

X

The Falklands Crisis and the Laws of War

*The Falklands War: Lessons for Strategy, Diplomacy and
International Law 64 (Alberto R. Coll and Anthony C. Arend eds., 1985)**

One week before the Argentine surrender at Port Stanley, the well-respected British news journal, *The Economist*, published an article captioned “War Laws—Made To Be Broken.” After discussing a number of provisions of the laws of war which the writer, obviously not an expert in the field, thought had been violated during the course of the hostilities, he ended up with this alarming conclusion: “These, and no doubt other matters not yet to appear, will be the subject of anguished inquiry, once the fighting ends.” Despite such contentions, the laws of war were more widely observed in the Falklands crisis than in any other conflict since World War II. This essay will analyze several law-of-war problems that arose during the hostilities, and will illustrate the degree to which both belligerents succeeded in observing legal norms of combat without any significant military disadvantage.

Maritime Exclusion Zone

The Argentine invasion of the Falkland Islands began on 2 April 1982. Great Britain broke off diplomatic relations that same day; but it was not until 7 April 1982, five days later, that Great Britain took its first real retaliatory step, announcing that as from 12 April 1982 it was establishing a “maritime exclusion zone” 200 miles around the Falkland Islands, and that any Argentine warships and naval auxiliaries thereafter within that zone “will be treated as hostile and are liable to be attacked by British forces.” On the following day Argentina responded by establishing a 200-mile defense zone off its coast and around the Falklands.

When the British announcement was made the impression was given, and it was generally understood, that the British nuclear submarine *Superb* was on

* The facts presented in this essay were drawn primarily from Christopher Dobson, *THE FALKLANDS CONFLICT* (1982), and from press reports contained in such publications as *THE ECONOMIST*, *U.S. NEWS & WORLD REPORT*, *TIME*, the *NEW YORK TIMES*, and others for the period of 1 April to 1 July 1982.

station in that area and this was undoubtedly the major reason for the failure of the Argentine fleet to emerge from its base at Puerto Belgrano, south of Buenos Aires. There were later complaints that the press, as well as the Argentines, had been intentionally misled when it was discovered that the *Superb* was at its base in Scotland. However, this was a perfectly valid and successful piece of “disinformation” by the British.

Since the 1856 Declaration of Paris it has been a settled rule of maritime warfare that a blockade, in order to be binding, must be effective; that is, the blockading belligerent must be able to enforce its announced blockade. The British declaration was not really a blockade, as merchant ships and neutral vessels were not barred from the exclusion zone; it only applied to enemy naval vessels. It was, therefore, nothing more than a gratuitous warning to the Argentine naval forces. A state of armed conflict certainly existed between Argentina and Great Britain and, hence, the armed forces of each, including naval vessels, were, apart from some limitations not here applicable, subject to attack wherever found. In any event, if, by disinformation, a belligerent can convince the enemy (and neutrals) that there is an effective blockade in existence, then there is an effective blockade.

On 23 April the British informed the Argentine government that “any approach on the part of Argentine warships, submarines, naval auxiliaries or military aircraft which would amount to a threat to interfere with the mission of British forces in the South Atlantic would encounter the appropriate response.” At the same time it stated that “all Argentine vessels, including merchant vessels or fishing vessels apparently engaged in surveillance of or intelligence gathering activities against British forces in the South Atlantic, would also be regarded as hostile.” Then on 30 April the British extended their maritime exclusion zone to include “any ships and any aircraft” found therein. This was now a true blockade—and, presumably, there were now British submarines on station in the area prepared to enforce the declaration. So far as is known, only one Argentine support ship, the *Formosa*, managed thereafter to reach the Falkland Islands. A number of military cargo aircraft were also successful in reaching their destination before the British carriers arrived in the area. It is interesting to note that sometime after the hostilities had ended a United Press International dispatch from Buenos Aires quoted an Argentine general as saying that the British air and sea blockade “was a success, a total success.”

