The Law and Practice of International Courts and Tribunals **3**: 1–35, 2004

THE CORFU CHANNEL CASE – AND THE MISSING ADMIRALTY ORDERS

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INTRODUCTION

In the *Corfu Channel* case a major issue was whether the passage of Royal Navy vessels through the Corfu Channel had been innocent in the international law sense of the term. The Court had accepted that passage would still be innocent if the purpose of navigation had not only been for the purpose of navigation but also to test Albania's attitude – that is, would Albania continue to fire on British ships from shore batteries if they continued to insist upon a right of passage? The Court said that the legality of the measure could not be disputed, provided that it was carried out in a manner consistent with the requirements of international law.[1]

As for the manner of sailing, the Royal Navy moved in line formation with guns trained fore and aft, albeit at action stations, ready to return fire if necessary. In the Court's words, the intention was to demonstrate such force that Albania would abstain from firing again on passing ships. In the circumstances of tension at the time the Court could not see in these British actions a breach of the rules of innocent passage.[2]

In the British memorial to the Court an Admiralty document stated "The most was made of the opportunities to study Albanian defences at close range. These included with reference to XCU [...]". The Court requested this document, in accordance with Article 49 of its Statute and Article 54 of its Rules. The documents were not produced, the Agent pleading naval secrecy. The UK Agent stated that the instructions in these orders related solely to the contingency of shots being fired from the coast – which did not happen. The commander of the *Volage* said, in evidence, that the orders contained information concerning positions from which the British warships might have been fired at.

The Court continued "[...] it cannot be deduced therefrom that the vessels had received orders to reconnoitre Albanian coastal defences [...]". Finally, the Court remarked that in judging the innocent nature of the

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1 *I.C.J. Reports 1949*, p. 30.

2 At pp. 30–32.

passage it could not remain indifferent to the fact that, even after two ships struck mines, there was no reaction from any of the cruisers. So the Court decided in favour of the UK, for the innocent passage of the ships.

The UK Government has now released the document XCU into its National Archives and this article will give a full account of the contents of the document, the circumstances surrounding its creation and the decision not to release it at the time.

A difficulty with the presentation of the material is that the key document, XCU, reproduced here in full is not self-explanatory. That is revelatory of the problems which the UK Government faced in responding to the Court's request to see it. The sequence of events, through British eyes, was that a British Royal Navy squadron had struck mines while passing through the Corfu Channel and Britain had gone to the UN Security Council to have Albania condemned. The Soviet Union vetoed this course of action and "left the UK with no other choice" but to go to the Court. Inevitably, Albania argued that Britain's action in sending its naval squadron through the Channel had been aggressive and provocative. Finally, Albania decided to ask for the orders under which the Squadron had been sailing. The Court thought this request reasonable and supported it. This action apparently took the British authorities by surprise. They had not collectively examined the sailing orders that had been issued by the Commanding Officer of the Squadron, without direction from above, either from within the Navy or within the Government.

When the Attorney General saw the orders they appeared to him to exclude the argument that the Royal Navy had exercised a right of innocent passage through the Channel and he raised the question, albeit almost in a rhetorical way, whether the document should properly be disclosed to the Court. He also expressed fury that the document had not been disclosed to him before he had agreed to have the proceedings launched against Albania before the Court.

This attribution of blame led to considerable confusion within the UK Government Administration. The Solicitor General, the Lord Chancellor, the Foreign Secretary, The First Lord of the Admiralty, the Prime Minister, and relevant departmental legal advisors, especially Sir Eric Beckett (for the Foreign Office), and Humphrey Waldock were also involved, along with a series of high ranking departmental officials.

Difficulties of perception abounded. What was "innocent passage"? Could it include sailing through the Channel solely for the purpose of demonstrating that one had a right to do so, ready to retaliate if attacked? This appeared to have been authorized at the highest level, in advance by the Prime Minister, the Foreign Secretary and the First Lord. Did the

document XCU do anything more than merely provide an operational framework for that, so that it could not stand on its own?

