient and appropriate if it was in this case. Although Argentina would have difficulty in accepting the application of the Conventions on the basis that there had been an occupation, they may have less trouble in accepting that the Conventions apply because there has been an armed conflict. Thus the situation is rather different from that of getting an ICRC presence in the Falklands.

Tony Aust

A I Aust
Legal Advisers

14 April 1982

cc Mr Williams (UND)

cc Mr Brown DS15(L) Room 8332 MOD/HR