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ABR14 – SCSA NOTA 2 – FORMAL CONSECUENSES OF A STATE OF WAR BETWEEN THE UNITED KINGDOM AND ARGENTINA (cab 148/211)

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CABINET

DEFENCE AND OVERSEA POLICY COMMITTEE

SUB-COMMITTEE ON THE SOUTH ATLANTIC AND THE FALKLAND ISLANDS

FORMAL CONSEQUENCES OF A STATE OF WAR BETWEEN THE UNITED KINGDOM AND ARGENTINA

Note by the Secretaries

A Note on this subject by the Foreign and Commonwealth Office Legal Adviser was circulated on 12 April for the information of the Sub-Committee as OD(SA)(82)8. The comments of the Attorney General are circulated herewith.

Signed ROBERT ARMSTRONG
R L WADE-GERY
D H COLVIN

Cabinet Office
14 April 1982

CONFIDENTIAL

NOTE BY THE ATTORNEY GENERAL

1. I have seen the Note by the FCO Legal Adviser entitled "Formal Consequences of a State of War between the UK and Argentina".

2. I entirely endorse its analysis of the problem and would wish to add only the following comments:

(a) <u>The existence of a state of war</u>

The Note proceeds on the assumption (see para 1) that what we may have to deal with is either a formal declaration of war by Argentina or at least an unequivocal statement by them that a state of war between the two countries now exists. If this is the correct assumption to make, what is said in the Note about the consequences (in particular in the answers to Questions 1 and 2) is also correct. I suggest, however, that it may also be necessary to contemplate the possibility of some more equivocal statement by the Argentine Government which, while it talks (for domestic consumption) in terms of war, leaves room for uncertainty as to whether they really do intend to put themselves in a state of war with us, in the strict legal sense. If so, it will be for consideration whether we should exercise our undoubted option to take the statement at its face value (by action of the kind described in the answer to Question 3) or, on the contrary, to indicate that we regard it as no more than bellicose posturing and that our own response will be limited to the continued exercise of our right of self-defence. The former would give us a freer hand as to the measures which

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we could employ (but might also entail disadvantages vis-à-vis third countries of the kind indicated in the Note). The latter might be thought to have advantages in terms of international opinion. It follows that the terms of any Argentine statement would need to be carefully scrutinised, and also assessed against the factual background of the context in which it was made, before a definitive decision was taken on how we should respond to it.

(b) Unhelpful consequences of neutrality

The answer to Question 7 correctly draws attention to the possibility that some neutral States might feel compelled, or might choose, to invoke their neutrality as a reason for denying their port facilities for the refuelling or reprovisioning of our task force. I would point out that the principle of international law which they would invoke has consequences going wider than this; it could also be interpreted as requiring neutral States to refrain from selling or otherwise making available to us, even in pursuance of existing contracts, naval vessels or other war matériel which we might seek to obtain from them and which could be used for the purposes of our conflict with Argentina. (Colleagues will remember that we ourselves have recently invoked this principle as the authority for our refusal to release the Kharg and other warships to the Government of Iran.) Whether any particular neutral country would in fact adopt such a posture might depend partly on how far it positively wished to distance itself from us in this affair; certainly, those who were looking for a

respectable excuse to do so would find this a convenient doctrine to rely on. However, in the special circumstances of this case we should not be entirely without arguments to deploy to combat any such tendency or to help persuade the genuinely doubtful. We could plausibly argue that the classical doctrines of international law on this topic must now be read subject to the qualifications flowing from the UN Charter's prohibition of the unlawful use of force (a fortiori of force which the Security Council has determined to constitute a "breach of the peace" and which we ourselves consider to be an act of aggression). We could maintain that, in a situation where that is the origin of the state of war, a neutral country is entitled to have regard to which of the two belligerents is the wrong-doer and which the victim and is not obliged to hold the scales exactly even as between them. But this argument has never been tested in practice: there has been no exactly comparable situation, since the UN Charter came into force, of a recognised state of war where one of the parties has been so clearly acting contrary to the Charter and where third States have sought to invoke their rights and duties as neutrals to the detriment of the injured party.