

MACCABAEAN LECTURE IN JURISPRUDENCE

The Rule of Law in International Affairs

BRIAN SIMPSON

Fellow of the Academy

THE MOST CELEBRATED MACCABAEAN LECTURE remains, I suppose, that delivered in 1959 by Sir Patrick Devlin, later Lord Devlin, on the separation of law and morals or, if you like, on sexuality and the law, for that was what his lecture was really about.¹ I am afraid that my subject is much more boring: I propose to consider the influence, if any, of international law on the conduct of states in relation to the use of force. In the present context of war in Iraq, the subject has a certain topicality. The possible influence of international law on the conduct of states is an aspect of a more general and very puzzling issue: what influence does any form of law have on human conduct? And that is in its turn an aspect of an even more general issue: why do people do things? Why did I give this lecture? Why did I say yes? Vanity? Inability to say no? The money? A burning desire to expound the truth? And why are you reading it? Some of you may already be wondering. If we add law to the possible motivations for human action or inaction it all becomes even more problematic. I have, and you have to take my word for this, never murdered anyone. Has my abstention from homicide got something to do with the law? I have stolen things, as I imagine most of you have too, but only very occasionally; why only occasionally? When we ask about the relevance of international law to the conduct of states questions of motivation become even harder to answer. For if individuals are complicated entities, states are even more complicated. When we talk of action by a state we know that this is a simplified way of talking about a process which involves the individual

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¹ Republished in P. Devlin, *The Enforcement of Morals* (Oxford, 1965).

actions of a large and uncertain number of individuals, organised in complicated institutions and structures, and operating within elaborate rules and conventions. Often, in popular discourse, language is chosen which seeks to conceal this obvious fact, as when, during the Cold War, people talked about the Presidential ‘finger on the trigger’, as if unleashing Strategic Air Command was like ringing a doorbell. Those of you who have watched *Dr Strangelove*² will have a better awareness of reality.

In the case of individual actions there is commonly a problem over evidence. Perhaps in relation to our own actions we have privileged access to relevant information, though the psychiatrists would have us believe that our own motives are often hidden from us, and can only be dug out, at considerable cost, by lengthy sessions on the couch. In the case of states the evidence available to historians is virtually always inadequate. By way of example take a decision by the British Cabinet. In the period with which I am concerned in this lecture the Cabinet apparently did not vote. The laconic Cabinet minutes which are available—not the raw notes actually taken at the time—though sometimes including summaries of points made by particular ministers, or unattributed statements of points made in the discussion, rarely give any indication as to why the members of the Cabinet went along with what was decided. Some may have been asleep, as Ernest Bevin often appeared to be,³ others engaged in doing the crossword or, as in the case of Prime Minister Asquith, and this is documented, writing letters to his girl friend.⁴ The minutes may of course be supplemented with other material, either from The National Archives, or from private papers of one kind or another. But the documentation upon which historians rely in providing explanations of the actions of states is always incomplete, and, at best, provides only weak evidence, or perhaps no evidence at all, as to why this or that course of action was adopted. When historians tell us what happened, and why, they try to offer explanations which seem both intrinsically plausible, on the assumption that actions are taken for what seem to the actors to be good reasons, and explanations which are at least consistent with what evidence there is. Underlying the assumption of rationality are all sorts of other unstated assumptions, for example about freedom of choice, and about the nature

² Columbia Pictures, 1963, directed by Stanley Kubrick.

³ See my *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford, 2001, hereafter *HREE*), p. 730.

⁴ M. and E. Brock (eds.), *H. H. Asquith. Letters to Venetia Stanley* (Oxford, 1982), Numbers 27, 144, 321 and 328.

of decision taking in complex organisations. These assumptions normally remain unstated and unanalysed.

There is an extensive legal literature on the legality or illegality of the use of force by states. There is also a vast theoretical literature on the conduct of states, and on the place, if any, which the rule of international law plays, or ought to play, in controlling it. I shall not be concerned with these forms of literature. I shall not discuss at all what international law says ought to happen, nor will I be concerned with the high theory either of international law or of international relations. Instead I propose to tell you the story of two related incidents which took place in the early months of the Second World War, and which involved the use of force, or the threat of force, by agents of the United Kingdom. Both are very fully documented in The National Archives. The aim is to see what, if anything, can be said about the way in which international law related to these particular incidents, and what general lessons, if any, they have to teach us. Even on just these two incidents the volume of both primary and secondary material is very large indeed, and I must somewhat simplify the account I provide.

The first incident involved a ship called the *Altmark*, and took place late on 16 February 1940. She was a naval auxiliary, and from a legal point of view part of the German navy. She had operated as a tender and supply ship to the German battleship *Admiral Graf Spee*, which had, in 1939, been engaged in commerce raiding in the Indian Ocean and the South Atlantic. *Altmark's* chief function was to carry fuel oil; she was fast, being capable of about 25 knots.⁵ In December 1939 the *Admiral Graf Spee* was engaged off Uruguay by the British cruisers *Exeter*, *Ajax* and *Achilles*. She retreated, damaged, into Montevideo Roads, where she was scuttled on 17 December before large and excited crowds. Her commander, Captain Langsdorff, committed suicide three days later.⁶ Some merchant seamen from ships which had been sunk by her were still on her during the action. They were released in Montevideo, just in time for Christmas. It was thought that she had taken about 300 other prisoners, who had earlier been transferred to the *Altmark*, but it was not known with certainty what had become of them.

⁵ Her tonnage was 11,000 net and 18,000 gross.

⁶ For a general account see D. Pope, *The Battle of the River Plate* (London, 1956 and 1970), and for the official history see S. W. Roskill, *The War at Sea* (London, 1954), I, 117–21. Roskill as published does not refer to sources, but The National Archives (hereafter NA) has a copy, in CAB 101/36, of his history, annotated with file references.

For some time the location of the *Altmark* was unknown. But on 14 February she entered Norwegian territorial waters off Trondheim; her arrival was reported to the British Admiralty.⁷ Norway was at this time neutral, and although she claimed wider territorial waters for some other purposes she only asserted a three mile limit for purposes of neutrality.⁸ The *Altmark*'s plan was to proceed southwards until she was able to enter the Baltic, whilst remaining all the time within what are known as the Leads.⁹ These are the waters between the Norwegian mainland and the outlying islands and skerries, and they were certainly part of Norwegian territorial waters. If this plan had been fully carried out the *Altmark* would have sailed for some six hundred miles within Norwegian waters before entering the Baltic, into which the British navy, for tactical reasons, could not pursue her. The *Altmark* was stopped by Norwegian naval vessels, her papers checked and her identity established, but she was never searched.¹⁰ She was accompanied on her way south by Norwegian torpedo boats.

The Royal Air Force¹¹ and the Royal Navy located the *Altmark*.¹² She

⁷ The basic files on the action against the *Altmark* are ADM 1/11524, ADM 199/280 and 281 (dealing with Cases 7255 and 7256), ADM 223/27, ADM 1/25843. Roskill deals with the incident at I, 151–3, citing CAB 65 WM 44 (40) 2, and Case 7364, referring to the War Diary of the Home Fleet, which is in ADM 199/393. Foreign Office material is principally in FO 371/25171/W2906, FO 371/25172/W3369, W3389 and FO 369/2549; the system of filing in the Foreign Office is explained in M. Roper, *The Records of the Foreign Office*, PRO Handbook 33, 2nd edn. (2002). ADM. 1/10829 and 10830 deal with awards. FO 952/2 has consular reports from Norway. GFM 33/111, 1519 and 3169 has material recovered later from the German Legation in Oslo, which I have not consulted. The log of HMS *Cossack* no longer exists; that of HMS *Arethusa*, a cruiser which was involved, is in ADM 53/111408. [Ernest] Llewellyn Woodward, *British Foreign Policy in the Second World War* (London, 1962) deals with the incident at vol. I, 85; he provides no references. There is material in CAB 65/5 WM 44 (40) 2, 45 (40) 2, 49 (40) 2, 50 (40) 1 (Meetings on 17, 18, 22 and 23 Feb.). MT 9/3188 deals with the condition of the prisoners. For the press see *The Times* for 19, 20 and 21 Feb. 1940. The fullest modern account is in J. Cable, *Gun-Boat Diplomacy 1919–1979* (London, 1971, 1981). An account by Philip Vian, Captain of HMS *Cossack*, is in his *Action This Day* (London, 1960). There is an account by Captain Heinrich Dau published in Germany, but I have not located a copy.

⁸ Norwegian claims were litigated in the Norwegian Fisheries Jurisdiction Case, 1951 *ICJ Reports*, 16.

⁹ The liner *Bremen* had used this route to return to Germany from Murmansk in 1939.

¹⁰ She was first intercepted on 14 Feb. by the *Trygg* off Trondheim, when north of the Bergen defended area, which warships were forbidden to enter under Article 2 of the Norwegian Neutrality Regulations. She was intercepted again on the same day, and again on 15 Feb. by the torpedo boat *Snogg*, and again by the destroyer *Garm*. She entered the defended area, and thereafter she was escorted south by the *Firern*, and later by the *Skarv* and *Kjell*.

¹¹ See AIR 4/22, log book of Flying Officer C. T. Dacombe, and on the web at www.oldtownhall.fsnet, a site established by the Town Council of Thornaby where the intercepting squadron was based.

¹² See ADM 1/11524. Reports reached London from the French Naval Attaché in Oslo, and from the Naval Control Officer in Trondheim, acting on a report from Captain D. F. Harlock of the SS *Helmond*.

was intercepted by a naval force which included a number of destroyers. Attempts were made to persuade her to stop. She did not do so. At various times in this operation naval vessels entered Norwegian territorial waters. She was driven into Jössingfiord in southern Norway late on the afternoon of 16 February. In the face of objections from the commander of the two Norwegian torpedo boats, which were on the spot, the destroyer HMS *Cossack*, under Captain Philip Vian, entered the fiord. The *Altmark* attempted to ram *Cossack*, but was driven ashore, and she was boarded just before midnight by an armed party; the *Altmark* was armed with some ‘pom pom’ anti-aircraft guns which were not used, and with machine guns and some small arms which were. The prisoners—there were 299 of them—were located, and the officer in charge of the boarding party called out to them ‘The Navy’s Here’.¹³ They were taken onto *Cossack* and brought home to Leith to a heroes’ welcome. No resistance was offered by the Norwegians, but there was firing from German naval seamen and several were killed.

Why was the *Altmark* boarded in Jössingfiord? One documented reason is that it was believed that she was a ‘hell ship’, run by a brutal Nazi captain, Heinrich Dau. This belief originated in reports from sailors who had been released in Montevideo and it was embodied in a report from the British Naval Attaché in Montevideo.¹⁴ Presumably part of the explanation must be the fact that the bellicose Winston Churchill was, at this time, First Lord of the Admiralty, and he was hardly likely to be in favour of doing nothing once the ship was located.¹⁵ Other possible explanatory reasons cannot be documented. But it appears to have always been assumed that if the *Altmark* was ever located she would be intercepted, and the prisoners released if they were on her.¹⁶ But there are no records of any discussion as to what should be done if she was located in neutral territorial waters.

¹³ There were 55 officers and 244 crewmen, of whom 60 were Lascars, that is sailors of Indian descent.

¹⁴ See FO 369/2549/K17889/20 (list of those released in Montevideo) and K181140 (report of conditions). The report of one of the officers, Captain C. Pottinger of the SS *Ashlea*, is quoted in G. H. and R. Bennett, *Survivors. British Merchant Seamen in the Second World War* (London, 1999) p. 115, based on ADM 199/2130. See also FO 370/592, ADM 1/10723, MT 9/3186 and 3188 (includes the decision to press no charges against the German captain after the war).

¹⁵ Churchill’s own account is in his *The Second World War*, Vol. I, *The Gathering Storm* (1948 edn.), pp. 443–7, his report to the Cabinet in CAB 65/5 WM 44(40). Many of the relevant papers are printed in M. Gilbert, *The Churchill War Papers. Volume I. At the Admiralty* (London, 1993), hereafter cited as *GWP*.

¹⁶ See FO 369/2549.

The whole incident was viewed at the time as showing that the navy had not lost the Nelson touch; it caused great national rejoicing, as I can personally recall. The scuttling of the *Admiral Graf Spee*, and the interception of the *Altmark*, were the only two dramatic success stories from the period between September 1939 and April 1940 which came to be known as the 'phoney war'.

The second incident took place on 8 April 1940; this was the day before Germany took control of all the major ports and cities in Norway. In 'Operation Wilfred' minefields were laid in the approaches to the port of Narvik, well within Norwegian territorial waters, and their locations were published, as required by international law. It was all, you may think, a little too late.¹⁷

The immediate aim of this operation was to interrupt the shipping of iron ore to Germany from the port of Narvik. The background was the belief that in its ability to wage modern war Germany suffered from two Achilles heels, its dependence on imported oil and iron ore.¹⁸ The iron ore came principally from fields in Northern Sweden around Gällivare and Kiruna. During the months when the Gulf of Bothnia was ice-free, that is from May to November, inclusive, the ore was shipped to Germany from the Swedish port of Lulea. During the winter, when Lulea was ice-bound, the ore was moved by rail to the Norwegian port of Narvik, which remained ice-free all year round because of the effects of the gulf stream. A small quantity of ore from a more southern Swedish field was also shipped to Germany from the Swedish port of Oxelösund, which was open for most of the year, and from Gävle. Since September 1939 the Ministry of Economic Warfare had argued in favour of an operation to cut off the supply, and it came to be believed, probably incorrectly, that if the supply could be interrupted Germany would be unable to continue the war for more than around twelve months.¹⁹ There was no tactical obstacle to prevent the navy from interrupting the supply from Narvik, either by mining the approaches, or by naval patrols; the Norwegian navy was tiny, and could not possibly prevent this. Interrupting the supply from Lulea and Oxelösund was much more difficult. But there were schemes to block the narrow channel to Lulea by sinking a large vessel in

¹⁷ See below, nn. 148–58.

¹⁸ See W. K. Hancock (ed.) *History of the Second World War. United Kingdom Civil Series*: W. N. Medlicott, *The Economic Blockade* (London, 1952), vol. I, 139–40, 152–62 and 180–92; this is based on archival material, but provides no references.

¹⁹ This estimate was provided to the Cabinet by the Ministry of Economic Warfare. See CAB 66/4 WM 122 (39) 1 (22 Dec.).

it, and there was also a scheme, which nearly came off, to sabotage the dockyard facilities in Oxelösund.²⁰ Another possibility was to lay mines from aircraft, but the distance from the nearest British airfield, which was in the Shetlands, presented serious problems, and would have required aircraft to overfly both Norway and Sweden.

The history of Anglo-Scandinavian relations during the phoney war is extremely complicated. I can only provide an outline.²¹ The Narvik operation, which had been under discussion since September 1939,²² was consistently supported by Winston Churchill as First Lord of the Admiralty, and by some other 'hawks' in the Cabinet, who were prepared to go ahead even if the action was in violation of international law. It was one of two rival but interrelated plans for British intervention in Scandinavia, both of which were under more or less continuous discussion in official circles between September 1939²³ and April 1940. It was the more modest scheme. The larger scheme was to open a Scandinavian front against Germany, though only with the consent, or at least acquiescence, of Norway and Sweden. The military view was that intervention in the face of active opposition would be extremely hazardous. The proposal for a Scandinavian front gained a new significance on 30 November 1939 when the Soviet Union, which was at this time allied to Nazi Germany, invaded Finland, opening the Winter War. This lasted until 12 March 1940, when Finnish resistance collapsed.²⁴ It became British policy to try to provide

²⁰ See HS 2/263. There are numerous references to plans to sabotage the port of Oxelösund by 'methods which are neither diplomatic nor military'—e.g. CAB 66/4 WP (40) 162. See also *GWP*, p. 548, CAB 83/1, Meeting of the Military Co-ordination Committee on 20 Dec. and again on 22 Dec. in ADM 116/4471. See also CAB 66/4 WP (39) 162, and Cadogan *Diaries* for 17 Jan. 1940 (D. Dilks (ed.), *The Diaries of Sir Alexander Cadogan, OM, 1938–1945* (London, 1971), p. 247). See now W. Mackenzie, *The Secret History of the SOE* (London, 2002) at pp. 17–22.

