



Foreign and Commonwealth Office

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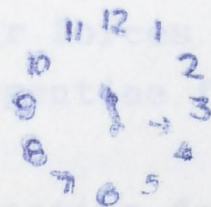
ALQ 062/3

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DESK OFFICER

14 JUN 1982

R Jackling Esq
Head of DS 11
Ministry of Defence
Main Building
Whitehall



R.

Dear Roger,

ATTACKS ON ARGENTINE FORCES AND MINING OF ARGENTINE WATERS.

1. Thank you for the letter D/DS11/10/6 of 9 June from Mottram asking about the legal position for certain operations in Argentine waters after the recapture of Port Stanley, and the repossession in full of the Falkland Islands.

2. I attach a legal note on this subject. It has been written as a separate note because I understand that OD(SA) has shown some interest, at least in the question of mining.

3. Because of the interest in OD(SA), the contents of the note have been cleared with the Attorney-General.

Yours sincerely
Henry Darwin

H G Darwin
Deputy Legal Adviser

c.c. Mr Steel (Law Officers Dept)
Sir I Sinclair
Mr Wright
Mr Gillmore
Mr Hulse - for entry

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NOTE ON LEGAL ASPECTS OF ATTACKS ON ARGENTINE FORCES WITHIN
12 MILES OF THE COAST AND THE MINING OF ARGENTINE WATERS

1. The Ministry of Defence has asked whether, after the repossession in full of the Falkland Islands, it would be lawful:
 - a. to respond to attacks on our forces within 12 miles of the Falklands, by attacks on Argentine forces within 12 miles of Argentina;
 - b. to respond to mining by Argentine forces designed to interrupt the supply chain to the Falklands, by mining the approaches to principal Argentine ports.
2. The assumption made is that the British Forces have fully recovered the Falklands, but Argentina has not accepted a ceasefire and is continuing air (and possibly naval) attacks on the Falklands or on British military or naval units or aircraft on, or in the immediate vicinity, of the Islands.
3. It is never very satisfactory to advise on a hypothetical basis about future circumstances, since there may be additional features in the actual situation, when it arises, which were not foreseen and which may affect the conclusions. The conclusions below would need to be reviewed in the light of actual developments.
4. In our response to the Argentine activities mentioned, we would have to justify our action by showing that it fell within the inherent right of self defence.
5. The inherent right of self defence recognised in the Charter is subject to the principles of necessity and proportionality. Force may be used in self defence only where this is necessary to resist or reverse the effects of an armed attack and where the means used in self defence are proportional to the nature and scale of the armed attack.

ATTACKS ON ARGENTINE FORCES

6. Up to the present time, it has not been shown that Argentine warships, except perhaps the aircraft carrier, while remaining within 12 miles of the coast, represent any actual threat to the Falkland Islands or to our forces on or in the immediate vicinity of the Islands. The aircraft carrier could represent such a

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threat if she was in a position whereby, having regard to her speed and mobility and the capacity of her aircraft to launch stand-off weapons, she constituted a direct and imminent menace to our forces on or in the vicinity of the Islands; but so far, this has not been the case.

7. Accordingly, attacks on Argentine naval units within 12 miles of the Argentine coast would not, with the possible exception of the aircraft carrier in the circumstances indicated above and then only after a further warning, appear to be necessary as measures of self defence. In addition, if they are attacks on units which do not constitute a threat while within 12 miles of Argentina, they would not be proportional to the actual Argentine attack or threat against the Falklands or our forces. They would be operations which do not actually defend the Falkland Islands or our forces from attack; they would be independent and separate attacks on Argentine naval units designed to put military and political pressure on Argentina. Such attacks would not be legally justified.

THE MINING OF ARGENTINE PORT APPROACHES

8. The laying of mines in the approaches to major Argentine ports is open to even stronger criticism. This operation would not significantly hamper attacks on the Falklands, which would presumably be largely by aircraft. The laying of mines would constitute a hazard not only to Argentine warships but also to merchant vessels of Argentina and of other countries.

Interference with third country shipping could be justified as an exercise of our right of self defence, when we were preventing military resupply of Argentine forces in illegal occupation of the Falklands but, as a general measure for closing Argentine ports to trade, could not be so justified.

9. The position of mining under the Hague Conventions of 1907 and the mining of Haiphong harbour by the US is discussed in the Annex.

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10. In these circumstances the mining of Argentine ports could not be legally justified. Any consequential damage to third country shipping could give rise to an international claim against the United Kingdom, and would give rise to the strongest objections by many countries.

GENERAL POINTS

11. In general both these measures would amount to a significant escalation of the hostilities which have taken place up to the present time. Insofar as they involve activities in internationally recognised 12 mile waters off the mainland of Argentina they would be tantamount to hostile military action against the mainland of South America. This would clearly much strengthen the arguments of Argentina in invoking the Rio Treaty, and seeking wider support in Latin America.

12. They would also strengthen any arguments by Argentina that, whatever may be the position as to hostilities around the Falkland Islands, over which the sovereignty is disputed, attacks on the mainland constitute a new armed attack which amounts to a breach of the peace initiated by the United Kingdom. This could seriously prejudice further discussion in the Security Council or in the General Assembly.

ANNEX

I THE HAGUE CONVENTION 1907

II THE MINING OF HAIPHONG HARBOUR

The Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines of 1906 provides in Articles 2 and 3 as follows:-

'Art. 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

Art. 3. When anchored automatic contact mines are employed every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zone as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel'.

The United Kingdom is a party to this Convention, though Argentina is not. Technically it would not apply in a war between Argentina and the United Kingdom.

But it represents a minimum standard of conduct which it would be difficult to refuse to observe in respect of mines of all kinds in hostilities short of war, particularly as mining affects third states. It is difficult to see what real effect the mining of Argentine ports would have except to interfere with commercial shipping.

II

In 1972, Haiphong and some other harbours in North Vietnam were mined by US aircraft, in order to prevent the supply of military materials to the North Vietnamese, at a time when virtually the whole of North Vietnam and South Vietnam were a theatre of military operation, and resupply through North Vietnamese ports was of strategic significance.

In the present case it would be difficult to show that the mining had any significant military effect; it would be a measure of general economic warfare against Argentina.

The mining of Argentine ports would presumably also interfere with the passage of goods consigned through Argentine ports for Paraguay and Bolivia, and perhaps Chile, which are not involved in the hostilities, as well as Uruguayan or Brazilian traffic in the River Plate. This would distinguish the case from mining of Falklands waters and would strengthen legal as well as political objections.

Legal Advisers
Foreign and Commonwealth Office

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