However, some legal advice was that "innocent passage" had to mean that a particular journey was navigationally at least the most practicable, if not absolutely necessary, way of making a journey. Indeed, there was strong support for the legal view that the right of "innocent passage" was contested and controversial within international law circles – that the Albanians were entitled to require prior notification before a passage was made. Yet, there was an equally strongly held view that the actions of the squadron were not in themselves in fact provocative – simply sailing through the Channel – and that nothing they had done could mitigate the horror of being the victims of undisclosed mines. In other words, how could the production or not of the document XCU affect the rights and wrongs of the British case? Its objective relevance was marginal to the actual quality of British conduct.

This led to a discussion of the issues in terms of perceptions in which the strictly legal view that a relevant document – the sailing orders – should be disclosed to the Court, gave way to the pragmatic assumption of the majority of advisors, including the Foreign Office Legal Advisor, that the document should not be disclosed because it would be interpreted by the Court as indicating, at least probably, hostile intent towards Albania. How the Court could see it might compromise Britain's case and the first priority was to win this case.

Ironically enough, this meant a convergence of the majority with the most critical member of the Administration, the Attorney General, that the document would be perceived – presumably wrongly in British eyes – as a major naval operation intended solely to test the Albanians and punish them if necessary. The document would disclose technical information about communications and especially aerial reconnaissance. These would show a general hostile intention towards Albania, which at least in general terms, had been denied by the UK Representative in the Security Council.

It was brilliantly argued by the Admiralty that the Court should be left to infer British intentions from the actions of the squadron on the day. This would be safer than inviting the Court to explore the confused and contradictory expressions of intention of various branches of the British Administration through such documents as XCU, which, in any case, could not be read on their own. The Prime Minster accepted this advice, which judged exactly how the Court would and did "jump".

At the same time the following comment has to be made. The British argument presented to the Court was that the XCU document could not be transmitted to the Court for "security reasons". It was debated whether the

document could have been disclosed minus some passages that would identify communications and intelligence strategy. However, it is quite clear from the record that the British team, the Law Officers, the Foreign Office and the Admiralty alike, if in different degrees, were not concerned about security, but about losing the court case. They thought the Court might interpret the naval orders as robbing the naval passage of its innocent character. They were quite prepared to argue, at least to themselves, that the passage had been approved as a testing operation at the highest level and that "innocent passage" as a legal concept would encompass that. However, they were definitely not willing to let the Court judge that question. One irony, of course, is that the Court did say that a sailing that was a testing operation would have been "innocent passage". The determination to win the case probably led to an unnecessary deception of the Court.

THE CHRONOLOGY OF THE BRITISH GOVERNMENT'S CONSIDERATION OF THE ALBANIAN GOVERNMENT'S AND THE COURT'S REQUEST FOR THE DOCUMENTS XCU AND XCU1

I. THE INITIAL DEFINITION OF THE QUESTION OF DISCLOSURE BY THE LAWYERS

On 15th October 1946, the Attorney General, Sir Hartley Shawcross, wrote a minute to the Foreign Secretary, Ernest Bevin, about the dilemma he faced in view of the Albanian Government's request for the XCU document in its proceedings before the Court. The Attorney General considered it quite clear from the Admiralty order under which the cruise was taken through the Corfu Straits,

> "[...] that this was conducted as a naval operation with the deliberate intention of trailing our coats, with the expectation that our ships might be fired upon and with the knowledge (apparently obtained from a previous reconnaissance) of certain existing defences on the Albanian coast and the object of observing what other defences there might be. If the International Court should find against us on the question whether there was a right of innocent passage through the Strait they may be compelled to reach the conclusion that we were deliberately committing an infringement of Albanian sovereignty in circumstances constituting an act of war [...]."