²¹ A starting point is Woodward, *British Foreign Policy*, I, ch. II.

²² See Churchill, *Gathering Storm*, p. 421, CAB 65/1 WM 20 (39) 11 (19 Sept. 1939). The Cabinet discussions in 1939 can be followed in CAB 65/1 WM 31 (39) 11 (19 Sept.) *GWP*, p. 119, WM 37 (39) 4 (4 Oct.), 53 (39) 9 (19 Oct.), CAB 65/2 WM 68 (39) 8 (2 Nov.), WM 116 (39) 4 (15 Dec.). See *GWP*, p. 441, 492, 519, 549. Supporting papers are in CAB 66; see in particular CAB 66/2 WP (39) 57, CAB 66/4 WP (G) (39) 153, (40) 168 and 169, also ADM 205/2, *GWP*, pp. 180, 522.

²³ The Cabinet discussions in Jan. 1940 may be followed in CAB 65/5 WM 1 (40) (1 Jan.) with papers by the Chiefs of Staff and one from Churchill CAB 66/4 WP (40) 3, *GWP*, p. 587, CAB 65/11 WM 2 (40) 2 (Conf. Annex) (3 Jan.), *GWP*, p. 597, CAB 65/11 WM 3 (40) (Conf. Annex) (4 Jan.), *GWP*, p. 607, CAB 65/11 WM 4 (40) 6 (Conf. Annex) (5 Jan.), WM 8 (40) 1 (Conf. Annex) (10 Jan.), WM 9 (40) 5 (11 Jan.), *GWP*, p. 619.

²⁴ The Cabinet discussions in Feb. 1940 may be followed in CAB 65/5 WM 44 (40) (17 Feb.), *GWP*, p. 174, WM 46 (40) 9 (19 Feb.), CAB 65/11 WM 45 (40) 1 (18 Feb.) *GWP*, p. 777, CAB 65/11 WM 46 (40) 9 (19 Feb.) *GWP*, p. 779, WM 48 (40) 6 (21 Feb.), CAB 65/11 WM 49 (40) 6 (22 Feb.), *GWP*, p. 789, CAB 65/5 WM 50 (40) 1 (23 Feb.), *GWP*, p. 795, (24 Feb.), CAB 65/5 WM 55 (40) (29 Feb.)

aid to Finland.²⁵ Opening a Scandinavian front came to be seen as a means of providing such aid. A Scandinavian front, had it been established at this time, would almost certainly have brought about direct conflict with the Soviet Union, and there were of course some in Britain who thought that the Soviet Union, rather than Germany, was the ultimate enemy. Lurking behind the convoluted story was the fear that Germany and the Soviet Union, having already partitioned Poland, and taken control of the Baltic States, might do the same to the rest of Scandinavia. One or other or both such powers would thereby secure total control over the Swedish iron ore fields.

The precise relationship between the two schemes was problematic. One view was that mining the Leads would antagonise Scandinavian opinion, and jeopardise the chances of carrying out the larger scheme. Furthermore, it was impossible to know how Germany would react to mining the Leads. Churchill, for example, seems to have thought that Germany would probably react by military intervention in Scandinavia; this would provide a welcome justification for wider British intervention. But nobody could possibly know, given the dismal state of British intelligence, what was likely to happen. Mining the Leads would only interrupt traffic in the winter months, and any deficit might be made up by increasing exports from Lulea in the summer, and also from Oxelösund and Gävle. It all depended on how Sweden would react, and what pressure Germany would bring to bear on her. Hence the somewhat desperate schemes for stopping the Baltic traffic too. The larger scheme was strongly favoured by France, whose consistent policy at this time was to fight the war anywhere except in France. It was not clear what assistance, if any, France might be able to provide in Scandinavia; her army and air force were already committed to passive defence along the Maginot line. Soviet reactions were again unpredictable, and the archives, astonishingly, give little indication that the risks of engaging in a war against both Germany and the Soviet Union were ever seriously considered by the War Cabinet. The imagination boggles at the outcome if this had ever come about.

Now let me give some account of the legal background to these incidents. First a word about Norwegian neutrality.²⁶ On 27 May 1936 all the

²⁵ See V. Tanner, *The Winter War. Finland against Russia* (Stanford, 1957) for an account. The author was at the time the Finnish Foreign Minister.

²⁶ See generally H. Koht, *Norway, Neutral and Invaded* (New York, 1941), ch. I, 'Why was Norway Neutral?' Koht points out that Norway had enjoyed peace since 1814, and the tradition of neutrality was deeply embedded in Norwegian culture.

Scandinavian countries had issued a Scandinavian Declaration of Neutrality, and Norway published Neutrality Regulations in 1938 and 1939;²⁷ since the outbreak of the war Norway, Sweden and Denmark had consistently sought to preserve their neutrality.²⁸ Finland's involvement in war with the Soviet Union had come about simply because of the Soviet invasion, and not because of any belligerence on the part of Finland.

The two incidents with which we are concerned certainly took place within the Norwegian three mile limit. Now it is quite clear that in general the British navy and air force respected the neutrality of Norwegian territorial waters. Whenever aircraft or naval vessels strayed into or above Norwegian waters the Norwegian Government, through its Minister in the Legation in London, Erik Colban, formally protested. The Foreign Office passed these protests on to the Admiralty or Air Ministry and they were investigated, so far as one can tell, conscientiously. They were then either rejected on the ground that there was no clear evidence that any penetration had occurred, or accepted and met with a formal apology. There are numerous examples in the Foreign Office papers. Sometimes tricky issues arose; in one case a British cruiser, whilst itself outside the three mile limit, shone a searchlight on a vessel within the limit. Was this really a violation of Norwegian neutrality?²⁹ So far as neutral obligations were concerned there was a text, that of *The Hague Convention (XIII) of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War*. This had been signed by the United Kingdom, but never ratified; Norway had both signed and ratified, and in addition reissued its own Neutrality Regulations on 1 September 1939.³⁰ The Foreign Office treated *The Hague Convention* and the Norwegian regulations as authoritative in so far as they were in accordance with general international law. Article 1 of the Convention provided that:

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

Article 2 of the Convention spelled out, though not comprehensively, what sort of acts would violate neutrality. It provided that:

²⁷ See ADM 1/9944. The regulations were published in *American Journal of International Law*, 32 (1938) Supplement p. 154.

²⁸ On one occasion Norway interned a German submarine, U 21, which ran aground in her waters through a navigational error; see ADM 199/669.

²⁹ See for example FO 371/24819.

³⁰ I do not know why the United Kingdom did not ratify.

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

So at least at first sight the incidents which I have mentioned appear to have violated the express terms of the Convention. Some very special justification would be needed to avoid this conclusion. Several articles explicitly spelled out the duties of a neutral power³¹ and other articles laid down what was permissible for warships of belligerents. Article 25 imposed a duty of surveillance:

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

Second, a word about the way in which at this time international law was, as it were injected into the processes of government. By 1939 four government departments had, amongst their officials, senior persons with the title of Legal Adviser. In addition to the Legal Adviser there might be a deputy, and one or more assistants, but there was only one Legal Adviser in each department.³² The four departments were the Foreign Office,³³ the Home Office, the India Office and the Colonial Office. Today all Foreign Ministries, so far as I am aware, possess Legal Advisers. Neither the Air Ministry nor the Admiralty had Legal Advisers. Quite how the Admiralty obtained legal advice on matters other than disciplinary questions is something which I do not, currently, fully understand. Within the Admiralty there was a division called the Military Branch, and within it there appear to have been one or more officials who gave legal opinions. But to date I have not located a useful account of the internal administration of the Admiralty which explains how this worked. During the war Humphrey Waldoock worked in the Admiralty, and, if accounts are to be believed, established himself as some sort of *de facto* legal adviser, but he

³¹ In particular Articles 3, 4, 6, 8, 9, 13, 16, 17, 21, and 22.

³² Deputies could be titled 'Second Legal Adviser'; thus Eric Beckett acquired this title in 1929.

³³ The origin of the office is explained by J. Ll. Edwards, *The Law Officers of the Crown* (London, 1964), pp. 131–40; there is a life of the first such adviser, who joined the Foreign Office as Legal Assistant Under-Secretary (he was not called the Legal Adviser) in 1876, by R. B. Mowatt, *The Life of Lord Pauncefoot. First Ambassador to the United States* (London, 1929) and a study by L. Wright, *Julian Pauncefoot and British Imperial Policy 1855–1889* (Lanham, 2002). See also A. W. Ward and G. P. Gooch, *The Cambridge History of British Foreign Policy 1783–1919*, Vol. III (Cambridge, 1923), pp. 608–9, B. Cheng (ed.), *The Foreign and Commonwealth Office* (London, 1962), Ch. 11, 'The Practice of International Law'. For proceedings at the first conference of Legal Advisers, held at Princeton in 1963, see H. C. L. Merillat (ed.), *Legal Advisers and Foreign Affairs* (New York, 1964), especially C. Parry, 'United Kingdom. Background Paper' pp. 101–52.

had not achieved this status in the early months of the war, and certainly he never gained the title Legal Adviser.³⁴ Similarly I do not, and for the same reason, understand the situation in the Air Ministry. Possibly the practice was to seek external assistance, either from the Foreign Office, or from the Treasury Solicitor, or, I suppose, from the Law Officers, as seemed appropriate. Both departments did have their own officials who specialised in dealing with courts martial.

The office of Legal Adviser, *eo nomine*, as an established senior position, was not invented in the Foreign Office. The practice of having an in-house lawyer to provide legal advice apparently originated in the Colonial Office, where there was a person with the title Legal Adviser from 1867 until 1870, the first incumbent being Sir Henry Thurston Holland, Bt., a barrister of the Inner Temple. He became an Assistant Under Secretary in 1870 and the office then lapsed.³⁵ On his resignation before his entry into Parliament as Conservative member for Midhurst in 1874 the position became vacant, and in 1875 it was given to Julian Pauncefote.³⁶ He had worked as a lawyer in the colonies, both in Hong Kong, where he became Attorney-General, and momentarily a puisne judge, and the Leeward Islands, where he had been appointed Chief Justice in 1873; he had been offered the post of Chief Justice in Ceylon, but preferred the post of Assistant Under Secretary in the Colonial Office. He did not hold the office of Legal Adviser, since there was then no such office. In the Home Office a Legal Adviser *eo nomine* appears much later. An Assistant Under Secretary (Legal) existed from 1897. In 1925 the department had four legally trained members of its staff, one being an

³⁴ According to Sir Robert Jennings, quoted in I. Brownlie, 'The Calling of an International Lawyer: Sir Humphrey Waldock and His Work', *British Yearbook of International Law*, 54 (1982), 7, Waldock, who worked from 1940–5 in Military Branch I of the Admiralty, was involved in the *Altmark* case. This may be correct, but it is not confirmed by the archives. He was involved in the issue of the right of hot pursuit, on which see below, pp. 227–30.

³⁵ See J. C. Sainty, *Office Holders in Modern Britain. VI: Colonial Office Officials* (London, 1976), p. 32, and B. L. Blakely, *The Colonial Office 1868–1892* (Durham, 1972), pp. 78–81. There was at the time another Assistant Under Secretary with legal training, one W. R. Malcolm, but he did not hold the office of Legal Adviser. From 1801 to 1836 there had been a post of Counsel to the Colonial Office, originally a part time position; the office became established in 1825 and the holder also acted as Law Clerk to the Board of Trade. It lapsed in 1836, but the last incumbent continued to give legal advice until 1846.

³⁶ (1828–1902). Pauncefote had for a short period in 1855 acted as private secretary to Sir William Molesworth, then Secretary of State for the Colonies, a position he lost on Molesworth's death. See Parry, 'Background Papers', p. 138 on the increase over time in the number of lawyers, and the formation in 1949 of a legal department. The Commonwealth Relations Office also had a Legal Adviser. Holland became Secretary of State for the Colonies 1887–92, and was created Viscount Knutsford in 1895.

Assistant Under Secretary, but there was no official holding a post of Legal Adviser as such.

The practice of the Foreign Office up to 1872 was to seek legal advice from the Law Officers and from the Queen's Advocate General, a civilian from Doctors' Commons. The last incumbent of this office was Sir Travers Twiss,³⁷ who resigned on 21 March in curious circumstances. He had married a woman, Marie Pharialdé Rosalind Van Lynseele, who was supposed to have been the orphaned daughter of a Polish officer. Allegations were made by a solicitor, one Alexander Chaffers, that, under the name Marie Gelas, she had been a courtesan working in London from 1859, and had been Twiss's mistress before their marriage in 1862; Chaffers had made a statutory declaration to this effect, and sent copies to the Lord Chamberlain and to the Bishops of London and Hereford. Proceedings were begun against Chaffers for blackmail, and Marie, after the preliminary hearing had started, fled the country; the case against Chaffers collapsed, and a second unrelated charge of blackmail was dropped.³⁸ What became of Marie I do not know, but Twiss consoled himself thereafter, as others have done, by devoting himself to the law of nations and the study of legal history.

After Twiss's resignation, the office of Queen's Advocate General lapsed.³⁹ The Law Officers could still be consulted, or the Treasury Solicitor, and within the office legal matters were probably handled internally by an Assistant Under Secretary, in all probability by Charles S. A. Abbott, the third Lord Tenterden. He, for example, had acted as agent in the Alabama Claims Arbitration in 1871, but he was not a lawyer. Tenterden became Permanent Under Secretary in 1873, and on 14 July 1876, as a consequence of a recommendation from a Departmental Committee, Pauncefote was recruited as an Assistant Under Secretary to provide in-house legal advice. His duties in the Foreign Office included diplomatic work as well as legal work, and in 1882 he succeeded Tenterden as Permanent Under Secretary, and continued to be the internal source of legal advice. Pauncefote was never accorded the title Legal Adviser. He became Sir Julian in 1880 and later, in 1899, the first Baron Pauncefote of

³⁷ Professor of International Law at King's College, London, from 1852, then Regius Professor of Civil Law in Oxford. He was also Vicar General to the Province of Canterbury.

³⁸ See the article in the *Dictionary of National Biography* and *The Times* for 14 and 15 March 1872. She had been presented at Court and her presentation was retrospectively cancelled, this being announced in the *London Gazette* on 19 April.

³⁹ According to Edwards, *Law Officers of the Crown*, p. 137 n. 72, between 1872 and 1886 the functions of the Queen's Advocate General continued to be performed by Dr Parker Deane.