On 2 May the Argentine cruiser, *General Belgrano*, was sunk by a British submarine with a loss of almost 400 lives. The exact location of the *Belgrano* at the time of the attack has not been officially disclosed, but there have been suggestions that it was about 35 miles outside the maritime exclusion zone. Certainly, a cruiser of a belligerent has no right to consider itself immune from enemy attack because it is on the high seas beyond the range of a proclaimed

maritime exclusion zone. Great Britain justified its action by pointing out that the cruiser was a threat to its picket ships, frigates, and destroyers, and that it had previously advised the Argentine government of the establishment of a defensive zone around units of the British fleet which the *Belgrano* had disregarded. Sympathy for the Argentine loss, and the feeling that the British had somehow been “unfair,” were quickly dissipated when, two days later, on 4 May an Exocet missile fired by an Argentine plane hit and sank the British destroyer *Sheffield* with a loss of about twenty lives.

On 7 May the British extended their war zone to 12 miles off the Argentine coast. This blockade was completely effective, made so by the Argentine fear that if its fleet sortied from its base it would be the victim of the British nuclear submarines which were now, beyond any doubt, patrolling the waters off the coast of Argentina outside the twelve-mile limit. However, on 15 May the Soviet Ambassador in London advised the British government that the Soviet Union considered the British blockade to be unlawful because it “arbitrarily proclaimed(ed) vast expanses of the high seas closed to ships and craft of other countries,” citing the 1958 Convention on the High Seas as the basis for its claim. Of course, a blockade always denies the use of part of the high seas to other countries. While the Soviet Union might have questioned the extent of the blockaded area as excessive, if the blockade was effective (and there seems little doubt that it was), it was a valid blockade under the 1856 Declaration of Paris, to which Russia was one of the original parties.

Fishing Vessels

In 1900 the United States Supreme Court held that by customary international law fishing vessels were exempt from seizure by enemy naval forces in time of war.¹ In 1907 this rule was incorporated into the Hague Convention No. XI. Article 3 (1) of that Convention says, in part, that “[v]essels used exclusively for fishing along the coast . . . are exempt from capture.” Paragraph 2 of that same article goes on to qualify that provision by stating that “[t]hey cease to be exempt as soon as they take any part whatsoever in hostilities.” As we have already seen, on 23 April 1982 the British government informed the Argentine government that, among other things, “fishing vessels apparently engaged in surveillance or intelligence gathering activities” would be regarded as hostile. This statement was really unnecessary as it was merely another declaration of the British intention to apply existing law.

On 9 May 1982 the Argentine fishing vessel *Narwal* was attacked by British forces and was so severely damaged that she sank on the following day. At the time of the attack she was about 60-70 miles within the British maritime exclusion zone, shadowing British fleet units. According to one report: “She was not armed but she was a spy ship with an Argentine Navy Lieutenant

Commander on board sending back information about the [British] fleet's movements."² The Argentines have not denied that allegation. That being so, the *Narwal* had lost her immunity and was legally subject to the treatment which she received.

Hospital Ships

Shortly after hostilities in the Falklands began, the British government requisitioned the SS *Uganda*, a vessel previously used for education cruises for schoolchildren, converting it into a hospital ship. There were allegations that en route to the South Atlantic the *Uganda* carried combat troops.³ If such allegations are true, this was a violation of articles 30 (2) and 33 of the Second Geneva Convention of 1949 on the treatment of sick and wounded sailors. While extra medical personnel may be carried on hospital ships, combat troops may not be. The fact that after the combat troops were debarked the vessel was used exclusively for proper purposes does not change the situation. When a hospital ship is used for improper purposes it ceases permanently to be entitled to the immunity granted to such ships. During both World Wars there were numerous claims of the misuse of hospital ships and rejection of their subsequent entitlement to immunity. It appears that such claims are inevitable and that, all too often, they will be justified.

The Economist (5 June 1982, p. 20) asserted that by bringing the *Uganda* into Falkland Sound at night to pick up wounded and shipwrecked Argentine soldiers the British "may have breached" the provision that hospital ships must "be situated in such a manner that attacks against military objectives cannot imperil their safety." The reporter or editor who wrote that article was obviously not very familiar with the laws of war. He cited the First Geneva Convention of 1949, which is concerned with land warfare, not sea warfare; and the provision he quoted relates to the placement of medical establishments and units on land, not to hospital ships. Article 18 (1) of the Second Convention makes it mandatory that "[a]fter each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick." This is presumably what the *Uganda* was doing in the Sound, and it is one of the humanitarian functions of every hospital ship.