The Attorney General considered that it would be better to disclose the documents "[...] as the implications arising from a refusal so to do might be even more sinister than those which would be justified by the

documents themselves [...]". However, he thought it was "[...] a dilemma which raises a political issue and I felt you ought to be made aware of it [...]".[3]

Shawcross instructed the Legal Advisor to the Foreign Office, Sir Eric Beckett, to fill in further background to the issue, so as to accompany his own letter, and he referred to this in his own letter to Bevin. Beckett stated to Bevin:

> "It is part of our case that the squadron was sailing through the Strait as part of a normal cruising programme which included a rendezvous with some other vessels north of Corfu prior to turning south and sailing to another Greek island [...]. We have admitted already that, because two British cruisers had been fired on in the Corfu Strait in May of the same year, our ships were prepared to be fired on again and were ready to reply with counter-fire if this happened [...]."

Commenting on the orders themselves, in particular of the Rear Admiral commanding the squadron, Beckett observes:

> "[...] that the whole thing was organised as a regular naval operation. While there are categorical orders that our ships were not to open fire unless the Albanians fired at them, we were fully prepared for a regular short bombardment of the Albanian batteries and positions if fire was opened. The targets had been selected, air spotting cover arranged etc. In short, while not inconsistent with the accounts which we have hitherto given of the matter before the Security Council and in our pleadings in this case, these documents may well give the impression that the primary purpose of the cruise through the Channel was to see if the Albanians would fire at us again and to give them a plastering if they did, and that the ordinary operational cruise was probably secondary, if not a camouflage. The impression which these documents give is the truth [...]."[4]

[3] FO 371/72100 R11937/G.

[4] The orders to which Beckett refers, in Documents XCU and XCU1, are reproduced as an Appendix. The interpretative exercises and even tricks of imagination described in the pages which follow all concern how these documents should be read. So the reader might add to whatever interest these pages afford if (s)he were to read through the Appendix a few times.

Other, further undisclosed documents, of which the Court was not aware, would reinforce this interpretation. Beckett went on to repeat the Attorney General's view that the documents should nevertheless be disclosed to the Court:

> "[...] because it will be obvious, if we refuse to disclose them, that we have something to hide, and (ii) the ordinary and proper course in any litigation is to disclose relevant documents of this kind [...]".[5]

On the 18th October, Beckett wrote to Shawcross that Bevin had decided that the risks of disclosure should be taken, "[...] because from the point of view of the litigation, you consider that this is the best and the proper course to take [...]".[6]

However, matters did not rest there. It appears from a further memorandum from Shawcross to Clement Attlee, the Prime Minister, on 29 October 1948, that there was discussion of the subject at the conclusion of the next Cabinet Meeting, the following Thursday. Shawcross said that now he has consulted with the First Lord of the Admiralty and the Lord Chancellor and the latter was shown all the relevant documents. He went on to reiterate that Britain's argument before the Security Council was that the cruise was an innocent passage, that is, using territorial waters "simply in order to get from point to point on their ordinary and lawful occasions [...]. (T)he ships were proceeding on what was part of the Autumn cruise to a rendezvous in the open sea north of what is called the Medri route through the Straits [...]." However, the Admiralty documents show that the passage was not part of the Autumn cruise. He stresses the added presence of the ship Leander, that the orders after reaching Medri were to turn about at once and to proceed due south. The sailing was called "exercise Corfu" by the Admiralty, to trail our coasts and see whether the Albanians had been "taught their lesson" (italics used by Shawcross). Hostilities were expected and if the Albanians struck, the response "[...] was not to be limited to purely defensive action on our part but punitive, retaliatory action was to be taken [...]". In this British ships were to be supported by aircraft carriers and Britain had made a previous aerial reconnaissance in violation of Albanian sovereignty, although this had been denied before the Security Council.