Preston. From 1886 he had, in one Edward Davidson, a Legal Assistant to the Foreign Office to share the burden, but he retained a supervisory role over important legal issues. He left the Foreign Office in 1892 to become Envoy Extraordinary and Minister Plenipotentiary to the USA. So from 1892 Davidson became the only lawyer in the Foreign Office, and he was thereafter listed in the Foreign Office list as Legal Adviser *eo nomine*. In 1896 his status appears to have been enhanced, as he now featured in the Foreign Office list just under the Under Secretaries, and ahead of the Chief Clerk. He was an Alpinist, as were quite a number of barristers, and became President of the Alpine Club (1911–14).⁴⁰ He resigned in 1918. He was succeeded by William Hurst who had joined the Foreign Office as Assistant Legal Adviser in 1902. He was Legal Adviser from 1918 to 1929, and later a Judge of the Permanent Court of International Justice. His successor, in post at the time of the two incidents with which we are concerned, was Sir William Malkin, Legal Adviser from 1929 until his death in an air accident over the Atlantic on 4 July 1945; he had joined the Office as an Assistant Legal Adviser in 1914. There is a biography of Pauncefote and a study of his work, and a certain amount in print about Hurst, but as for the others there is virtually nothing, nor is there any general study of their significance. The truth is that not much is known about them.⁴¹

Legal Advisers had come to be viewed as possessing high if undefinable status in their departments, ranking somewhere close to Under Secretaries. Whilst being important members of the British bureaucratic elite, and possessing considerable influence domestically, they were also members of the international community of international lawyers. This comprised a growing number of academics, a small number of regular legal practitioners, and lawyers in other Foreign Ministries, as well as a handful of international judges who, because of the reluctance of states to submit to adjudication, had, in comparison with domestic judges, very few cases to decide. Eventually Legal Advisers came to view themselves as forming a special sub-set of international lawyers; the holding of

⁴⁰ See J. Tilley and S. Gaselee, *The Foreign Office* (London, 1933), p. 117 on his nickname 'Quoad Davidson'; the authors had been officials in the Foreign Office, Tilley as Chief Clerk. His obituary in *The Times*, 14 July 1923 mentions his tendency to pepper his opinions with fragments of legal Latin. According to Ward and Gooch his original title was 'Counsel'; they cite the *Report of the Civil Establishments Committee*, 1890, Q 28,664.

⁴¹ Sir Franklin Berman, himself a former Legal Adviser to the Foreign and Commonwealth Office, has indeed tried to persuade me to embark on a comprehensive study, but with some reluctance I have decided that this is a project more suited to a younger person, or perhaps to a team of scholars, though I might go so far as try to write an article on the subject.

international conferences of Legal Advisers, which began in 1963, encouraged this perception of their professional identity.⁴²

The Legal Adviser's function was, obviously, to provide legal advice, and this, if it involved telling other officials or politicians that something would be illegal, might not always be welcome. During his time at the Admiralty Winston Churchill toyed with various plans, some of a wild nature, for action against Germany. One was to scatter mines from aircraft into German domestic waters. Someone in the Air Ministry must have wondered about the legality of this, and an Air Ministry paper on the subject was sent to the Admiralty; it had been prepared with the assistance of Malkin, no doubt because the Air Ministry did not possess its own Legal Adviser. Its conclusion was that such mining, except in the Kiel Canal, would be unlawful except by way of reprisal. Churchill was enraged, and the document was peppered with his hostile comments to a degree that suggests the influence of alcohol.⁴³ Churchill even crossed out the title to the paper and replaced it with: 'Some funkstick in the Air Ministry running for shelter under Malkin's petticoats.' I take it that 'funkstick' means 'scared old fogey', or something like that; perhaps it was a piece of Harrovian slang. Be that as it may skilled Legal Advisers had to be careful to avoid becoming viewed as persons whose only function was that of constructing legal impediments to the pursuit of what ministers and their colleagues thought to be the public interest, and thereby causing nothing but trouble to government.

Within the Foreign Office one major function of the Legal Adviser was to come up with justifications, either for what the government had done, or was proposing to do, and to evaluate the cogency of such justifications, rather than telling ministers or officials what they could or could not do. Decisions as to what ought to be done, or not done, raised issues of policy, and thinking within the Foreign Office was strongly influenced by the idea that issues of policy, which were not for the Legal Adviser, and issues of legality, which were his concern, were conceptually distinct. From Davidson's time onwards the Adviser did not combine diplomatic with legal duties; it is recorded of Davidson that he held strongly to the view that he should give legal but never political advice.⁴⁴ But the reality of the matter was that, particularly in relation to the conduct of foreign affairs, it was not always easy to preserve this distinction. Very occasionally

⁴² See above, n. 33.

⁴³ See *GWP*, pp. 482–5 The document is in ADM 116/4239.

⁴⁴ See Tilley and Gaselee, pp. 117–18; the authors treat Davidson as a slightly comic figure.

the Legal Adviser and his assistants might find it very difficult, or even impossible, to come up with any justification, but this seems to have been a rare event. Partly no doubt this was because a good lawyer can usually think of something to say, especially in relation to international law, which lacks a comprehensive court based jurisprudence. Partly perhaps this was because those concerned with policy rarely favoured action which was quite incapable of some sort of justification. Here it is important to appreciate that although the Legal Adviser was the expert, all diplomats and experienced ministers had a general knowledge of international law, and of its concepts and categories, which inevitably operated as one factor in coming to decisions. You did not need Malkin to tell you that boarding the *Altmark*, or mining the Leads, or sabotaging the dockyard facilities in Oxelösund, or overflying Sweden without permission was, legally, tricky. So international law was not simply injected into the processes of government through the work of the Legal Adviser; it already permeated the world of diplomacy and international politics. Some experts deal with bodies of thought, such as low temperature physics, or higher mathematics, which are so recondite as to be unintelligible to outsiders. This has never been the case with law of any kind, except perhaps in worlds such as that of ancient Rome where legal procedures and forms were for a time kept secret.

The significance of international law, either as fed in through the Legal Advisers, or through other mechanisms, was not simply that it told those in government what they could or could not, legally, do, or how actions could or could not be justified. It also provided the scheme of categories and concepts in terms of which actions involving forceful conflict were thought about, and analysed: ‘the obligations of neutrality’, ‘territorial waters’, ‘extra territorial jurisdiction’, ‘violation of sovereignty’, and so forth. All these concepts and categories had a place in everyday thought and language, for example as it appeared in the serious press, and in the thinking and language of diplomats, and in the refined and elaborated thought and language of the community of international lawyers. As we shall see, the everyday notion that the *Altmark* had no business to be skulking in Norwegian territorial waters to escape the British navy was given a special legalistic form in the claim that it was not exercising a ‘right of innocent passage’, ‘innocent passage’ being conceived by Malkin and others to be a term of art in the international law of the sea.⁴⁵

⁴⁵ This notion was developed by Malkin in an opinion of 21 Feb.; see FO 371/24818. His opinion was read to the Cabinet on 22 Feb. See CAB 65/5 WM 49 (40) 5 (22 Feb.) See below, n. 137.

In addition to their role in providing legal services and advice, I suspect, though hard evidence for this is impossible to come by, that the existence and status of Legal Advisers had another significance. A Legal Adviser, and his assistants, had a professional commitment to the value of respect for legality; but for such respect they were out of a job. Their participation in the processes of government encouraged, to a degree which it is impossible to assess, what Dicey once called ‘the predominance of the legal spirit’ within government,⁴⁶ or, if you like, respect for the rule of law in international affairs. Let me quote statements of faith by two of Malkin’s successors, Sir Eric Beckett (Legal Adviser 1945–53) and Sir Gerald Fitzmaurice (Legal Adviser 1953–60). In a lecture delivered in 1949 Beckett, who had worked in the Office since 1925, said that:

As a matter of twenty years personal experience I cannot recollect any case where His Majesty’s Government have deliberately acted as a matter of expedience in complete disregard of international law, leaving its advocates later to do their best in the matter of special pleading. There are no doubt cases where they have gone near the line either in the stress of great emergency or in cases where a pedantic observance of doubtful or ill-developed rules would produce a result ‘which hardly made sense’, but that is a very different matter.⁴⁷

Fitzmaurice, who had worked in the Office since 1932, wrote a memorandum, probably in August 1956, inspired by his outrage at the conduct of Eden’s government over the Suez crisis. This memorandum was, apparently, never delivered to anyone:

I start from the basis that in the 27 years or so in which I have been a legal adviser in the FO, HMG have never (apart from one or two incidents in the heat of the war) committed a deliberate and pre-meditated illegality, or at any rate one not capable of some reasonable justification in legal terms.⁴⁸

These are large claims, and one would much like to know the incidents in which they thought the government had, as it were, come close to the brink. They may well have included the two incidents which I discuss in this lecture. But I do not take these two statements as representing considered historical or legal judgements; the excesses of the British bombing policy during the Second World War, over which so far as I know

⁴⁶ See A. V. Dicey, *The Law of the Constitution* (London, 1885, 1952 ed. by E. C. S. Wade), p. 195, and cf. p. 406.

⁴⁷ See *HREE*, p. 43, based on a text of the lecture given to me by his son.

⁴⁸ In FO 800/748, quoted by G. Marston, ‘Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government’, *International and Comparative Law Quarterly*, 37 (1988), 773–817 at 815.

international lawyers were never consulted, cannot possibly be fitted into their analysis, whatever may be said for or against it. I take these more to be declarations of faith, and faith is not unimportant, or without influence.

Let us now return to the *Altmark* incident. In February 1940 the relevant Home Fleet rules of engagement were based on what was then called the case of the *Deutschland*. She was a German battleship, and was thought to have been the vessel which had sunk the British armed cruiser *Rawalpindi* off the Faroes in November 1939.⁴⁹ In fact the German vessel involved was the battleship *Scharnhorst*; the *Gneisenau* was also out at the time. The navy was determined to sink the *Deutschland* and avenge the *Rawalpindi*, and on 24 November the following Fleet Order was issued: 'If enemy ships attempt to escape by entering Norwegian territorial waters they are to be followed and stopped.'⁵⁰ This order had, for tactical reasons, to be issued promptly, without Cabinet authority, but later on the same day Churchill reported it to the War Cabinet, saying that it had been issued under the doctrine of 'hot pursuit'. The War Cabinet noted this, and there was no recorded dissent.⁵¹ There is no evidence one way or the other as to whether Churchill, or the First Sea Lord, Sir Dudley Pound, or anyone else in the Admiralty, took legal advice before this order was issued, nor was any such advice tendered to the War Cabinet on 24 November. In all probability no such advice was taken; the order was indeed issued at 0123 hrs. Be that as it may, we cannot tell from the archival evidence who conjured up the supposed doctrine of 'hot pursuit'. But at a War Cabinet meeting on the next day the Foreign Secretary, Lord Halifax, who by now had Malkin's advice, expressed doubts both over the order and its legal basis.⁵² After referring to the previous day's discussion he went on:

The question has arisen whether similar orders should be given to our Air Force, and he had asked his legal advisers to investigate the matter. It was doubtful whether the doctrine of 'hot pursuit' would be accepted in International Law although this country has maintained it. The doctrine implied that a ship had been engaged outside territorial waters, and that the action was not broken off because she entered territorial waters. He did not wish to put obstacles in the

⁴⁹ See Roskill, *War at Sea*, I, 82–7, 121, ADM 223/26, ADM 116/4252, ADM 1/19900, AIR 14/185, CAB 65/2 WM 93 and 94 (39), ADM 1/19900 (a file dating from 1946 containing logs of the two German battleships actually involved). *Deutschland* was in reality back in Germany at the time, and *Scharnhorst* escaped British pursuit without entering Norwegian waters.

⁵⁰ On this and what follows see ADM 116/4252.

⁵¹ CAB 65/2 WM 93 (39).

⁵² CAB 65/2 WM 94 (39) 3.

way of effective action, but the War Cabinet would wish to give full consideration to the effect of such action on neutral and world opinion. He personally thought that the Germans would always take any action which suited them whether or not they had any excuse for doing it, but action by us in neutral territorial waters would certainly be seized upon by the Germans as justification for further breaches of neutrality on their part, which might be harmful to the Allies.

Churchill agreed with this statement of the legal position. But:

... he thought it would be intolerable if the British navy had to stand aside while the *DEUTSCHLAND*, after having sunk the *RAWALPINDI*, crept down the Norwegian Coast inside territorial waters.

The Cabinet accepted Churchill's view, but thought that a different situation would arise if the *Deutschland* took refuge in Bergen harbour, since it was thought that the Norwegians would then be bound to intern her if she stayed more than twenty-four hours. The reference is to Article 12 of *The Hague Convention (XIII) of 1907*:

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads or territorial waters of the said Power for more than twenty-four hours, except in cases covered by the present Convention.

The Air Minister explained that aircraft had been instructed not to enter airspace over neutral waters, but that if they spotted the *Deutschland* inside Norwegian waters they could attack so long as no civilian lives were endangered. It was agreed that after consultation between the Admiralty and the Air Ministry amplified orders should be issued. So on 25 November the Admiralty order was amended, *inter alia*, to read:

1. Enemy surface vessels may be attacked if they take refuge in, or are found within, territorial waters of Norway, Faroes and Iceland except when this would endanger life in towns or villages. *Endeavour should be made to engage the vessel before she enters these waters so that destruction may be represented as the continuation of engagement or pursuit already begun on high seas* ... [emphasis added]

The new order, drafted in the Military Branch of the Admiralty, made it clear that the navy was not to pursue the *Deutschland* into the port if she entered a Norwegian port, such as Bergen. Since the air force was also involved in the pursuit, a modified order was also issued to the units involved.⁵³

⁵³ Issued 23.31 hrs. on 25 Nov. The Air Ministry file is AIR 14/185.

This incident is covered in part by entries in the diaries of Sir Alexander Cadogan, the then Permanent Under Secretary at the Foreign Office.⁵⁴ The entries shed a curious light on the processes of government:

H [Halifax] told me Deutschland is out and Winston has given instructions to pursue her into Norwegian territorial waters, according to doctrine of 'hot pursuit'. May be all right! . . . Navy has lost touch with 'Deutschland' so similar orders have been given to Air Force. *And* discovered that orders are not in line with doctrine of 'hot pursuit' but gave free hand. Rather odd. But in that case, no worse to act with air arm than with navy . . . Horace [Wilson] rang up to explain that probably Cabinet didn't know what they were doing.⁵⁵ P.M. doesn't seem to mind. I rang up H [Halifax] and found that he had, really, known what he was doing. So I don't see why I should bother. Told Horace, who agreed. Then Resident Clerk rang up to tell me that orders to Air Force hadn't gone off—should they? I said yes!

The following day, 25 February he added:

Met H [Halifax] at Palace gate.⁵⁶ Told him about my telephone calls last night about the 'Deutschland'. Funny people these politicians are! H. v. distressed at idea of blowing some rock into the Danube, but appears to have agreed that we should go into Norwegian waters and hammer the 'Deutschland' to bits! Fact is, they didn't know what they were talking about, and hadn't thought about it. He seemed—or looked—rather reproachful when I said I had loosed the R.A.F. last night. But it was only logical! However, I'm getting into hot water all around . . . Now I have authorised an outrage by our Air Force. If I hadn't, and if the Deutschland had got through, I should have been hanged on Tower Hill. Luckily everyone has lost touch with the 'Deutschland'; no one seems to know where she was or where she was going, so I hope we shall have a quiet day.

The reference to the rock was to a plan to blow up a cliff at the Kazan gorge in Romania to impede traffic, particular by oil tankers, on the Danube; tunnels were dug but the operation was never carried out.⁵⁷ On Sunday 26 November he recorded: 'We seem to have heard nothing more of the "Deutschland" up to this morning. In some ways I am rather relieved. Cabinet discussed revised instructions yesterday morning.' In the event the German ships escaped, and did not enter Norwegian waters to do so.

⁵⁴ Dilks (ed.), *Cadogan Diaries* pp. 233–4. This edition is to some degree expurgated; the original diaries are in Churchill College, Cambridge.

⁵⁵ Wilson was Permanent Head of the Civil Service and acted as adviser to the Prime Minister, Neville Chamberlain.

⁵⁶ The King had given Halifax a key to the Buckingham Palace gardens.

⁵⁷ See ADM 223/480. The plan is referred to in Medlicott, *Economic Blockade*, 1, 255 and 257. Later in the war such operations were handled by the Special Operations Executive. See also HS/198 and 204.