Incendiary Weapons

Among the Argentine material captured by the British on the Falkland Islands was a large supply of napalm, one of the most effective incendiary weapons in military arsenals. This caused a great deal of critical comment in the British press. Actually, even under the provisions of Protocol III of the still unratified 1980 Conventional Weapons Convention, incendiaries such as napalm are not

outlawed, only their mode of use is restricted; and since those restrictions are all directed towards the protection of civilians, it does not appear that they would have been violated by Argentine use against British combat troops.

Protecting Powers

Diplomatic relations between Argentina and Great Britain were broken off on 2 April 1982, immediately after the news of the Argentine landings on the Falklands reached London. Shortly thereafter Great Britain requested the Swiss government to act as its Protecting Power vis-à-vis Argentina, presumably pursuant to Common Article 8/8/8/9 of the four 1949 Geneva Conventions, while the Argentine government requested Brazil to act in that capacity on its behalf. Even though they performed no major functions in the military area, this is of extreme importance in view of the fact that it was the first clear-cut instance of the use of Protecting Powers since World War II, despite the innumerable international armed conflicts which have occurred in the interim. There were, for example, no Protecting Powers in either Korea or Vietnam, and there do not appear to be any in the Iran-Iraq War.

Civilians

Civilians presented on the whole a physical rather than a legal problem. However, there were a number of rules of the laws of war which came into play. When resistance at Port Stanley ended on 2 April, Governor Rex Hunt (in full ceremonial dress with a white-plumed Napoleon-style hat), his wife, and his family were escorted to an Argentine Air Force plane and flown to Montevideo, Uruguay. The British Antarctic Survey Team's civilian scientists, based at Grytviken, on South Georgia, were also repatriated by the Argentines after a short delay. LADE, the airline which had been operated by the Argentine Air Force between Port Stanley and Comodoro Rivadavia, in South Argentina, continued to fly after the Argentine takeover. While eighty to one hundred British subjects who were living on the islands as civilian employees of the British government elected to avail themselves of this method of departure with their families, only twenty-one "Kelpers" so elected; and when members of the Anglo-Argentine community in Argentina proposed that a neutral ship be sent to the islands to evacuate the 300 children to the mainland, it was the Falkland Islanders, not the Argentine government, who rejected the proposal.

Article 35(1) of the Fourth Geneva convention of 1949 authorizes the departure of protected persons (civilians) from the territory of a party to the conflict. On the basis of the Argentine claim of sovereignty over the Falkland Islands and their dependencies, this article would have been applicable. However, if we adopt the thesis of British sovereignty, then the departure of

those who left the islands was an act of grace by Argentina since article 48 of that Convention, relating to occupied territory, only requires the Occupying Power to permit the departure of protected persons who are not nationals of the power whose territory is occupied—and all but thirty of the Falkland Islanders and other residents were British nationals. (The other thirty were Argentines.) One British subject, William Luxton, was deported, probably because he was considered to be a subversive influence; several others were apparently placed in a detention center at Fox Bay. Article 41 (1) of the Fourth Convention states that the only measures of control which the Occupying Power may adopt with respect to protected persons are assigned residence and internment. Deportation is specifically prohibited by article 49 (1) of the Convention but it may be assumed that Mr. Luxton preferred it to internment. Article 42 (1) of the Convention authorizes internment if the security of the Occupying Power makes it necessary—a decision which, of course, is a subjective one made by that power. Accordingly, the action of the Argentines in this respect was within the purview of and in accordance with the provisions of the Convention.

There were estimated to be 17,000 British passport-holders in Argentina when hostilities commenced on 2 April 1982. The Argentine government announced that it would guarantee the safety of these individuals. Nevertheless, on 5 April the British government broadcast a radio message recommending that they leave the country. How many did so is unknown but there is no evidence that the Argentine government made any effort to prevent them from exercising the right granted to them by article 35 of the Fourth Convention, mentioned above, to leave the territory of a party to the conflict.