So Shawcross was now convinced that disclosure of the documents would "in all probability result in our being disentitled to recover damages

5 Ibid.

6 Ibid., R11937/257/G in FO 371/72100.

before the International Court [...]". He, Shawcross, reported that the Lord Chancellor agreed with this view.[7] He agreed that, in the Attorney General's words, "[...] we were faced with the disagreeable necessity of suppressing evidence, the existence of which will be known and which is indeed actually referred to in documents which we have no alternative but to produce. This course, while not so inevitably fatal as the disclosure of the documents would be, is bound to produce grave suspicion and may probably lead to severe criticism [...]." Shawcross continued, that if he had known of the documents earlier he would have hesitated to become involved in the proceedings. As it is he "would certainly not become a party to the suppression of evidence in this way were not such serious international issues at stake [...]". Shawcross finally concluded that at the trial "[...] I shall have to say that the documents are of an operational nature, giving technical information about our armaments and tactics and that they are of a class which I am instructed cannot be disclosed [...]".[8]

II. The Initial Response of the Admiralty to the Lawyers

The Admiralty were not at all happy with what they took to be the *Holier Than Thou* attitude of the lawyers, particularly of the Attorney General, to the question whether to hand over the naval orders. Even though the decision not to disclose could only please them, they were not prepared to be put in a corner over supposed professional scruples of the lawyers.

On 2 November 1948, the Admiralty made a formal response to the lawyers' complaints, and effectively also to the Foreign Office, that, in summary, asserted the passage of the squadron had been innocent and the lawyers were doing the Admiralty no favours by "sacrificing their professional consciences in the national interest". In its accompanying memorandum, J.G. Lang,[9] on behalf of the Admiralty, took it, correctly,[10] to be common ground, that they were authorized by the Prime Minister and the Foreign Secretary to use the Corfu Channel with a view to testing Albanian intentions. There was no restriction that the Channel should be used only "when necessary". It was the Admiralty itself that put this

7 Ibid.

8 Ibid., FO 371/72100, R 11937/257/G.

9 Permanent Secretary to the Board of Admiralty.

10 For instance, see also Wallinger's minute on behalf of Ernest Bevin of 16 October and Beckett's minute to Shawcross on 18 October 1948, which clearly state the highest authority to test the Albanians, FO 371/72100, already discussed earlier. G.A. Wallinger was a Foreign Service Officer, Grade VI, in the Foreign Office.

qualification into the orders given to the Commander in Chief, Mediterranean.[11]

It is here already that conscious reflection begins to play tricks with memory about how to describe past actions. The minutes take on a philosophical complexity. The following commentary, in particular the remarks about the exercises of the aircraft carriers in the region, complicate the whole question whether the passage of the squadron was in fact necessary. One appears to be trying to give shape, after the event, to actions which might not have been clear at the time:

> "The significance of the point[12] is that it adds to the probability that the aircraft carriers were sent to the north of Corfu for exercises, *which would make the passage of the North Corfu Channel a natural step* – (author's italics) although I would emphasise that there is no positive evidence written before the incident which enables us to say that the aircraft carriers were in that position for exercise purposes; this point was developed by the Commander in Chief, Mediterranean after the incident and when it seemed likely that the Security Council at New York might ask what were the ships doing in that area [...]".[13]

In fact the formal note by the First Lord of the Admiralty in response to the Foreign Secretary and the Attorney General is a disquisition on the philosophy of action. He is categorical that both the Prime Minister and the Foreign Secretary knew what the Commander in Chief was doing, the way in which he was doing it and that not a single feature of the actions taken by H.M. Ships can be shown to detract from the innocence of the passage.[14]

The question is still how to describe these actions. The following long passage is crucial to what becomes a central argument of the Admiralty, that the XCU document was not an integral part of H.M.G.'s naval action in the Corfu Channel, and, therefore, not essential to an understanding of that action:

> "3. It has, however, been alleged that the phraseology used in the operation order XCU issued by Rear Admiral 1st Cruiser squadron

11 ADM 1/22504 Lang, 2 November 1948 to the First Lord.
12 That is, the restriction is in the Commander in Chief's orders.
13 Ibid., ADM 1/22505.
14 Ibid., Corfu Case Note by the First Lord of the Admiralty.