This story illustrates my first general point, which is that governments may take action or decide to take action which has legal significance without obtaining considered expert legal advice, and may even, as Cadogan puts it, simply not know what, legally speaking, they are doing at all. Government often operates reactively, and there just may not be time. But even in this instance it is noticeable that Churchill felt the need to offer his colleagues—perhaps he was most concerned over Halifax’s reaction—some sort of legal justification for issuing an order which appeared, on its face, to envisage an illegal violation of Norwegian neutrality. So in this instance respect for international law played a very curious role in the process of decision. And when the Cabinet merely noted the issue of the first order we simply cannot tell why the other members of the War Cabinet went along. The modification of the order approved the next day certainly reflects some influence from international law, probably through the mediation of Malkin and of officials in the Military Branch of the Admiralty, though precisely how this operated remains quite obscure.

Thereafter an interdepartmental dispute developed between the Admiralty and the Foreign Office over the *Deutschland* order.⁵⁸ The Foreign Office, operating through Lord Halifax, was not enthusiastic at the idea that the orders issued in response to the loss of the *Rawalpindi* should provide the navy with a *carte blanche* to pursue enemy warships into neutral waters, without going to the War Cabinet for authority in particular cases. Obviously such action might involve issues of foreign policy. So the Foreign Office argument was that the orders of 24 and 25 November had only been approved by the War Cabinet in relation to the pursuit of the *Deutschland* (or I suppose whatever ship or ships had sunk the *Rawalpindi*). If they were to become permanent standing orders, then new Cabinet authority was required. Furthermore Malkin, and indeed officials in the Admiralty, were unconvinced that there really was a doctrine legitimizing ‘hot pursuit’ *into* neutral territorial waters; there was indeed a doctrine which might sometimes permit ‘hot pursuit’ *out of* such waters, but that was a different matter entirely.⁵⁹ Patrick Dean, then a temporary Third Legal Adviser in the Foreign Office, was asked to look into this, and having consulted the authorities came to the conclusion that the only major supporter of such a doctrine was the Dutch jurist Cornelis Bynkershoek,⁶⁰ familiar to all American law students for his

⁵⁸ See ADM 1/10600, ADM 116/4252, FO 371/24816, 24817 and 24819.

⁵⁹ For hot pursuit *out of* territorial waters see G. G. Fitzmaurice, ‘The Case of the I’m Alone’, *British Yearbook of International Law*, 17 (1936), 82.

⁶⁰ *Quaestiones Juris Publici Duo*, Book I, Ch. 8.

cameo appearance, along with Samuel Puffendorf and others, in the ludicrous case of *Pierson v. Post* (1805),⁶¹ which was concerned with the hot pursuit not of warships, but of a fox. Dean thought such a doctrine was incompatible with Articles 1 and 2 of *The Hague Convention (XIII)* of 1907.⁶² Waldock in the Admiralty looked into the matter, and minuted on 4 April that he was unable to find a case in which the Admiralty or Foreign Office had ever relied upon such a doctrine.⁶³ The Foreign Office was informed by telephone. On the same day Malkin, carefully avoiding the categorical, wrote that he: ‘. . . felt obliged to say that I thought it highly doubtful whether we could establish the existence of the doctrine nowadays at all’. The Admiralty was however anxious to retain the orders as standing orders; it was operationally unsatisfactory to have to consult the War Cabinet ad hoc in the midst of naval operations. A minute on 17 January by an official in the Military Branch, which was concurred in by both the First Sea Lord, Dudley Pound, and Churchill, reads: ‘I hope no commanding officer would relinquish an attack on enemy warships because of territorial waters.’ One suggestion was that the orders might be justified as a reprisal for German breaches of international law then thought to have occurred in the conduct of naval operations, and in particular by the alleged sinking by German submarines of three vessels in Norwegian territorial waters.⁶⁴ They were the SS *Walton*, sunk on 8 December 1939, the SS *Thomas Deptford*, sunk on 13 December 1939, and the Greek SS *Garoufalia*, sunk on 11 December.⁶⁵ The Admiralty claimed all three had been torpedoed by German submarines whilst in territorial waters; the view in the Foreign Office, and in particular that of Malkin, was that the ‘three ships’ justification, and any justification based on other supposed breaches of international law by Germany in the conduct of naval operations, was weak, in part because of uncertainty over the facts. It was not at all clear,

⁶¹ 3 Cai.R. 175, 2 Am. Dec. 264

⁶² His opinion is dated 4 April 1940. It refers to Kent’s *Commentaries on International Law*, Wheaton’s *International Law*, 5th edn., Halleck’s *International Law*, Phillimore’s *International Law* and Oppenheim, *International Law. A Treatise*, 5th edn. Kent thought that there was some early authority for such a doctrine, relying on Casaregis and Azuni.

⁶³ In 1915 the German cruiser *Dresden* had been engaged in Chilean waters; Chile protested and the Foreign Secretary, Sir Edward Grey, did not rely in his response on hot pursuit. See *British and Foreign State Papers*, CIX (1915), 668.

⁶⁴ A note by P.S. [i.e. Private Secretary] in ADM 1/10600/M/06554/40 reads: ‘I think the case is pretty clear. The decisions in Cabinet 140 had better be attributed to reprisals (special re *Deutschland*) and General.’ The point being made is that any violation of Norwegian waters needed to be justified on the basis of it being a legitimate reprisal.

⁶⁵ On the ‘three ships’, see ADM 116/4254, FO 371/24816/N152, FO 371/24817/N8255, N1077, FO 371/24819/N3895.

for example, that all three ships had been torpedoed by German submarines in Norwegian waters; they might have been sunk by drifting mines, or might have been outside territorial waters at the time. British mines were designed to become inactive if they broke from their moorings, but the Norwegians were not convinced that the mechanism was foolproof.⁶⁶

The interdepartmental dispute was still rumbling along, unresolved, at the time of the *Altmark* affair. It was not eventually resolved until 8 April 1940 when, with Foreign Office concurrence, the orders of 24 and 25 November 1939, which were understood to apply only to Norwegian waters, were approved as standing orders, with the proviso that any case falling outside these orders would require special authority.⁶⁷ This decision coincided with the laying of the minefields in the approaches to Narvik. Given this action it hardly made sense to object any more.

This brings me to my second general point; governments are not monolithic, and there can be interdepartmental and interpersonal conflict both over policy, and over the application of law to policy, and over their interrelation. Furthermore there can be also conflict over what the relevant law is, and this may, for long periods, be unresolved since an occasion which requires resolution may not arise, or because the departments involved would prefer to leave the issue unresolved, or because the officials have other matters which are more pressing to consider. *The British Year Book of International Law* has recently published my account of such an interdepartmental dispute over the *Genocide Convention* of 1945.⁶⁸ Internal conflict within the government machine may generate serious difficulties in answering general questions on the influence of law on the conduct of states.

Let us now return to Jössingfiord on the late afternoon of 16 February 1940. Confronted by objection from the two Norwegian torpedo boats to his entry into the fiord, and by the fact that the Norwegian commander assured him that he did not know that there were any British prisoners on the *Altmark*, Captain Philip Vian, in command of HMS *Cossack*, sig-

⁶⁶ Koht, *Norway*, pp. 21–3 discusses the subject and says that around 27 Norwegian ships were sunk by German mines laid in circumstances which made them illegal, and nine Norwegian ships had been sunk with other violations of international law. A protest was delivered on 1 April but there was no reply.

⁶⁷ See the draft Cabinet papers in ADM 116/4252; the paper in its final form referred to the *Altmark*. For the Cabinet decision see CAB 65/5 WM 84 (40) 4 (8 April); the paper is in CAB 66/6 WP (40) 119 (4 April).

⁶⁸ 'Britain and the Genocide Convention', *British Yearbook of International Law*, 75 (2002), 5.

nalled the Admiralty to ask what he was to do next. Why? Although there is no direct evidence we may be sure that he was aware of the orders of 24 and 25 November. The second order appeared, from its text, to be based on the notion of 'hot pursuit'; clearly the *Altmark* had never been hotly pursued from the high seas into Norwegian waters. We may also be sure that he would be aware that the navy normally kept out of Norwegian waters. He would also know that neutral Norway was viewed as a friendly country. There was at first a risk of resistance from the Norwegian vessels, one of which had trained a torpedo tube on the *Cossack*. Where quite his general understanding of international law fitted into all this we shall never know; he was of course a naval officer, not a lawyer. Even if we could ask him I doubt if he would have been able to give a crystal clear answer to such a question. But he must have thought that the situation was one in which a prudent naval officer should seek guidance from higher authority, more particularly since there were no tactical considerations which ruled out a little delay; there was no risk of the *Altmark* escaping. She was trapped.

Earlier on the afternoon of 16 February Churchill had instructed the First Sea Lord, Admiral Sir Dudley Pound, that the *Altmark* was to be arrested whether or not she was within Norwegian territorial waters.⁶⁹ There is no evidence as to whether any legal advice was taken before this instruction was issued; probably, I think, not. The Admiralty reply to Captain Vian's signal was despatched at 5.25 p.m. on the 16th in the form of an instruction from the First Sea Lord, authorised by Churchill.⁷⁰ Unless the Norwegian torpedo boats undertook to convoy the *Altmark* to Bergen, with a joint British and Norwegian guard on board, *Cossack* was to board the vessel and liberate the prisoners, if they were found on board, and retain control of the vessel pending further orders. If the Norwegians interfered they were to be warned to stand off. If fired upon *Cossack* was not to reply unless the attack was serious, and then only necessary force was to be used, *Cossack* desisting if firing ceased. It should be suggested that Norwegian honour would be satisfied by submission to superior force.⁷¹

Before this order was actually transmitted, Lord Halifax was consulted by telephone. He took, according to Churchill's own account, only five minutes to give his approval. The then duty Captain in the Admiralty, R. K. Dickson, thought it was about one minute, and recollected Churchill

⁶⁹ Churchill, *Gathering Storm*, p. 444.

⁷⁰ See *GWP*, pp. 772–3 for the first order and p. 774, from CAB 65/5, for the second.

⁷¹ The text of the signals is in CAB 65/5 WM (40).

remarking 'That was big of Halifax'.⁷² He did, however, apparently suggest the addition of what became the last sentence of the signal, with its reference to honour, to the draft, which would have been read over to him. It appears from Dickson's account that Halifax had earlier been informed of the intention to order the interception and removal of the prisoners, and had been told that the order would be issued at 5.45 p.m. unless the Admiralty heard to the contrary; the phone call was made at about 5.20 p.m. because Churchill had become impatient. Churchill later wrote:

Admiral Pound and I sat up together in some anxiety in the Admiralty War Room. I had put a good screw on the Foreign Office, and was fully aware of the technical gravity of the measures taken. To judge them fairly it must be remembered that up to that date Germany had sunk 218,000 tons of Scandinavian shipping with the loss of 555 Scandinavian lives. But what mattered at home and in the Cabinet was whether British prisoners were found on board or not. We were delighted when at three o'clock in the morning news came in that three hundred had been found and rescued. *This was the dominating fact.* [emphasis added].⁷³

At the time of the interception there was no firm evidence that the prisoners were still on board; they might well have been transferred to some other vessel, and it is clear that it was the presence of the prisoners which Churchill thought justified the action, perhaps in law, perhaps in common sense, or perhaps morally. Such distinctions were in all probability not in his mind at all. It is also clear that there was reluctance to use violence against the Norwegian torpedo boats. But at the end of the day where, if at all, international law featured in Churchill's and Pound's thinking is obscure, except as requiring some special justification for the interception.

The signal from the Admiralty was received and deciphered on *Cossack* by about 11 p.m. A second signal from the Admiralty instructed Captain Vian that if the Norwegians refused to cooperate, and he was forced to board, then if prisoners were found the *Altmark* was to be taken as a prize. If there were no prisoners aboard, but the vessel was indeed the *Altmark*, then the captain and officers were to be brought back to Britain so that it could be discovered what had become of the prisoners. This

⁷² Information on the HMS *Cossack* website, reproduced from an article in *Ditty Box* in March 1945 by Rear-Admiral R. K. Dickson, www.hmscossack.freeserve.co.uk/history.htm

⁷³ Churchill, *Gathering Storm*, p. 445, Roskill, *War at Sea*, I, 152. The orders were issued over the head of Admiral Forbes, in command of the Home Fleet, and he apparently lodged a mild protest over this.

signal does not appear to have been cleared with Halifax, though there is no firm evidence on the point. In the event it had no significance, for it was only deciphered after midnight; by then the boarding and the release of the prisoners had taken place.⁷⁴ Captain Vian, and I assume his officers, were by now sitting down to a celebratory dinner with the last partridges of the season.⁷⁵ A further signal arrived at 2.30 a.m. instructing Vian to leave the *Altmark* and sail for home as soon as the prisoners had been recovered. The *Altmark* had in any event been too severely damaged for there to be any question of its being taken back to the United Kingdom as a prize.⁷⁶ *Cossack* was only slightly damaged.

Why Halifax agreed to the interception is undiscoverable; there is no documentary material. But, as we historians often must do, we may guess that the principal motivating factors were the belief that she was carrying British prisoners in very bad conditions, and that it would be unacceptable to public opinion, or perhaps to the Cabinet, for the navy to stand by and allow them to be taken to Germany. Halifax was also plainly anxious to avoid, if at all possible, any violent measures against the Norwegian torpedo boats, and wished to give their commander an opportunity to acquiesce without loss of face. It is unlikely that he consulted Malkin, though this would have been possible if Malkin was still in his office, or available on the telephone. There is no direct evidence, but if he had done so the fact would probably have been reflected in the later documentation. As in the case of Churchill and of Pound we simply cannot say where precisely, if at all, international law featured in Halifax's thinking. He may have been much more concerned by public and neutral opinion than by law as such, but even so, opinion and legal perception, would be intertwined.

So the third general point which this story illustrates is the fact that it will sometimes be quite impossible to know precisely what role international law played in a decision to employ force, here against an enemy vessel in neutral waters. It does not of course follow that it played no part at all. The reluctance of the Admiralty to authorise the interception without the approval of the Foreign Secretary is explicable simply because of an awareness that issues of foreign relations were necessarily involved.

⁷⁴ The boarding party met resistance, and one British sailor was seriously wounded. Seven or possibly eight German sailors were killed; figures differ in the sources. One Norwegian bystander was slightly injured.

⁷⁵ Vian, *Action This Day*, p. 29.

⁷⁶ She was repaired in Bergen and after return to Germany became the *Uckermark*; she sank in Yokohama in 1942.

But part of the explanation may also be the fact that the Admiralty and Foreign Office had been engaged in a long running discussion about the legalities of naval action in neutral waters, whether under some notion of 'hot pursuit', or of 'legitimate reprisal', both legal concepts, and also by the fact that it was ultimately issues of legality which made the decision to board the *Altmark* a tricky case. Had she been on the high seas there would have been no anxieties over the decision to intercept at all, and Captain Vian would never have sought instructions from the Admiralty.

So much for legal justifications before the action was taken. Once the action had taken place, the question of *ex post facto* justification arose. The interception was first discussed in the War Cabinet on 17 February, when attention was given to issuing a press statement.⁷⁷ By now Malkin had certainly become involved. He attended this meeting and, one suspects, expressed some doubts as to the legality of the action, either directly to the Cabinet, or to Halifax. Cabinet minutes at this period never record any direct interventions by officials in attendance; it does not follow that they did not intervene, and only the original notes, if they survive, would clear the matter up. Discussion turned mainly on whether it was wise to include in such a statement any condemnation of the attitude of the Norwegians, or to go so far as to accuse them of a breach of international law for having, as it were, aided and abetted the *Altmark*. This idea arose because she was escorted at the time of the interception by the two Norwegian vessels, whose commander, as we have seen had objected to the interception. Also she had not, apparently, been searched by the Norwegians to see if there were prisoners aboard, and if so whether they were being ill treated. 'It was felt that, while the case for the action we had taken was extremely strong on grounds of common sense and broad equity, it was undesirable to deal with this aspect of the matter until the receipt that afternoon of the report of the Captain of H.M.S. *Cossack*.' At this time it was still believed that the prisoners had suffered serious mistreatment, and if this was confirmed it might provide a justification. The Cabinet minutes indicate that it was not suggested that such a justification would be legal in nature.