Argentina claimed in a television broadcast that the British were guilty of “indiscriminate bombing” of Port Stanley as a result of which two civilians were killed and four were wounded. Inasmuch as more than 10,000 members of the Argentine military forces were crowded into the area of that small town (normal population: 1,050), with somewhere between 250 and 600 civilians who had remained in their homes, the civilian casualties appear to have been remarkably light. Certainly, the British bombardment and bombing of the Argentine personnel and positions in Port Stanley cannot be said to have violated any provision of the 1907 Hague Regulations on Land Warfare, 1907 Hague Convention No. IX on Naval Bombardment, or the as-yet inapplicable 1977 Protocol I. The residents of Port Stanley were British nationals and were the persons on whose behalf the British forces had traveled 8,000 miles to fight and there is no reason to believe that the British commanders did not exercise the utmost caution on their behalf. Thus, when, on 13 June 1982, the International Committee of the Red Cross (ICRC) proposed the creation of a “neutral zone” for the protection of the civilians still in Port Stanley, the British immediately

agreed. The Argentines did so on the following day and the ICRC announced that it had arranged for such a zone.

Prisoners of War

Article 13 (1) of the Third Geneva Convention of 1949 provides that “[p]risoners of war must at all times be humanely treated.” Although there were undoubtedly individual cases in which this provision was violated during the hostilities in the Falkland Islands, on the whole the treatment of prisoners of war, first by the Argentines and later by the British, more closely resembled the Russo-Japanese War of 1904–5 than either World War I, World War II, Korea, or Vietnam. In this respect, as in others, the war was fought as a “gentlemen’s war.” Thus, although article 118 of the Third Convention merely requires the release and repatriation of prisoners of war “without delay after the cessation of active hostilities,” the Royal Marines captured on both the Falkland Islands and on South Georgia were repatriated almost immediately by the Argentines. So also were two Royal Air Force technicians captured at the airfield at Port Stanley, men who were able to provide the British with valuable intelligence information.

When the British began to take prisoners of war, first on South Georgia and then on the Falkland Islands, they followed the pattern established by the Argentines of promptly repatriating them. In fact, the practice was so regular and so prompt that it aroused the ire of the Royal Navy when the entire crew of the Argentine submarine *Santa Fe*, captured by the British at South Georgia, was quickly returned to Argentina. As one report stated, “to give the Argentines back a fully trained crew of submarine specialists seemed the height of folly.”⁴

We have seen that article 118 of the Third Convention requires the repatriation of prisoners of war “without delay after the cessation of active hostilities.” Despite this clear provision, India held Pakistani prisoners of war for over two years after the complete cessation of active hostilities, from December 1971 to March–April 1974, allegedly because there was no guarantee that hostilities would not break out again, but actually as political hostages in an effort to compel Pakistan to recognize Bangladesh. Contrary to the procedure followed by India, which flagrantly violated the Convention provision, Great Britain began the repatriation of Argentina prisoners of war immediately after the final surrender of the Argentine forces on the Falklands. At first the British sought to obtain a statement from Argentina acknowledging the cessation of active hostilities. Even though such an acknowledgment was not forthcoming, the British quickly repatriated over 10,000 prisoners of war, retaining about 550 officers, including the Argentine commander on the Falklands, General Menendez. Within a month, despite the Argentine government’s refusal to

210 Levie on the Law of War

admit to a complete cessation of hostilities, the remaining prisoners of war were returned by the British.

There were some instances in which it has been suggested that the provisions of the Third Convention may have been violated. When the Royal Marines at Port Stanley surrendered they were required to lie on the ground, face down, under guard while they were being searched for weapons. Photographs were made of that scene. It has been implied that the taking of those photographs violated article 13(2) of the Convention which requires that prisoners of war be protected against "insults and public curiosity." Inasmuch as hundreds of photographs have been taken and published in every war of the moment of surrender, hands held high in the air, and full-faced, with no complaints by the belligerents, and inasmuch as it is impossible to recognize any particular individual in the Falklands picture, there is at least a reasonable doubt that the photograph violated article 13 (2) of the Convention.