> is evidence of non innocent passage, in that he uses the phrase 'it has been decided to test the Albanian reactions to the above diplomatic notes by making use of the North Channel.' The Admiral here fortuitously used language almost the same as that used by the Foreign Office in their letter of 11 September to the Admiralty where they said, 'if, therefore, no ships have passed through the channel of late, we should like you to consider whether one could not be directed there in the near future as a test case'; the earlier phrase in the Foreign Office letter concerning Albania having 'learnt her lesson' is also significant. However, the Rear Admiral's phraseology was not known to the Admiralty and was not in fact in accordance with the instructions issued by the Admiralty to the Commander in Chief, which were that the straits might be used by the Mediterranean Fleet when necessary.
>
> 4. We have already said that in our opinion the proof of innocent passage lies in the character of the action taken by the ships themselves, not in the phraseology used by individuals. It was for that reason we considered it was unnecessary and undesirable to table XCU before the Court. If, however, it is argued that, as a matter of law, the Admiral's phraseology constituted an integral part of the action of H.M. Ships, it is necessary to examine with some care the true meaning of what was said."

The Note went on to say, in paragraph 5, that the words meant, for both the Foreign Office and the Admiralty, that we had notified the Albanians of our rights and that we intended to exercise them, and that, if the Albanians resisted these claims by force, we should retaliate in kind. Whether in the Foreign Office or Admiralty language, testing reactions cannot be quoted as proof of non-innocence "[...] so long as we insist that our original claim was valid".

In paragraph 6, the Note accepts that the phrase could be the subject of an insinuation that it amounts to trailing one's coat or provocation, which is another reason we wanted to leave the document out. However, in the complete context the point could be adequately substantiated before the Court, even though misrepresentations could be made by hostile propaganda.

Finally, with respect to the question of the production of the document XCU before the lawyers with respect to the issue of innocent passage, the Note pointed out, in paragraph 7, that the Admiralty had not known of this additional legal issue being added to the case before the Court, but, in any case, consistently with the Admiralty's philosophy of

action, it could say that it had until very recently itself no knowledge of the document in question, because no copy of the Rear Admiral's orders had been sent to the Admiralty "[...] nor would it have been usual for this to be done [...]".[15]

III. THE FURTHER RESPONSE OF THE LAWYERS TO THE ADMIRALTY

The Attorney General responded in a letter to the Prime Minister on 3 November 1948, in the strongest possible terms. Firstly, it was intolerable that the Admiralty should try to decide what documents were disclosed to the Court. That was the prerogative of the Law Officers. While a decision might be made that it was in the public interest not to disclose a document, whether the case in litigation might be lost could not be relevant in making such a judgement. Secondly, it was obvious that the question of innocent passage, as an Albanian counter-claim, had to arise. It had been argued from the start by Britain in the Security Council, that the passage had been innocent. Thirdly, the definition of innocent passage was exclusively a matter for the lawyers. The Attorney General was adamant that the passage was not innocent:

> "[...] 'Innocent passage' consists simply in a passage through territorial waters in order that a ship, otherwise on its lawful occasions, may get from point to point. If the passage of H.M. Ships had been, as Sir Alexander Cadogan was instructed to inform the Security Council it was, but as it now turns out it was not, a normal part of the Fleet's Autumn cruise leading to a rendezvous with H.M. other ships in the open sea north of the Straits, it might no doubt have been 'innocent'. In truth, however [...] it is abundantly clear that the reasons for the passage, and possibly also the manner in which it was conducted, were quite inconsistent with 'innocent passage' [...]."

Fourthly, Shawcross did not think that a special reading of XCU would save its innocence. Otherwise why were the Admiralty so set against its disclosure? For one matter, it discloses that a previous illegal aerial reconnaissance has taken place. Fifthly, he insisted that the approval of the Prime Minister and the Foreign Secretary for a naval squadron to pass through the Channel was merely for a passage in the normal course, when, if attacked, the squadron would defend itself. This permission did not extend to coat-trailing with an accompanying intention of a punitive response.