On the same day the Norwegian Government lodged a protest. The text of which, after describing the incident, objected to:

... this grave violation of Norwegian territorial waters, which has caused strong indignation, as it took place in the interior of a Norwegian fiord and thus cannot be due to any mistake or difference of opinion with regard to the

⁷⁷ CAB 65/5 WM 44 (40) 2 (17 Feb.).

limit of the territorial waters . . . The Norwegian Government expect of the British Government that they will hand the prisoners over to the Norwegian Government and make due compensation and reparation.

On the afternoon of 17 February Erik Colban met Lord Halifax to deliver this protest, and discuss the matter.⁷⁸ A later aide mémoire of 24 February amplified the first protest, maintaining that the Norwegian authorities had behaved with strict respect for international law. They had no right to insist on a search, or to prevent the *Altmark's* passage, since it was a warship; no time limit applied to it either under *The Hague Convention (XIII)* of 1907—the reference is to Article 12—or under the Norwegian Neutrality Rules. They sympathised with British concerns over prisoners thought to have been ill treated, but: ‘. . . a neutral state cannot interfere between belligerent Powers or in their disputes without definite authority for so doing in a treaty or in some other recognized rule of international law’. Anyway they did not know that there were prisoners on board. If the British Government was not prepared to accept the Norwegian view of the matter then the dispute should be referred to an ad hoc Court of Arbitration; it was not suggested that it should go to the Permanent Court of Arbitration. In a passage which must have been drafted by a Norwegian lawyer the precise issues to be decided by the Court of Arbitration were set out:

Was it the right and duty of Norway, according to International law:

- a) To inspect and search the ‘Altmark’ and, in doing this, to ascertain if there were prisoners on board
- b) To prevent the continued passage of the ‘Altmark’ through Norwegian Maritime Territory
- c) To demand the delivery of the British prisoners on board the ‘Altmark’ and, if necessary, to release them by the use of force

If the answer to any of the questions a) to c) should be to the disfavour of Norway:

Would this fact give Great Britain a right, according to International Law, to interfere forcibly against the ‘Altmark’ on Norwegian Maritime Territory and to release the prisoners, as was done.⁷⁹

The Norwegians went so far as to request the return of the prisoners.

⁷⁸ Copy in ADM 1/25843, see also FO 371/24817/N790, FO 419/34/67 (N 1998) and FO 419/34/66 (Halifax's account of meeting) (W 2906). The text with a brief record of the conversation was later published in *Correspondence between His Majesty's Government in the United Kingdom and the Norwegian Government respecting the German Steamer 'Altmark'*, Cmnd. 8012 of 1950.

⁷⁹ Text in FO 370/2010.

The Norwegian protest could not, given established diplomatic practice, simply be ignored; there had to be a reply. The British reply was in the event delivered almost a month later, on 15 March. Why this delay? Part of the reason was that it took a little time to establish exactly what the facts of the matter were.⁸⁰ For example what steps had the Norwegian authorities taken to establish what the *Altmark* was doing in Norwegian waters? Had they really no reason to believe there were British prisoners on board?

There were other more compelling reasons. The initial justification offered by Lord Halifax in his conversation with Minister Colban on 17 February was based on what perhaps could be characterised as humanitarian intervention, though this expression is nowhere used. There was good reason to suppose that there were British prisoners aboard, and good reason to think that they were being held in intolerable conditions. This being so, Norway was under a duty to make a careful search. But the search appeared to have been perfunctory, and so the Norwegians 'had failed in their duties as neutrals'.⁸¹ If there had been no prisoners on board, Norway might have had a legitimate complaint. A minute of the conversation, eventually published in 1950, said that: 'In brief, if no prisoners had been found when the ship was boarded, the Norwegian Government would have had an excellent ground for complaint.' Halifax conceded that there had been a technical infraction of Norwegian territorial waters, carried out under the express authority of the British Government, though he avoided saying in terms that any violation of international law had taken place.⁸² It appears that Halifax did not regard the legal issue as of primary importance, perhaps because he had been advised that he was, legally, on weak ground: 'The legal question, however, appeared to me of less importance than the fact that three or four hundred British subjects had been kept for many weeks in conditions in which no decent person would have kept a dog.' Another and much fuller minute of the conversation reads:

[I] did not labour the legal side of all this. I was no lawyer and the legal considerations anyway seemed to me to be of secondary importance . . . the least the Norwegian Government could have done would have been to find some pre-

⁸⁰ FO 371/25172 has a report from an agent in Norway; on the Norwegian side there had been some conflict between the responsible Admiral, who was strongly pro-British, and the Norwegian Foreign Ministry, which may have been influenced by the fact that the British Navy had not in Nov. 1939 attempted to intercept another armed German naval tender, the *Westerwald* when on passage in Norwegian waters. See FO 371/24816/N662, 24817/N666.

⁸¹ There were suspicions that at least some of the Norwegians knew perfectly well that there were prisoners on board.

⁸² Cmnd. 8012, p. 4.

text to detain the 'Altmark' at Bergen and in any case to have looked for and taken off any sick . . . It was the fact that they had not even done this of which we felt so well entitled to complain.⁸³

Halifax probably merely thought he was relying on common-sense ethics. As for Churchill he was, once the action had been taken, at pains to emphasise its illegality: 'The action we have taken undoubtedly constitutes the most flagrant breach of neutrality of a technical nature which could be imagined. The plunge has been taken, and taken with an enormous measure of world sympathy.' His argument was that one might as well be hanged for a sheep as a lamb, and his memorandum continues: 'Why should we stop here? Far from excusing ourselves to Norwegian protests we should adopt and pursue the policy of moral counter-attack . . .'.⁸⁴ This was the moment to strike and lay mines in the Leads; there was now nothing to lose.

On 20 February the Prime Minister, Neville Chamberlain, made a statement replying to a speech made on 19 February by the Norwegian Foreign Minister, Professor Dr Halvdan Koht; he was a historian, not a lawyer. In it Koht argued that once it was established that the *Altmark* was a warship the Norwegians had no right to search it, or take any action about the prisoners.⁸⁵ Chamberlain in his response referred explicitly to international law, emphasising as critical the fact that the *Altmark* was being used to transport British prisoners to Germany:

According to the view of Professor Koht the Norwegian Government sees no objection to the use of Norwegian territorial waters for hundreds of miles by a German warship for the purpose of escaping capture on the high seas and of conveying British prisoners to a German prison camp. Such a doctrine is at variance with international law as His Majesty's Government understand it.⁸⁶

But unfortunately it turned out that although the conditions in which the prisoners had been held had been unpleasant, principally because the *Altmark* lacked suitable accommodation, there had been no wanton ill treatment. So the initial justification, whose legal status was at the best dubious, could hardly be sustained.

It is clear indeed that Malkin thought that, legally speaking, the Norwegians had a lot on their side. As he put it in a minute: 'Personally, I should like to avoid any written argument with the Norwegians for as

⁸³ In ADM 1/25843, telegram of 18 Feb. to Sir Cecil Dormer, Minister Plenipotentiary to Norway.

⁸⁴ CAB 66/5 WP (40) 60, *GWP*, p. 760.

⁸⁵ For his own account see Koht, *Norway*, pp. 37–40.

⁸⁶ *Parliamentary Debates, House of Commons*, vol. 357, cc. 1161–4.

long as possible, because any such argument must be mainly in legal lines, and it is on that the Norwegians have a good deal to say.⁸⁷ And a Foreign Office official, C. E. Steele, dealing with a possible Parliamentary question on the Government's response to the offer of arbitration, took the same pessimistic line: 'I do not think H.M.G. would under any circumstances be prepared to arbitrate this case which is by no means strong according to the letter of the law.'⁸⁸ Against this background Malkin was naturally extremely reluctant to make a formal response, or reject the proposal for arbitration, whilst there was a risk that Norway might bring a case against the United Kingdom before the Permanent Court of International Justice, a case which the United Kingdom might well lose. In a memorandum he explained his anxiety:

I am most anxious that our reply . . . should not be delivered until we have completely safeguarded our position under the Optional Clause, for as soon as we had refused the request for arbitration, the Norwegians would, in principle, be in a position to start proceedings in the Permanent Court, and if they did so before we had completed our action about the Optional Clause, we should have to rely on the action we took last September, and it would be for the Court to decide whether that action was valid.

So he urged delay.⁸⁹

For it was at this time certainly possible for Norway to bring proceedings over the *Altmark* incident before the Court. Britain had, under the Optional Clause, and subject to some reservations, accepted the jurisdiction of the Permanent Court of International Justice for a period of ten years, acceding on 5 February 1930.⁹⁰ The reservations did not cover the exercise of belligerent rights.⁹¹ In 1938 the Committee of Imperial Defence became concerned that:

. . . under the Optional Clause and the General Act [of the Permanent Court of Arbitration],⁹² this country could be taken to international arbitration on disputes arising out of the exercise of our belligerent rights, and that this involved a risk which the Committee felt His Majesty's Government could not afford to run.⁹³

⁸⁷ Minute of 23 Feb. in FO 371/25172/W3155.

⁸⁸ FO 371/25172/W3624.

⁸⁹ Minute of 26 Feb. in FO 371/25172.

⁹⁰ See Cmnd. 3452 of 1929.

⁹¹ It was then thought that in any future war in which the United Kingdom was engaged other members of the League of Nations would not, under Article 16 of the Covenant, be neutrals able to trade with the enemy; this was however no longer the accepted position.

⁹² I do not deal with the similar problem over the Permanent Court of Arbitration.

⁹³ Memorandum of Feb. 1939 in FO 371/24012/W2967.

The principal concern was disputes with neutral countries arising out of naval blockade, and so the Admiralty was particularly concerned.⁹⁴ So far as the Court was concerned, British submission to the Optional Clause ran until 4 February 1940, and thereafter continued until notice was given to terminate it. On 7 September 1939, the Foreign Office had written to the Secretary-General of the League of Nations saying that since accession circumstances had so radically changed that it no longer considered itself bound under the Optional Clause with regard to disputes arising out of events occurring at a time when the United Kingdom was engaged in the present hostilities. The letter was based on the *rebus sic stantibus* principle.⁹⁵ However, Norway and six other countries, Denmark, Estonia, the Netherlands, Peru, Sweden and Switzerland had reserved their position over the validity of this declaration. So the legal position between September 1939 and February 1940 was uncertain, and if it arose, the Court would have jurisdiction to decide the effect of the British declaration, and might rule against Britain.

The *Altmark* incident arose after the original period of ten years expired, but thereafter acceptance of the optional clause continued in default of any action to terminate or modify acceptance. Acceptance of the Optional Clause was now terminated, and the compulsory jurisdiction reaccepted for a period of ten years on the same conditions as before, but with an additional reservation which excluded disputes arising out of events occurring when the United Kingdom was involved in hostilities. The Secretary-General was notified by a letter dated 28 February, which was published on 11 March. Until this business was concluded no reply was made to the Norwegian protest.⁹⁶ The reply was not delivered until 15 March.⁹⁷

There was another reason for delay. Since mining the Leads to interrupt the iron ore traffic had long been viewed as a possibility, any formal justification for the interception of the *Altmark* needed not simply to offer a convincing justification for intercepting the *Altmark*, but also needed to offer one which would be consistent with mining the Leads, if at some future date, this was to be approved by the War Cabinet. Indeed one idea, supported by the French Ambassador, M. Corbin, was that the *Altmark* incident should, in effect, be milked; it showed that the Norwegians were

⁹⁴ See ADM 116/4298.

⁹⁵ See Cmnd. 6108 of 11 Sept. 1939, FO 371/25172/W3624.

⁹⁶ See FO 371/24436, also CAB 65/5 WC 46 (40).

⁹⁷ FO 371/25172/W3369, the final draft of a letter to Colban being by C. E. Steele. See FO 419/30/107 (text of reply of 15 March, W 3369).

unable to control what happened in their waters. This illustrates my fourth general point, which is that such justifications may be as much, or indeed primarily, addressed to the future as to the past.

This is particularly well illustrated by what eventually became of the exchanges between the British and Norwegian governments on the affair. At the time the Foreign Office wanted to publish these exchanges, but after the collapse of Norway the Norwegian Government in exile was unhappy about this, and nothing was done. But eventually, in 1950, they were published, albeit with the Norwegian proposal for arbitration discreetly and misleadingly removed. By now nobody was much concerned with the interception of the *Altmark*, which was history; the point was to present the British view of the matter for whatever relevance it might have in the future.

Between 17 February and 15 March, and in particular up to 29 February, the form to be taken by the British reply was much discussed, and as time passed and no decision was taken to mine the Leads the opportunity to use the *Altmark* affair to justify mining the Leads receded in importance.⁹⁸ The case based on the ill treatment of the prisoners could not be sustained, and Chamberlain, influenced by a piece which had appeared in *The Times*, wondered whether something might not be made of the fact that the *Altmark* had been in Norwegian waters for more than twenty-four hours, in violation of Article 12 of *The Hague Convention (XIII)* of 1907, which, as relevant, provided that: ‘. . . belligerent war-ships are not permitted to remain in the ports, roadsteads or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention’. The British vessels had only spent a short time in such waters.

Malkin, however, thought this was incorrect; Article 12, he thought, only concerned time spent within neutral ports or anchorages, or time spent anchored or stationary, rather than time on passage. It was Article 10 which governed the case: ‘The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents.’ Mere passage, he argued, meant innocent pas-

⁹⁸ The discussions can be followed in CAB 65/5 WM 46 (40) 9 (19 Feb.) and see Confidential Annex in CAB 65/11 WM 46 (40) 9 (19 Feb.), CAB 65/5 48 (40) 5 (21 Feb.), FO 371/24818 generally, CAB 65/5 WM 49 (40) 5 (22 Feb.), CAB 65/5 WM 52 (40) 5 (26 Feb.), ADM 1/25843 (draft probably of 21 Feb., CAB 65/5 WM 55 (40) 1 (29 Feb., copy in FO 371/24818). Drafts are in CAB 66/5 WP (40) 61 (draft of 22 Feb. produced in consultation with Admiralty and Attorney General, also in FO 371/24818), CAB 66/6 WP (40) 75 (draft of 26 Feb. circulated by Halifax, copy in FO 371/24818).

sage. The reason why the passage of the *Altmark* was not innocent was not that she was carrying prisoners, nor that she spent more than twenty-four hours in Norwegian waters.⁹⁹ Instead, it was that she had followed a route dictated not by normal navigational considerations, but simply by the wish to escape interception by the British navy. If her plan had succeeded she would have travelled six hundred miles within the Leads.¹⁰⁰ This view was in accordance with thinking in the Admiralty, which had long insisted on a right, *eo nomine*, of innocent passage, rather than mere passage, through territorial waters; sometimes this right of passage would be covered by a treaty, as in the case of the Bosphorus or the Suez Canal.¹⁰¹ The navy sometimes wished to exercise this right whilst carrying prisoners.¹⁰² It was, however, thought prudent in 1940 for the navy to avoid, so far as possible, the carriage of prisoners through neutral waters, given the fuss which had been made about the prisoners on the *Altmark*.¹⁰³ Eventually, in 1946, a Fleet Order, the text of which had been settled in 1940, was issued explaining the concept of innocent passage for the guidance of naval officers, and emphasising that the carriage of prisoners would not in itself prevent a passage being innocent.¹⁰⁴

In the end, as we have seen, a Note was delivered on 15 March.¹⁰⁵ By this time the Scandinavian situation had radically changed, since there had been an armistice between the Finnish Government and the Soviet Union. The justificatory argument presented in this Note was of a legal character:

His Majesty's Government must, therefore, conclude that the use made by the 'Altmark' of Norwegian territorial waters was not a legitimate exercise of the right of innocent passage, and ought not to have been permitted by the Norwegian Government, and that the action of the Norwegian Government in permitting, and, indeed, facilitating, the 'Altmark's' operations, and in making no proper

⁹⁹ The *Altmark* had a top speed of around 25 knots, and in a twenty-four hour period could at a more modest speed of 20 knots cover 480 miles.

