
The Rule of Law in International Affairs

On 23 October 2003, **Professor Brian Simpson FBA** delivered the Maccabaeian Lecture in Jurisprudence, in which he took a wry look at the influence (if any) of international law on the conduct of states in relation to the use of force. To give this topical subject an historical perspective, Professor Simpson considered the role of international law in two cases of military action taken by the British in Norwegian territorial waters in early 1940, in spite of Norway's neutrality – the first of them the interception by the Royal Navy of the German ship *Altmark*. This edited extract discusses the development of British thinking prior 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 German vessel which had sunk the British armed cruiser *Rawalpindi* off the Faroes in November 1939. 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.

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. 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. 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 the advice of Malkin (Legal Adviser to the Foreign Office), expressed doubts both over the order and its legal basis. 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.... He did not wish to put obstacles in the 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.

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 warships 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 made it clear that the navy was not to pursue the *Deutschland* if it entered a Norwegian port, such as Bergen, into the port. Since the air force was also involved in the pursuit, a modified order was also issued to the units involved.

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

The Altmark aground in Jossingfjord. In February 1940, the German naval auxiliary ship Altmark entered neutral Norwegian waters, secretly carrying 299 British merchant seamen as prisoners – survivors from ships sunk by the Graf Spee. The Altmark was located by the RAF and the Royal Navy, and driven into Jossingfjord. After consultation with London, HMS Cossack put a boarding party onto the Altmark, and freed the prisoners with the famous cry 'The Navy's here!'

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. 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:

Met H [Halifax] at Palace gate [the King had given Halifax a key to the Buckingham Palace gardens]. 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 on the Danube; tunnels were dug but the operation was never carried out. 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.

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, though precisely how this operated remains quite obscure.

Thereafter an interdepartmental dispute developed between the Admiralty and the Foreign Office over the *Deutschland* order. 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 would 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. 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, familiar to all American law students for his cameo appearance, along with Puffendorf and others, in the ludicrous case of *Pierson v. Post*, 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. Humphrey 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. 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 M Branch, which was concurred in by both the First Sea Lord and by Churchill, reads:

I hope no commanding officer would relinquish an attack on enemy warships because of territorial waters.

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 also be 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. Internal conflict within the government machine may generate very serious difficulties in answering general questions on the influence of law on the conduct of states.

Professor Simpson is Charles F. and Edith J. Clyne Professor of Law in the University of Michigan

The full text of this Lecture has been published in *Proceedings of the British Academy*, Volume 125, 2003 Lectures, and can be found via www.proc.britac.ac.uk