15 Ibid., ADM 1/22504.

The central point Shawcross made, with the utmost virulence, needs to be quoted at paragraph length:

> "6. It is a fundamental principle of the practice of the Courts of our country and of the conduct of our legal profession that parties to litigation are not entitled to use merely those documents which they think will assist their case and to suppress others which are inimical to it. I must make it clear that neither the Solicitor General, nor myself, nor, I am sure, any of the other members of the Bar who are assisting us in this matter, would for a moment contemplate being parties to the course of conduct now forced upon us by the Admiralty's failure to procure and produce these documents earlier had our country's international position not been so gravely involved. As it is, we retain great misgiving about the propriety of what is being done, which we can only justify on the principle 'my country [...] right or wrong, my country'. We all feel that we must insist that circumstances such as these are not allowed to recur [...]".[16]

The Lord Chancellor wrote a Minute to the Prime Minister on 5 November 1948, commenting on the Notes by the First Lord of the Admiralty and the Minute of the Attorney General. He supported the Attorney General on every point, including the inevitable final course of action. Apart from chiding the Admiralty for having opinions about what documents to disclose and what might be the meaning of "innocent passage" he focussed on what he thought was the most important point, the responsibility for the Admiralty's failure to help the Law Officers to prepare their case by seeking out and handing over the naval orders under which the squadron had sailed. Where HMG is involved in litigation any relevant department involved must take steps to see that every document "[...] which can in any way bear upon the case is made available to the Law Officers". The Admiralty should have, from the start, set out to recover these documents. It was an unfortunate mistake in this case that the Admiralty did not take the necessary steps. In Jowitt's own words:

> "[...] It should have been known to the Admiralty authorities that Operation Orders might have been issued, and it must have been obvious that if such Operation Orders were issued they might have some bearing on the elucidation of the material facts [...].

[16] ADM 1/22504, Hartley Shawcross to Prime Minister, 3 November 1948.

> In the result, I feel that we have reached a most unfortunate position. The Law Officers have advised in regard to the case and have authorised statements of the facts to be prepared without knowing the contents of the documents which were technically in the possession of the Admiralty and which could have been obtained by them [...]."[17]

This was not the end of the lawyers' view.

The Legal Advisor produced reflections that quite sharply distanced him from Shawcross and Jowitt. He did not have the status of the others so as to address the Prime Minister directly. Working within the Foreign Office, he approached the Permanent Under-Secretary at the Foreign Office, Sir Orme Sargent, on his own initiative, and through his superior, he shaped the opinions that the Foreign Secretary eventually addressed to the Prime Minister on 9 November 1948. Beckett began at once on 3 November to respond to the First Lord's and the Attorney General's arguments.

Beckett agreed with Shawcross that the Admiralty should have produced the naval orders earlier, but he had tried to discourage him from pursuing the matter with the Secretary of State basically because, in his view, there was no point. In other words there was nothing really that the Secretary of State could decide and the Attorney General's action was actually nothing more than to alert the former to the fact that the case was taking on a more unfavourable aspect. In very disparaging terms Beckett referred to the letter of Shawcross to Bevan:

> "[...] Unfortunately, the Attorney General then found it necessary to write his letter of the 25 October to the Secretary of State, which of course worried the Secretary of State very much, and, as far as I can see, to no purpose at all because we were, for good or ill, engaged on the case before the Court and, for good or ill, we had then disclosed the documents which we had decided to disclose and withheld the documents which we had decided to withhold [...]."[18]

In the letter Shawcross states in the strongest terms that if the documents containing the naval orders came before the Court Britain would in all probability lose the case. However, he did not call for

[17] Ibid., Corfu Case, Minute by the Lord Chancellor: Prime Minister, 5 November 1948.

[18] FO 371/72101, W.E. Beckett to Sir O. Sargent, 3 November 1948.

disclosure. He merely deplored having been put in the position by the Admiralty of having to suppress evidence and go against the grain for a lawyer. "[...] and I should certainly not allow myself to be a party to the suppression of evidence in this way were not such serious international issues at stake [...]."[19]