¹⁰⁰ On 21 Feb. Malkin produced a long memorandum on the subject; see FO 371/24818/N2400; see below, p. 255.

¹⁰¹ An earlier memorandum by E. A. Seal, who was Principal Assistant Secretary in the S. Branch of the Admiralty, had taken the same line; see ADM 1/25843.

¹⁰² See material in ADM 199/280, which includes a note of advice given in 1871 by the Secretary to the Admiralty which dealt with the position of German prisoners on a French warship which had entered the Firth of Forth to the effect that so long as the prisoners remained on the ship they were under French jurisdiction and a neutral power had no right to interfere; if landed the prisoners would have become free.

¹⁰³ Letter of 27 Feb. from C. E. Steele to C. G. Jarrett in the Admiralty in ADM 199/280.

¹⁰⁴ C.A.F.O. P 118/46, issued 4 July 1946.

¹⁰⁵ Text in Cmnd. 8012 of 1950 and see FO 419/30/107 (Confidential Print of W 3369/2854/49).

enquiry as to the nature and object of those operations, constituted a failure to observe the obligations of neutrality. In the light of the facts and the above considerations, His Majesty's Government feel that they were fully justified in taking the action which in the circumstances they felt compelled to take.

There was explicit reference to Article 10 of *The Hague Convention (XIII)* of 1907, and it was argued that both the Norwegian gun boat commander, and the commander of the *Altmark*, implicitly recognised it, one by asking if there were prisoners aboard, and the other by lying about the matter, and that if the *Altmark* was being used to convey prisoners for hundreds of miles through Norwegian waters this would have been a violation of the Convention. But the letter was careful to make the issue turn not primarily on the presence of the prisoners, but on the evasive route being followed. The weakness of the argument was that even if it was correct to say that the passage of the *Altmark* was a violation of the Convention, it did not obviously follow that Norway had a right, without consent, to inspect a belligerent warship, or that failure to exercise such a right gave the British navy a right to violate Norwegian neutrality, the principal wrongdoer being Germany and not Norway.

So far as the proposal for arbitration was concerned the reply, whilst not rejecting the suggestion, expressed the hope that the proposal might be dropped. It also expressed regret that the British Government had had no option but to take action in Norwegian waters, and the hope that the Norwegian Government would at least recognise that: ‘. . . this case constitutes a clash not of right and wrong, but of two rights . . .’ This ingeniously avoided taking any definitive stand on the legalities. And it concluded that in view of the friendly relations between Britain and Norway, and the fact that both sides of the argument had now been expressed, it was hoped that the matter might now be left to rest. And so far as the two governments were concerned this was what indeed happened in 1940. The Norwegian Government did draft a response to the British Note, though it was never delivered,¹⁰⁶ and the dispute was soon overtaken by events.

From the outset the incident had been an object of interest in the community of international lawyers.¹⁰⁷ After the war Humphrey Waldock,

¹⁰⁶ See Koht, *Norway*, p. 40 saying a response was despatched from Oslo on 1 April. There appears to be no copy in The National Archives, because it was never delivered.

¹⁰⁷ The incident was discussed in the Grotius Society in 1940, see *Transactions of the Grotius Society*, 26 (1940), 67, discussion led by W. R. Bisschop; see also ‘L’Incident de l’Altmark’, *Revue Générale de Droit International Public*, 48 (1941–5), 90, E. Borchard, ‘Was Norway Delinquent in the Case of the Altmark’, *American Journal of International Law*, 34 (1940), 289, letters

now back in Oxford as Professor of International Law, published an article on the incident, replying to the view which had been expressed by some international lawyers that the operation had been illegal. His article defended the interception, going somewhat further in its search for justificatory arguments than the British Note of 15 March in relying on Article 12 of the Convention as well as on Article 10. Waldock's article made use of some inside information, but he had not been put up to writing the article by the Foreign Office.¹⁰⁸ Malkin had, however, somewhat earlier been involved, though the details are obscure, in providing information to Hersch Lauterpacht, as editor of Oppenheim, *International Law*, presumably in the hope that Lauterpacht's treatment of the incident would be favourable, in which he did not wholly succeed. Waldock's article was slightly misleading in that it did not place the incident in its historical context, making no mention whatever of the mining of the Leads or of the proposal for arbitration. When, with the consent of the Norwegian Government, a version of the exchanges was published in 1950, the introduction made the point that the full exchanges had never been published, but, as we have seen, this was also a little misleading, since it implied that the full exchanges were now being published. This was not the truth.

The long term result of the *Altmark* incident was the German decision to invade Norway, which it triggered, though a German plan to take control of Norway had been under discussion much earlier. This became public knowledge through the Nuremberg trials. Understandably some resentment remained alive in Norway. When Philip Vian, now an Admiral, requested permission after the war to take a naval vessel, nostalgically, into Jössingfiord, to see the place in daylight, his request was refused, as he records in his memoirs.

Let me now turn to the second of my two incidents, the mining of the approaches to Narvik. Obviously this operation was, potentially, of much greater strategic and diplomatic significance than the rescue of the prisoners from the *Altmark*. Two hundred and ninety-nine merchant seamen

to the *New York Times* on 19 and 26 Feb. and 10 March 1940, and C. H. Hyde, *International Law*, (2nd edn. 1945), III, 2339, with critical review by H. Lauterpacht in *British Yearbook of International Law*, 23 (1946), 505. Lauterpacht analysed the incident in his 1940 edition of Vol. II of Oppenheim at 554–6. See also B. MacChesney, 'The Altmark Incident and Modern Warfare—"Innocent Passage"—in Warfare and the Right of Belligerents to use Force to Redress Neutrality Violations', *Northwestern University Law Review*, 52 (1957–8), 320, R. Omang, *Altmark Saken 1940* (Oslo, 1953), which I have not consulted, and D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester, 1975), pp. 40–4 with bibliography p. 195.

¹⁰⁸ C. H. M. Waldock, 'The Release of the Altmark's Prisoners', *British Yearbook of International Law*, 24 (1947), 216, on which see FO 371/2010.

were not going to make much difference, one way or the other, to the outcome of the war. The merits and demerits of the operation were extremely difficult to assess. Would mining the Leads so alienate Scandinavian opinion as to rule out the cooperation or acquiescence which the military thought essential to the larger scheme to open a Scandinavian front? Would it make it even more difficult to bring aid to Finland? How would Germany react? How would Norway react, and what effect would the operation have on the ability of the United Kingdom to make use of Norwegian shipping? What would neutral opinion, especially American opinion, make of the operation? How great an impact would the operation have on the supply of iron ore to Germany, granted the problematic nature of plans to obstruct the Baltic traffic by covert operations?

Between September 1939 and April 1940 the subject was discussed at many meetings of the War Cabinet; no other wartime operation absorbed so much cabinet time.¹⁰⁹ It would be quite impossible in a lecture to dissect the archival material in any detail, but the discussions can, at the risk of some simplification, be analysed as involving three stages. The first stage lasted from September 1939 until January 1940, when both Norway and Sweden were warned, in deliberately vague language, that the United Kingdom, at some uncertain date in the future, intended to extend its naval operations into Norwegian territorial waters. There was no specific reference to mining the Leads or to the iron ore traffic.¹¹⁰ This warning was duly communicated to the Norwegian Minister in London, Erik Colban, on 6 January.¹¹¹

The Cabinet had, in the course of the discussions, been bombarded with papers from the Admiralty, the Chiefs of Staff, the Ministry of Economic Warfare, and the Foreign Office. The consistent advocate of the plan had always been Churchill, who took the line that this would not impede but might even facilitate the larger plan. It was in all these discussions tacitly conceded that some sort of justification would be necessary, unless of course Norway agreed, which was in the highest degree unlikely. On 15 December, by which time Lulea was frozen, Churchill, who had been urging action since September, pressed his argument before the Cabinet:

... the abuse of Norwegian territorial waters had now come to a head with the sinking of one Greek and two British ships inside the three mile limit. He con-

¹⁰⁹ See material cited above, nn. 23–4.

¹¹⁰ CAB 65/11 WM 3 (40) 9, WM 4 (40) 6. Draft note is in FO 371/24816.

¹¹¹ See CAB 65/11 WM 5 (40) 6.

sidered that this action on the part of the enemy made it necessary that we should, in our own interests, claim and make use of a similar latitude, without delay.¹¹²

But as we have seen the facts surrounding the sinking of the three ships were disputed, and even if the case was proven, and the violations were deliberate and not merely the result of a navigational errors, their relevance was problematic.¹¹³ Was the navy proposing to intervene to protect neutral merchant ships, or its own ships, from German submarines? Or was the action some form of reprisal against Germany for its supposed general misconduct in the war at sea, which happened, unfortunately, to impact upon Norwegian neutrality? Or was it some version of tit for tat—Germany broke the rules of international law, so why should not Britain break them too? Whatever justification was offered everyone would of course know that the real aim was to stop the iron ore traffic, and it was not plausible to claim that this traffic was unlawful.

On the following day Churchill submitted a further paper on the subject.¹¹⁴ It did not attempt to justify action by the use of the Leads by ore carriers, which was certainly entirely legal, but by the claim that Germany had seriously violated the neutrality of Norwegian waters: ‘. . . the Germans, conducting war in a cruel and lawless manner, have violated the territorial waters of Norway’. In this paper, somewhat desperately, he directly addressed both the ethics and legality of his proposed action, and its effect on opinion:

The effect of our action against Norway on world opinion and upon our own reputation must be considered. We have taken up arms in accordance with the principles of the Covenant of the League in order to aid the victims of German aggression. No technical infringement of International law, so long as it is not accompanied by inhumanity of any kind, can deprive us of the good will of neutral countries. No evil effect will be produced on the greatest of all neutrals, the United States . . . The final tribunal must be our own conscience. We are fighting to re-establish the reign of law and to protect the liberties of small countries. Our defeat would mean an age of barbaric violence, and would be fatal, not only to ourselves, but to the independent life of every small country in Europe. Acting in the name of the Covenant, and as virtual mandatories of the League and all it stands for, we have a right and are bound in duty to abrogate for a space some of the Conventions of the very laws we seek to consolidate and reaffirm. Small nations must not tie our hands when we are fighting

¹¹² CAB 52/2 WM 116 (39) 4.

¹¹³ Koht, *Norway*, p. 35 states that there was no certainty as to how the ships came to be sunk; it was conceded that one had been in Norwegian waters at the time.

¹¹⁴ CAB 66/4 WP (39) 162, *GWP*, p. 522.

for their rights and freedoms. The letter of the law must not in supreme emergency obstruct those who are charged with its protection and enforcement. It would not be right or rational that the Aggressor Power should gain one set of advantages by tearing up all laws, and another set by sheltering behind the innate respect for law of their opponents. Humanity, rather than legality, should be our guide.

There is no direct evidence, but it seems to me most unlikely that any lawyer helped draft this document, and we may be quite certain that Malkin was not consulted. The text has all the stylistic indications of being drafted by Churchill himself. It was not of course a public document, but one addressed to Churchill's own colleagues, especially, one supposes, to the Prime Minister and the Foreign Secretary. It was agreed to defer a decision until the views of the Chiefs of Staff were known; they were opposed on pragmatic grounds. On 22 and 27 December the discussion was resumed,¹¹⁵ the outcome being a temporary defeat for Churchill, and a decision to make a diplomatic approach to Norway and Sweden in the hope that they might cooperate in the wider plan to open a Scandinavian front. Halifax opposed the operation, one reason being that it would be: '... a naked act of force in clear violation of their sovereign rights and of international law ...'¹¹⁶ As for Churchill's plan, a final definite decision was to be deferred until the views of the USA and the Commonwealth were received, but at an appropriate moment Norway and Sweden were to be told orally that: '... we proposed to stop the coast wise traffic from Norwegian ports to Germany as a counter measure for German infringement of Norwegian territorial waters and that we propose to order naval vessels to enter Norwegian territorial waters'. There the matter rested at the end of 1939.

There were further discussions on 2 and 3 January,¹¹⁷ and it was now thought that the communication to Norway should be by a note, with the action justified by the sinking of the 'three ships'.¹¹⁸ But early in January the French Government, in the person of the Ambassador, the ingenious M. Corbin, came up with a new justificatory idea of a more legal character: mining the Leads should not be presented as a legitimate reprisal, but as a reaction to a radical change of circumstances. The idea must have come

¹¹⁵ CAB 65/4 WM 122 (39) 1 (Conf. Annex) (22 Dec.), 123 (39)1 (27 Dec.), CAB 65/2 WM 122 (39) 1 (22 Dec.) and 123 (39) 1 (27 Dec.). There were papers from Halifax CAB 66/4 WP (39) 168, the Minister of Economic Warfare WP (G) (39) 153, and the Chiefs of Staff WP (39) 169.

¹¹⁶ CAB 66/4 WP (39) 168.

¹¹⁷ See CAB 65 WM 1 (40), and CAB 65/11 WP (40) 3 and WM (40) 2.

¹¹⁸ Draft note in FO 371/24816.

from a lawyer in the French Foreign Ministry, being based explicitly on a decision of a French Prize court back in 1917, which only a lawyer would know about. It should be argued that the actions of the German navy within Norwegian territorial waters had deprived those waters of their neutral character; hence no question of violating the neutrality of Norwegian waters arose, since there were no such waters to violate.¹¹⁹ This new approach was approved by Malkin, who seems to have thought that the ‘three ships’ justification was weak, as it surely was. In the absence of the Attorney-General the Procurator-General was consulted, and he agreed with Malkin. He is the same person as the Treasury Solicitor, who is always a barrister just to confuse us, and the office, though still existing in some metaphysical sense, is normally thought no longer to possess any functions. Perhaps this incident shows that one such function does survive.

So it was that the note provided on 6 January to Norway and Sweden set out an account of German naval actions and went on:

3. By these hostile acts German naval forces have turned Norwegian waters into a theatre of war and have in practice deprived them of the enjoyment of neutrality.
4. His Majesty’s Government find themselves obliged to take account of the actual situation and to extend the scope of naval operations into waters which have become a theatre of operations for the enemy’s naval forces.

So a somewhat transparent cloak of legality was wrapped around the proposed naval action.

This threat provoked extremely strong protests both from Norway and Sweden, and King Haakon VII himself added a personal protest. Halifax, who had to conduct the interviews with the Norwegian and Swedish Ministers, was not a little shaken by this.¹²⁰ The Foreign Office had never been enthusiastic about Churchill’s proposal to mine the Leads, and the project now entered its second stage, which lasted from 6 January until the *Altmark* incident on 17 February.

On 8 January Cadogan noted in his diary that:

Fact is, this Narvik business is silly—as I knew it would be. I continue to think we can do it—if Winston insists—but (a) it won’t be very effective in itself, and

¹¹⁹ See CAB 65/11 WM 5 (40) 6. He produced a somewhat similar argument over the *Altmark* incident.

¹²⁰ See CAB 65/11 6 WM (40) 8. Cadogan, *Diaries*, p. 243 describes the interview as ‘painful’. Koht, *Norway*, p. 36 states that the supposed abuse of Norwegian waters was taken up with Germany. Conversations with the Swedish and Norwegian Ministers on 6 Jan. are in the Confidential Print FO 419/34/10 and 11; the Norwegian and Swedish replies and the protest by the King are in FO 419/34/13 and 14.