One Argentine naval sub-officer was shot and killed while a prisoner of war, while apparently attempting to sabotage the captured submarine *Santa Fe*. The British immediately informed the Argentine government of the incident through the medium of the International Committee of the Red Cross and instituted a Court of Inquiry, presumably pursuant to article 121 of the Third Convention. The Argentine government was advised of the result reached by that court, which exonerated the British guard, and apparently it was satisfied that justice was done.

As in all modern armed conflicts, land mines were used in the Falklands in great profusion; at the end of hostilities, their removal became a major problem. Article 7 of Protocol II to the as yet unratified 1980 Conventional Weapons Convention contains provisions for the recording of the location of minefields. Apparently, as is not unusual in modern warfare, this was not done in many instances by the Argentines, with the result that the locating and removal of the numerous buried mines became a slow, painstaking, and dangerous procedure.

After World War II large numbers of captured German soldiers were retained in France for the purpose of removing mines, and a substantial number were killed or injured in the process. As a result, article 52(1) of the Third Convention specifically provides that only prisoners of war who volunteer for the task may be employed on labor which is of a dangerous nature, and the third paragraph of that article provides that the removal of "mines and similar devices" is to be considered dangerous. It has been asserted that captured Argentine soldiers were "ordered" to clear minefields near Goose Green. If this was so, it constituted a clear violation of the provisions of the Convention. If they were volunteers, it did not.

Article 117 of the Third Convention provides that "[n]o repatriated person may be employed on active military service." While the meaning of this phrase

is subject to numerous interpretations there can be no doubt that it precludes the use of repatriated personnel in actual combat. There are charges that some Royal Marines, captured by the Argentines on South Georgia and repatriated to Great Britain, were subsequently included in the British Task Force. If this was so, it was a violation of the provisions of the Convention.

One interesting episode occurred with respect to prisoners of war. When Captain Alfredo Astiz, the commander of the Argentine forces on South Georgia, surrendered to the British forces on 22 April 1982, he and the commander of the *Santa Fe*, the Argentine submarine which had been captured that morning, were entertained at dinner by the British officers. Subsequently, it was alleged that Captain Astiz was the infamous "Captain Death," one of the most sadistic of the government's interrogators during the suppression of the guerrilla movement in Argentina some years before. Sweden wanted to question him concerning eyewitness reports that he had shot a young Swedish girl. France wanted to question him concerning the disappearance of two French nuns. This raised an interesting question of law. The offenses were alleged to have occurred in Argentina long before the beginning of the hostilities between Argentina and Great Britain. Assuming that they constituted violations of article 3 of the Fourth Convention, dealing with non-international armed conflicts, can a Detaining Power in a subsequent international armed conflict turn over a prisoner of war to a third state, a party to the Conventions, for possible trial and punishment? The British answered that question in the negative, rejecting the Swedish and French requests. Whether that decision was correct remains an open question. After being taken to Great Britain, where he was subjected to what has been described as a "token" interrogation, Captain Astiz was repatriated.

Mercenaries

One of the most difficult problems which confronted the Diplomatic Conference drafting the 1977 Protocol I involved proposals seeking to eliminate the use of mercenaries. Under the definition now contained in article 47 of that instrument, one of the requirements for categorizing an individual as a mercenary is that he "is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party."

The Gurkha Rifles have been part of the British Army for well over 100 years. They are recruited from an ethnic group which lives in what is now Nepal. During World War II there were 100 battalions of Gurkhas in the British Army; today there are five such battalions. When it became known that the 7th Gurkha Rifles was being sent to the Falklands, Argentina protested to Nepal. Whether that protest was based on the allegation that the Gurkhas were serving the British

as mercenaries, or was made merely because they were Nepalese citizens, is not known. The Gurkhas are certainly motivated by the desire for private gain. They serve the required number of years, and then retire in Nepal as relatively prosperous citizens. However, inasmuch as they receive a considerably smaller pay than do British soldiers, it is doubtful that they come within the definition of mercenaries.