(b) it must prejudice the larger scheme. H. [Halifax] saw P.M. about it and finds latter is of same view more or less. We must now persuade Winston—if we can—that we must climb down as gracefully as we can.

So on 9 January Halifax convened a meeting in the Foreign Office. In addition to Foreign Office officials it was attended by officials from the Ministry of Economic Warfare, but not, for obvious reasons, by officials from the Admiralty.¹²¹ Halifax, no legalist as we have seen, stated the question at issue thus: ‘. . . would the material advantages to be gained from this action outweigh its disadvantages from the moral and psychological point of view?’ He thought the material disadvantages were not very serious:

. . . but the other disadvantages were undoubtedly serious and might be summed up as: prejudice to our general moral position as the upholders of international law, serious damage to our popularity and good name in Norway and, to some extent, in other neutral countries and in America, and an opening for German propaganda.

The obvious material advantages were then set out; the most important was the stopping of the iron ore traffic from Narvik in the winter months. The effect on neutral opinion generally was hard to judge, but in the USA there would be some who would look at the matter from a moral and legal standpoint, and it would be difficult to justify the action simply because of the sinking of the ‘three ships’. On the other hand, decisive action might reduce the fear of Germany in Scandinavia, and if the outcome was a German attack on Norway this would be welcome since it would make it possible to open the Scandinavian front.

The consensus was that the Narvik operation was on balance a good idea, and might provoke an attack which would enable the larger plan to be carried out. But the predominant view that emerged, which was pressed by the officials from the Ministry of Economic Warfare, was that much more might be achieved by using the *threat* of mining the Leads to extract concessions from Norway and Sweden, than would be achieved by actually mining the Leads. For example the Norwegians might stop Norwegian pilots from assisting ore carriers; the route through the Leads without local pilots was hazardous, and three ore ships had already been lost. Norway might be persuaded to cease exporting Norwegian iron pyrites to Germany. Sweden might be persuaded not to increase exports

¹²¹ Draft minutes in PREM 1/419, also FO 371/24816/N560. Also attending was Sir Robert Vansittart, Chief Diplomatic Adviser to Halifax and Cadogan’s predecessor, Cadogan, R. A. Butler, the Junior Minister, and Sir Orme Sargent, the supervising Under Secretary for the Northern Department, and other officials.

from Lulea to make up for what could no longer come from Narvik if the passage was made more dangerous. There was, however, some scepticism as to the likelihood of Norwegian and Swedish concessions. Merely threatening action had the advantage that: ‘. . . it would preserve our good name and would not imperil our relations with Norway or involve us in the risk of losing the supplies we draw from her or from the Ship Chartering agreement’. The minutes of this meeting were made available to the Prime Minister but not, so far as can be told from the records, to Churchill and the Admiralty. No doubt there was no wish to provide Churchill with a chance to press his view on Chamberlain before the meeting of the War Cabinet which was to take place later the same day.

Halifax’s approach was explained when he wrote to Mallet, the Chargé d’Affaires in Stockholm, and described his discussions with the Swedish Minister, Bjorn Prytz. He explained that he ‘. . . could not find words to express the strength of our conviction that, on the broadest grounds of equity, we were entitled to refuse to be bound by one particular rule of international law while the Germans were breaking all the rest’.¹²² Charles Hambro, associated with the Ministry of Economic Warfare, wrote to Orme, ‘Moley’, Sargent in the Foreign Office to say that the Scandinavians simply did not realise that British reluctance to act was not motivated by fear of German reprisals, but by ‘. . . high regard for neutral susceptibilities and international law’.¹²³ So it was that two individuals involved in the process of decision taking viewed the matter in somewhat different ways, and of course we have no direct evidence of precisely what other officials thought.

Later on the day of the meeting, 9 January, Halifax told the Cabinet about the sharp formal protests from both Norway and Sweden, and from the King, which described the proposed action as being ‘absolutely contrary to international law’ and pointed out the threat to Norwegian independence.¹²⁴ Halifax said that: ‘. . . he had been considerably impressed in the first place by the extent to which the Norwegian reaction coupled with the opposition of Sweden might have a damaging effect in the judgement of the world . . .’ The proposal, now supported in a tentative way by Halifax, was that agreed at the meeting: it was to use the *threat* of action to influence Norway and Sweden. At a Cabinet meeting

¹²² FO 371/24816/N789.

¹²³ FO 371/24816/N470; this file contains relevant texts and other material.

¹²⁴ CAB 65/11 WM 7 (40) 8.

held on 10 January Churchill was in effect temporarily defeated, the Narvik action being again deferred.¹²⁵

The story I have told so far leads me on to my fifth general point—in the attempt to produce justifications for the mining of the Leads, legal arguments, moral or ethical arguments, commonsense arguments, and pragmatic arguments all become muddled up. Analytically such arguments are quite distinct; in the real world of international relations and diplomacy they are inextricably intertwined. Perhaps the reason for this is to be found in the various audiences to which arguments are addressed, which do not comprise analytical philosophers, and are not even confined to professional lawyers. Churchill's paper was directed at his colleagues; other justifications were to be addressed to the Norwegian officials and the King, and, ultimately, to other governments and to public opinion generally.

At a meeting on 17 January it was agreed that Halifax should make a further approach to the Norwegian and Swedish governments.¹²⁶ This was done on 18 January; the argument was firmly presented that they should adopt a more cooperative attitude towards supporting a policy which was in their long term interests. They should not insist on precise conformity to international law when Germany regularly flouted it. The Foreign Office minute of the conversations shows that Lord Halifax now approached the legitimacy of violating Norwegian waters as primarily moral in nature, and involved conflicting assessments of the moral position.¹²⁷ He made play with the general use of Norwegian territorial waters by German vessels, and the consequential right of the navy to interfere:

In these circumstances HMG could not but feel that, weighed on the moral scale, the situation was neither equitable nor tolerable; and if the Norwegian government felt entitled on moral grounds to make the protest they had made against our proposed action—a protest to which the German Government if it had been made to them would have paid no attention whatever—they were themselves under a strong moral obligation to consider whether they, for their part, could not do something to remedy the situation if they objected to His Majesty's Government taking the remedy into their own hands.

Throughout the discussion with Colban, Halifax insisted, and Colban agreed, that the issue was really not one of law. For that reason the British position was the stronger one. It was 'one of equity rather than of law'. But the Scandinavians would not be moved, and on 19 January Minister

¹²⁵ CAB 65/11 WM 8 (40) 1 (Conf. Annex). See also Cadogan, *Diaries*, 11 and 12 Jan.

¹²⁶ CAB 65/11, WM 16 (40) 9 (Conf. Annex) (17 Jan.).

¹²⁷ FO 371/24817, telegram of 18 Jan. to Sir Cecil Dormer.

Colban delivered another note of protest, which relied in part on legal arguments and in part on the very right of Norway to exist, which appears to have been thought to be moral in nature:

Infringements of Norwegian territory, of the kind suggested in the British Government's Aide Mémoire of the 6th instant, would constitute open violation of International Law and lead to incalculable consequences for the Northern countries. They would also be in direct opposition to the principles by which Great Britain has been guided in its policy, especially in its relations to the Small States. The Norwegian Government cannot give up their belief that the British Government will recognise the principles of International Law, of which the British Government so often and with such great force have been the spokesman, represent such great values in the life and history of nations, that they cannot be set aside for the immediate material advantage which the British Government might gain through an intervention against German trade and shipping along the Norwegian coast. The circumstance, that Great Britain considers that it is fighting for its life, cannot give it a right to jeopardize the existence of Norway.¹²⁸

By early February it had been decided in principle to go ahead with the larger Scandinavian plan, which involved establishing a strong military presence in Scandinavia and taking control of the ore fields in Sweden. But this scheme was only to be pursued with Scandinavian consent. How this consent was to be obtained remained profoundly obscure.

This then was the confused situation when the *Altmark* affair occurred. The successful rescue of the British sailors, though at one level quite unrelated to plans to interrupt the trade in iron ore, or to open a new front in Scandinavia, was bound to have some general significance for Anglo-Scandinavian relations, but it was by no means obvious what this significance would be. The third stage in my story may be said to extend from the date of the *Altmark* incident until 29 February, when, at a Cabinet meeting, there was a decisive intervention by Prime Minister Chamberlain.¹²⁹

This period opened with a visit on 20 February by the French Ambassador, M. Corbin, to Halifax. He suggested, that the *Altmark* affair should be exploited as providing a justification for no longer treating Norwegian waters as inviolable. If Germany reacted by seizing southern Norwegian ports this would be favourable as it would justify intervention to help Finland through Narvik.¹³⁰ Churchill, who seems to have been in

¹²⁸ Copy in FO 371/24817, also 24819. There was another meeting on 2 Feb. and Colban delivered another aide mémoire. See FO 419/34/44 (Confidential Print).

¹²⁹ CAB 65/5 WM 55 (40), copy in FO 371/24818/N2607.

¹³⁰ FO 371/24818/N1027/7/63, also FO 419/34/42.

contact with M. Corbin, had pressed for immediate action at a Cabinet meeting on the previous day: ‘Norway, by her action over the ALTMARK, has given us good grounds for pointing out that we were not prepared to run the risk of similar events in the future.’ A minefield should be laid; the Norwegians could not stop this and ‘. . . we would force traffic out into the open seas, and thus relieve the Norwegians of their heavy responsibility’. The Cabinet was almost persuaded, and authorised preparations to be made to lay the minefield.¹³¹

Somewhat oddly, since foreign policy rather than naval policy was involved, it was within the Admiralty that work was put in hand on drafting a formal justification. Presumably this was because of Churchill’s suspicions of the Foreign Office, and fear that it would oppose action; he had a long record of meddling in the business of other departments. The style indeed strongly suggests Churchill’s personal involvement. The draft began:

Since the beginning of the war upwards of 90 Norwegian ships . . . have been sunk by German U-boats and mines employed contrary to international law. Not only has this grievous material loss been inflicted on Norway, but more than 100 Norwegian sailors have been murdered upon the high seas. The Royal Norwegian Government has shown itself incapable of resisting or resenting this cruel onslaught otherwise than by ineffectual and unheeded protests. . . . The territorial waters of Norway have been and are being used as a kind of communication trench . . .

There was much more in the same vein.¹³²

Within the Foreign Office Orme Sargent produced a memorandum setting out the arguments for and against the operation; the drift was that the arguments against were the more powerful.¹³³ The factors set out in this memorandum were neither moral nor legal but rather prudential, but it did emphasise the significance of world opinion, and the importance of earning the respect of the Scandinavian peoples. Sargent also produced a memorandum explaining that the action could be justified either on the ground that Norway no longer controlled its waters, or on the more general ground of German misconduct in maritime warfare; it could not be justified on the humanitarian grounds relied upon in the case of the *Altmark*. We may be sure that Malkin had a hand in this.

¹³¹ CAB 65/11 WM 46 (40) 9 and Confidential Annex CAB 65/11 WM 46 (40) 9 (19 Feb.), *GWP*, p. 779.

¹³² ADM 1/25843, date probably 21 Feb.

¹³³ FO 371/24818/N2274, memo of 20 Feb.

The Prime Minister, no doubt influenced by Halifax, had reservations, and agreed that there should be consultations both with the Dominions, and with Clement Attlee, Sir Archibald Sinclair and Sir Arthur Greenwood.¹³⁴ Attlee and Greenwood were opposed:

... while we might be justified in considering ourselves released from the provisions of international law by German methods of warfare, we should not be justified in taking action which would injure a third party. In their view the laying of a minefield in Norwegian waters would expose that country to attacks by Germany. Mr. Attlee also doubted whether we should gain any advantage sufficient to outweigh the moral disadvantages that we should incur.

Similarly the Dominions were not in favour. General Smuts had earlier said that the 'Real strength of allied cause is its moral basis'.¹³⁵ He also thought the action was unlikely to produce significant advantages. Lord Lothian, the ambassador in Washington, had anxieties over American opinion: 'Anything which can reasonably be regarded as 'bullying' of a small neutral will be resented and will strengthen the growing resentment here for maintaining American neutral rights as against British interference'. Everything would turn on the strength of the justification which could be made out, both under international law, and pragmatically, showing the operation to be a real contribution to defeating the enemy. He thought that the best form of justification would be to show both that Germany had constantly violated Norwegian neutrality and that Norway was unable to prevent this.¹³⁶

Within the Foreign Office continuous attention was being paid as to how, if at all, the mining could be justified. On 21 February Malkin had produced a long memorandum on the subject.¹³⁷ He took the view that the action was plainly a violation both of neutral rights, and of Articles 1 and 2 of *The Hague Convention (XIII)* of 1907:

- It can only be justified, therefore, on one or both of the following grounds
- (1) The failure of the Norwegian Government to prevent the improper use of their territorial waters by Germany.
 - (2) As an appropriate measure of reprisal for illegal actions at sea by Germany.

But he foresaw difficulties in producing a convincing justification. In the first place everyone would know that the real object would be to interfere

¹³⁴ CAB 65/5 WM 50 (40) 1 (23 Feb.) 1, *GWP*, p. 795.

¹³⁵ This was on 12 Jan.; see PREM 1/419.

¹³⁶ The results of these consultations were reported to the Cabinet on 29 Feb.; see CAB 65/5 WM 55 (40) 1 (29 Feb.). See also material in FO 371/24818 and in PREM 1/419.

¹³⁷ FO 371/24818/N2400.

with the ore traffic, and he thought it was extremely difficult to make any case that this traffic was improper. The second was that the Admiralty had in the past frequently insisted on its right of innocent passage and ‘I am afraid that there is a considerable chance of statements made by us in the past being quoted against us in a highly inconvenient manner.’ It would be necessary to show that the use being made of the Leads by German warships to escape interception (ore carriers would not do) did not, or ought not to count as ‘innocent passage’, but the concept had earlier never been elaborated. And the difficulty over this argument was that there was not enough satisfactory evidence that German warships did habitually use the Leads for this purpose. There was the *Altmark* case, ‘but we have already drawn pretty heavily on the “Altmark” account, and it may be doubted whether it would stand much more strain’. There was the sinking of the three ships, but the facts were disputed by the Norwegians. It might be possible to show that the pocket battleship *Deutschland* returned to Germany through the Leads.¹³⁸ What would be best would be evidence of use by submarines, which were barred under Norwegian neutrality regulations.¹³⁹ There might be a good case based on German illegalities at sea, so long as the facts could be firmly established; the problem was lack of evidence. And there were other problems. The first was the weakness of the claim that such illegalities justified British violation of neutrality, and in particular the violation of the neutrality of just one neutral country, Norway. If this justification was to be used then it would be better to announce that action would be taken in all neutral waters in Northern Europe, or bordering the North Sea. It would be best also to act when neutral indignation against Germany was very strong. Malkin concluded that:

. . . it would not be right to suggest the case is as satisfactory as we should wish it to be. A case based on abuse of Norwegian territorial waters, if we were in a position to establish the necessary facts, would, I think, be stronger than one based entirely on retaliation for German atrocities at sea, but if we could establish the first sufficiently, there is no reason why we should not rely on both, provided we do not want to use the German atrocities as a justification for some other form of retaliation.

Using this memorandum, the Foreign Office on 26 February circulated a revised draft of a justificatory statement.¹⁴⁰ Steps were taken to ensure

¹³⁸ In fact it had not.

¹³⁹ Only in the case of U 21 was there any such evidence; see above, n. 28. In reality there were good reasons why German warships would not normally wish to use the Leads, where their presence was likely to be reported, and where navigation was hazardous.