Neutrals and Neutrality

Prior to World War II, during hostilities there was a dichotomy under which all states in the world community were either belligerents or neutrals, with well-established rules applicable to each status. At various times in the course of World War II, Italy and Spain, and perhaps others, announced that they were "non-belligerents." That term can be defined best by saying: "I hope that you win, and I will do everything I can to help you, except fight." During the Anglo-Argentine hostilities in the Falkland Islands, the United States did not officially use the term "non-belligerent," but that was undoubtedly its status. After Secretary Haig failed in his peacemaking efforts, the United States announced its support of Great Britain which included a willingness to supply any military aid short of direct involvement of American combat forces. On 29 April 1982 the United States Senate adopted a resolution in which it declared that "the United States cannot stand neutral." Five days later, on 4 May, the United States House of Representatives adopted a similar resolution in which it expressed "full diplomatic support of Great Britain in its efforts to uphold the rule of law." In the course of the war the United States furnished the British with a secure method of communication with its nuclear submarines in the war zone, weather information, aviation fuel, use of the airfield on Ascension Island, ammunition and missiles, and KC-135 tanker planes.⁵ A request for AWACS was refused because it would have involved American airmen in the hostilities. Whether the United States acted in accordance with the rules of neutrality which existed prior to World War II is, at the very least, questionable.

There was speculation that, despite the strong anticommunist stance of the Argentine junta, it was receiving aid of various kinds from the Soviet Union. It can be assumed that if the Soviet Union considered the granting of such aid to be in its own interests, it would not have found it impossible to overlook the ideological differences. The USSR abstained on, but did not veto, United Nations Resolution 502, calling for Argentina to withdraw its forces from the Falkland Islands. The Soviets also employed surface vessels and planes from Angola and Cuba for surveillance of the British Task Force as it sailed towards the South Atlantic. This, however, may have been routine since Soviet ships and planes do this with respect to all naval movements of Western powers; there is no hard evidence that the USSR passed the information so obtained to the

Argentines. In fact, it has been suggested, with a good deal of reason, that had the Soviet Union been doing so the *Narval* would never have been sent on the suicidal spy mission in which it was engaged when it was sunk by the British.

Implications for the Laws of War

In some important respects, the Falklands crisis offers much hope for the continued viability of the laws of war. Despite the intense nationalistic rivalries underlying it, the conflict illustrates that states can wage conventional warfare in compliance with the laws of war without thereby giving adversaries a substantial military advantage. But, on the other hand, one must be mindful of the peculiar qualities of the Falklands War that made it possible for the laws of war to exert their restraining influence. First, this was a limited war, fought for limited ends with limited means. For both parties the end was quite specific—control of a particular territory. This was not an abstract, hazy goal, but rather a concrete, easily recognizable objective. The means, too, were limited. The adversaries restricted their operations to the disputed territory, and refrained from military actions against the enemy's homeland; had it not been conducted otherwise, the war would have been much more violent and destructive and could have released the kind of political frenzy and hatred that weaken the observance of the laws of war. Second, the adversaries, despite obvious differences in political regimes, saw themselves as members of the same civilization, and shared many cultural affinities and bonds—some stretching over centuries. This helps to explain why the war was in many respects a “gentlemen’s war.” Third, the conflict was brief. It is difficult to predict how well the laws of war would have been observed had this been a protracted struggle, filled with the usual weariness and mounting frustration against the enemy. It is an open question whether further conflicts that lack all these special characteristics will have as encouraging a record on the observance of the laws of war as did the Falklands War of 1982.

Notes

1. *The Paquete Habana*, 175 U.S. 677 (1900).
2. Christopher Dobson, *The Falklands Conflict* (London: Hodder & Stoughton, 1982), p. 104.
3. The *Uganda* may have been confused with the *Canberra* (*New York Times*, 28 May 1982, p. A8:4). In a letter dated 8 October 1982 Captain L. W. L. Chelton, R.N., Chief Naval Judge Advocate of the Royal Navy, advised the author that no British hospital ship carried combat troops to the South Atlantic; and that members of the International Committee of the Red Cross, carried thereon, could verify this.
4. Dobson, *The Falklands Conflict*, pp. 156–7.
5. The British were legally entitled to use the Ascension airfield under an agreement, “Use of Wideawake Airfield in Ascension Island by United Kingdom Military Aircraft,” signed at Washington, 29 August 1962 (13 UST 1917, TIAS 5148, 449 UNTS 177).