¹⁴⁰ CAB 66/6 WP (40) 75 (26 Feb.), copy in FO 371/24818.

that this draft was not circulated in time for the hawks—Samuel Hoare, Winston Churchill, Oliver Stanley and Anthony Eden—to propose modifications before it was distributed as a Cabinet paper.¹⁴¹

The possible form of a reply to the Norwegian protest was discussed by the Cabinet on a number of occasions. The concern was not primarily with the incident of the *Altmark*, but with justifying the mining of the Leads. At a meeting on 22 February it was thought that the legal case was not very strong. On 22 February the Foreign Office circulated a draft, produced in consultation with the Attorney-General and the Admiralty. At a meeting on 23 February this draft was considered, and Halifax took the line that it was difficult to base the case on German use of Norwegian waters or the sinking of the three ships, since the facts could not be conclusively established.¹⁴² Hence the emphasis on general German misconduct at sea. He did not consider this a purely legal ground:

We could not make much of a case . . . on purely legal grounds . . . but we could make a broad case, on the grounds of rough justice, for taking the gloves off and dealing in a rather high handed manner with Norway in order to protect ourselves against Germany's methods of warfare at sea. Hence any doubts he had . . . were not based on legal grounds, but turned on whether, on balance, our action would prove advantageous to us.

It is clear from the minutes that he inclined against immediate action, and had been influenced by Malkin. The Attorney-General made it clear that the *Altmark* incident did not provide any justification in international law for interfering with merchant ships in Norwegian waters by way of reprisal. The Prime Minister thought that there was consequently no need to act while the *Altmark* affair was fresh. Thus it was that the search for a justification for the Narvik operation came to be increasingly disconnected from the business of drafting a reply to the Norwegian protest.

The redraft was available for the Cabinet meeting on 26 February.¹⁴³ It opened by presenting the *Altmark* incident as illustrating a use of neutral waters which was not innocent, and was therefore illegal. But it went on to set out criticisms of the general brutality and illegality in German conduct of the war at sea, and argued that Germany was flagrantly violating neutral rights, yet expecting from the Allies strict observance of them.

All this provides illustration for what I put forward as my sixth general point, which is that respect for international law, in so far as it

¹⁴¹ Cadogan, *Diaries*, p. 255.

¹⁴² CAB 65/5 WM 50 (40) 1 (23 Feb.), *GWP*, p. 795. For the draft see CAB 66/5 WP (40) 61 (22 Feb.), copy in FO 371/24818.

¹⁴³ CAB 66/6 WP (40) 75, considered CAB 65/11 WM 52 (40) 7 (26 Feb.).

influences or has a potential to influence the conduct of government, and indeed respect for ethics, is intimately associated with pragmatic acceptance of the importance of opinion. In the conduct of international affairs, as in ordinary life, one important factor is certainly the desire to secure favourable opinions, both domestically and internationally; perceptions of legality or illegality influence opinion.

The story also illustrates another point, my seventh, which is that there was in this case a clear difference between the supposed reasons for the proposed military or naval action—to interrupt the supply of iron ore, or to initiate the opening of a Scandinavian front—and the proposed justifications which were under discussion at this stage. Arguments for intervention, and possible legitimising justifications, were distinct.

Any idea of using the *Altmark* incident to provide a justification for intervention in Norwegian waters received a fatal blow when Chamberlain, at a Cabinet meeting on 29 February, spoke out firmly against action.¹⁴⁴ He did so not on moral or on legal grounds, for he thought, or at least said he thought, that the action could not be criticised on such grounds. Instead he opposed action because it was inopportune, and would not best serve British interests. What primarily concerned him was the risk that mining the Leads might make it more difficult to secure Scandinavian cooperation in sending help to the Finns. He was also concerned over the effect on American opinion, and over the loss of some iron ore which, at this time, was reaching Britain from Narvik. There was also the risk of Norwegian retaliation in the form of a refusal to sign the War Trade Agreement, which was still under negotiation. Churchill, though deeply regretting the decision, accepted all this in good part, making it clear that he was not prepared to urge action to which the Prime Minister was firmly opposed. So it was agreed, for the moment, to put the proposal to one side. There was, so far as can be told from the minutes, no vote, and it may well be that Churchill's acquiescence was secured by discussion between himself and Chamberlain, and possibly Halifax, outside the Cabinet room.¹⁴⁵ There is no evidence, and at the end of the day we simply cannot tell why Churchill temporarily gave up the fight, or what part, if any, international law played in his thinking. The reason recorded in the Cabinet minutes says nothing about international law.

The British response to the Norwegian protest over the *Altmark* was, as we have seen, finally delivered on 15 March.

¹⁴⁴ CAB 65/5 WM 55 (40) 1 (29 Feb.), copy in FO 371/24818/N2607, also *GWP*, p. 824.

¹⁴⁵ Chamberlain wrote him a letter of thanks; see *GWP*, p. 827.

By now the Scandinavian situation had changed radically, and we enter the final stage. The Finnish Government, from 23 February onwards, had become involved in negotiating peace terms with the Soviet Union.¹⁴⁶ During these negotiations the Western Allies were also involved in attempts to persuade Finland to continue the war by offers of further aid; delivery of aid on any substantial scale required the collaboration of both Norway and Sweden, collaboration which it became increasingly certain they were not willing to provide. An armistice was agreed on 12 March, and the final steps required for the signature of the peace treaty took place in Moscow on 20 March.¹⁴⁷ So it was no longer necessary to secure Scandinavian cooperation to aiding Finland, and in so far as respect for international law owed its significance to its relationship to Scandinavian opinion, its importance was diminished.

At a Cabinet meeting on 27 March consideration was given to a note from the French Government, which since 21 March had been led by Paul Reynaud, who had replaced Édouard Daladier; it argued that the Western Allies should now assume control of Norwegian waters and of strategic parts of Norway.¹⁴⁸ The hope was that the Norwegians would either cooperate in military intervention, or at least not actively oppose it. Halifax was still dubious as to the value of such a dramatic step.¹⁴⁹ The issue came before a meeting of the Chiefs of Staff on 27 March, with the French Admiral Darlan in attendance, at which the technicalities were discussed; one problem was that the places where mines might be dropped were 650, 700 and 800 miles from the nearest British airfields.¹⁵⁰ It then went to the Anglo-French Supreme War Council, which met in London on 28 March.¹⁵¹ Chamberlain at this meeting in effect announced the end of the 'phoney' war, and said that:

... the conclusion he drew was that, in order to maintain the courage and determination of the peoples, the Allies should take active measures. These measures should, if possible, be in the nature of surprises: they should be injurious to Germany and should not, if possible, offend the moral principles which the Allies had so far upheld in the eyes of neutrals. Nevertheless the action of the smaller neutrals, in fear of Germany, gave the Allies a certain latitude, of which

¹⁴⁶ Tanner, *Winter War*, p. 172. Koht, *Norway*, p. 29 states that feelers had been put out in late January.

¹⁴⁷ Tanner, *Winter War*, p. 260, with texts pp. 263–7.

¹⁴⁸ He also wanted the Caucasian oil fields to be bombed. See CAB 65/6 WM 76 (40) 2 (27 March), *GWP*, p. 920, CAB 66/6 WP (40) 109 (26 March).

¹⁴⁹ CAB 66/6 WP (40) 107, memo of 26 March. See also CAB 66/6 WP (40) 112.

¹⁵⁰ CAB 127/8 COS 60th Meeting.

¹⁵¹ CAB 127/9 SWC (40) 6th Meeting.

advantage should be taken, in the manner in which they should treat the laws of neutrality.

So he favoured first of all the plan, known as the Royal Marine Operation, to float fluvial mines down the Rhine; this scheme had long been favoured by Churchill.¹⁵² So far as iron ore was concerned, Norway and Sweden should be told of the intention of the Allies to safeguard their own interests, but nothing more specific. He suggested a minefield to stop the export of ore from Narvik, and fuller consideration of action over Lulea when it became ice free. M. Reynaud opposed the fluvial mines, fearing reprisals against France; he wanted immediate action against the traffic from Narvik and later action over Lulea. Churchill intervened to say that the mining of the Leads should be regarded as a reprisal for German attacks on our merchant shipping and other illegal acts of war. It should be treated as a British operation so as to save the French from reprisals. A non-specific warning should be given to the Scandinavian countries on 1 April along the following lines: ‘. . . they reserve the right to take such measures as they may think necessary to hinder or prevent Germany from obtaining in Sweden and Norway resources or facilities which for the purposes of the war would be to her advantage or to the disadvantage of the Allies’. The British Cabinet accepted the recommendations of the Supreme War Council on 29 March.¹⁵³ Plans were also to be prepared to interrupt supplies of ore from Lulea.

On 5 April Notes were delivered to Norway and Sweden. These stated that the Allies intended to defend their vital interests and requirements ‘by whatever measures they might think necessary’. A list of these vital interests and requirements was provided, and one was set out in the following form:

Further the Allies, seeing that they are waging war for aims which are as much in the interests of the smaller States as in their own, cannot allow the course of the war to be influenced against them by advantages derived by Germany from Sweden or from Norway. They therefore give notice that they reserve the right to take such measures as they may think necessary to hinder or prevent Germany from obtaining in those countries resources or facilities which, for the purpose of the war, would be to her advantage or to the disadvantage of the Allies.

The justifications given were that the Scandinavian countries were no longer free agents, and that the Allies were waging war for aims which were as much in the interests of Norway and Sweden as in the interests of

¹⁵² Churchill remained enthusiastic after he became Prime Minister; see PREM 3/375.

¹⁵³ Cite to CAB 65/6 WM 77 (40) 2 (29 March).

the Allies. A circular to British Missions Abroad set out a justification for the British decision to mine the Leads. Germany, it argued, was engaged in an illegal course of action, amounting to terrorism, in its sinking of neutral vessels. The worst sufferer had been Norway:

The position is therefore that Germany is flagrantly violating neutral rights in order to damage the Allied countries, whilst insisting upon the strictest observance of the rules of neutrality whenever such observance would provide some advantage to herself. International law has always recognised the right of a belligerent, when its enemy has systematically resorted to illegal practices, to take action appropriate to the situation created by the illegalities of the enemy. . . .

So the mining of the Leads was to be presented as a legitimate reprisal. It was also justified by reference to the concept of necessity, and to the claim that the action being taken would, in the long term, benefit the smaller states of Europe.¹⁵⁴

Norway did not agree, and the British action met with strong protests against what was described as ‘. . . this open breach of international law and violation by force of Norwegian sovereignty and neutrality’. The British Cabinet finally approved mining the Leads at a meeting on 5 April,¹⁵⁵ and the operation, known as Operation Wilfred, was carried out on 8 April in the Vestfiord north of Bödo and near Molde.¹⁵⁶ A joint Anglo-French Statement was released on 8 April, justifying the action by the supposed brutality of the German campaign against merchant shipping:

. . . carried out in defiance of the recognised rules of war, frequently in circumstances of the greatest barbarity . . . It is a fact deserving of constant emphasis that these German attacks have been deliberately aimed at the destruction of neutral lives and property, and it is abundantly clear that the purpose behind them is pure terrorism. The Allies, on the other hand, have never destroyed or injured a single neutral ship or taken a single neutral life.¹⁵⁷

Much loss had fallen on Norway, which had even provided armed escorts for German ships whilst unable to stop their misconduct; this refers to the *Altmark* affair. It was now necessary for Britain to end this state of affairs:

Their purpose . . . is to establish principles which the Smaller States of Europe would themselves wish to see prevail and upon which the very existence of those States ultimately depends. The Allies, of course, will never follow the

¹⁵⁴ The UK note of 5 April is in Confidential Print FO 419/134 (from N 3986/2/43).

¹⁵⁵ CAB 65/6 WM 82 (40) 6 (5 April).

¹⁵⁶ See Roskill, *War at Sea*, I, 156–60, T. K. Derry, *The Campaign in Norway* (London, 1952), pp. 14, 25–6.

¹⁵⁷ ADM 1/11673.

German example of brutal violence, and any action they decide to take will always be carried out in accordance with the dictates of humanity.¹⁵⁸

There was some fear that Norway would repudiate the Shipping Agreement, and plans were made to seize vessels in British ports under the right of angary, and to divert vessels for as long as possible to contraband control bases. But these plans were never implemented. The fluvial mines scheme was postponed at French insistence.

The minelaying plan was now associated with military plans to establish a considerable military presence in Norway at Narvik, Trondheim, and Bergen, and to raid Stavanger, where there was a major airport. The hope was that since it was by now fairly obvious that some sort of German attack was imminent this would not in the event be resisted by the Norwegians. Unknown to British intelligence the German invasion of Norway was in fact already underway, and by the end of the next day Germany was in control of the whole of Denmark, and of Oslo, Kristiansund, Stavanger, Bergen, Trondheim and Narvik. Hence the mining of the Leads achieved nothing. There followed the disastrous Norwegian campaign. Once again Britain, in spite of its professed ideals, had failed to save two more small neutral countries from German aggression. As in Churchill's story of the unhappy experience of the person who proposed to administer medicine to a bear by blowing a powder into its mouth, the bear blew first.

Let me now, very briefly, ascend into legal theory, but by way of introduction let me make a final general point, which is that empirical studies of particular incidents cannot but generate some scepticism over the possibility of making general statements about the conduct of states. Be that as it may, a celebrated theory of law, that of H. L. A. Hart,¹⁵⁹ presented a domestic legal system as a system of rules of two kinds, duty imposing, and power conferring. Rules of the first kind constrain conduct, those of the second kind facilitate activities which are, it is argued, impossible in the absence of law. It is in my view better to think not so much of two kinds of legal rules, but of two different functions of law, and in reality domestic law has many other functions over and above the imposition of duties and the conferment of powers. So too has international law. One function I have been able to illustrate is that it provides a resource in the argumentative justification of government action. There are all sorts of fascinating puzzles about this process, and about the effect it has, if any, on government action. Why is so much energy and importance attached

¹⁵⁸ See ADM 1/11673.

¹⁵⁹ *The Concept of Law* (Oxford, 1961).

to attempts to produce plausible and convincing justifications? To what audiences are these justifications addressed? How does the perceived audience affect the form of the justifications offered? To what extent are such justifications properly considered to be legal at all? Are they at bottom ethical in nature? Or is it, in this field, not really possible to separate the legal from the ethical or the merely commonsensical? Is there perhaps, as Devlin argued so many years ago, no real separation possible between law and morals? What precise role is played in relation to the construction of such justifications by experts in the specialised body of thought we call international law? These and other deep questions I can, in the main, only leave with you, with the caution that once attention is directed to concrete evidence rather than to high theory it all becomes extremely complicated. But I shall add one final comment.

Western jurisprudence, or philosophy of law, has been, at least in modern times, obsessed with the analysis of justifications offered by courts in domestic law, and by the process of domestic adjudication. And in the domestic arena legal opinions, whether or not set out in the elaborate form appropriate to the presentation of a case to a court, are, at least in the common law world, parasitic on court decisions. Indeed the whole concept of law as it is in use domestically, is parasitic on the existence of courts. If I tell you that this or that is unlawful, and give some justification for this, I am in effect saying that this is the view which a court is likely to take, or ought to take, if matters go that far. For that is conceived to be where the buck stops. In the world of international law the situation is radically different. There is, it is true, an International Court of Justice, which took over the role of the earlier Permanent Court of International Justice. But these institutions, notwithstanding the potential scope of their global responsibility, have, in comparison to domestic supreme courts, adjudicated only upon a very limited range of cases, not through some defect in their composition, but because states are only very occasionally prepared to allow them to adjudicate. Their relationship to international law is the reverse of that which obtains domestically; their very existence has been parasitic upon the existence of international law. I cannot but wonder whether the forms and functions of justification in the international arena have been and will always be affected by this different relationship, so long as it continues. It all needs further study.¹⁶⁰

¹⁶⁰ I am grateful to Mr Charles Banner of the AIRE Centre and to the late Mrs Vivienne Jones for invaluable assistance in preparing this lecture for publication. It is of course expanded from the text of the lecture as delivered. Material in The National Archives is reproduced by courtesy of HM Stationery Office.