For Beckett there was no point in objecting to what had happened if one did not actually intend to change direction. It could only disrupt teamwork to no end. As Beckett predicted the result of the letter was a meeting between the Secretary of State, the First Lord, the Minister of Defence and the Attorney General, "[...] and I gather it was somewhat acrimonious. It seems to have been mostly in the nature of a post mortem over what had happened [...]". From Beckett's point of view this is rather unfortunate. Britain is in the middle of the case before the Court and the Attorney General is at loggerheads with the First Lord. Beckett then came to the point he wanted his superiors to consider – how to put an end to this quarrelling, so that the team at The Hague can function smoothly, for "[...] these arguments about the past are irrelevant to the immediate purpose in hand and far from helpful, and if there is anything that can be done to put an end to it till the case is over I should be grateful if it were done [...]. The case serves no purpose unless the Navy feel the best possible can be done to win it, and, until now, the First Lord has been even surprised at the thoroughness of the team's work." Beckett continues "[...] The Attorney General has somewhat magnified, I think, 'the difficulties of the position in which he is placed' [...]".[20]

The Legal Advisor then comes to a remarkably interesting reflection on events, similar to that of the First Lord in its play with memory. The post mortem that has taken place between Ministers has not really hit upon what was wrong in the past. Beckett highlights the very clumsiness and confusion that marked all of HMG's actions, going on, effectively, to suggest that there is no clear picture about which Britain "could come clean" before the Court. Disclosure of documents will do no more than create an impression of "disorder in the house" which will bring the country into discredit for no useful purpose. His reflection is worth quoting at length, to illustrate the problem of sorting out and presenting after the event, what was not, in any case, in Beckett's view, very deliberate behaviour:

[19] FO 371/72100, R12722, Hartley Shawcross to Ernest Bevin, 25 October 1948.

[20] Supra, note 17.

> "[...] The Admiralty should, when they authorised the Commander-in-Chief, Mediterranean, to send the ships through the Channel again and to let them fire back if they were fired at, have told the Commander-in-Chief that, if there was any firing, a big political incident was bound to result, and therefore it was particularly important that the Commander-in-Chief should so arrange the passage that it was indisputably a passage actually required by the practical circumstances of the situation, and not merely a passage, as it now rather appears to be, having really no other object than to try out the Albanians' reaction and give them a plastering if they fired. The Commander-in-Chief should also have been told so to frame his orders that, when the international incident occurred, HMG would come out of the matter with the cleanest hands possible. Now, the Admiralty did not do this and the Commander-in-Chief never saw for himself what one might have thought was a fairly obvious point, with the result of which the Attorney General now complains. I am bound to observe that it did not also occur to anyone in the Foreign Office to give the Admiralty a tip to this effect. Lastly, the Admiralty were at fault in not, immediately the ships were sunk, getting all the relevant documents from the Commander-in-Chief, Mediterranean, instead of, as in fact has been the case, dragging them out of him in the last few weeks. I suppose I am at fault in taking it for granted that the Admiralty had done what they ought to have done and assuming, without verifying, that, when they told me orally and in writing what the orders were, the Admiralty people concerned were speaking from knowledge of the documents which they had read, and not merely from what they thought they were. This, however, is a mistake which neither the Admiralty nor I are ever likely to make again."[21]

In a further, more formal, memorandum to Sir O. Sargent on 5 November, Beckett reiterates these points again, saying that, even if all the facts now known, had been known by the team at the beginning of the action they would have entailed nothing more than certain minor alterations in presentation. If all the departments had known at the start what they know now, Britain would still have had no choice but to bring the matter to the Security Council. When the Russians vetoed the Council, then Britain would have had to go to the Court. Then one would have to

[21] FO 371/72101, W.E. Beckett to Sir O. Sargent, 3 November 1948.

alter slightly the written pleadings. That is all.[22] Sargent, and after him, Bevan, passed on, word for word, the remarks of Beckett, in his two memoranda, particularly that of 5 November 1948, to the Prime Minister. The conclusion of their remarks was exactly in the terms desired by Beckett, that the controversy about the naval orders should be dropped and that the legal team should proceed to win the case in The Hague. Thus it was the lawyer Beckett who was determining the course to be taken on document XCU.[23]

IV. REJOINDER BY THE ADMIRALTY

The Admiralty responded with great vigour to the Attorney General's memorandum of 3 November. Effectively it denied the authority of the Attorney General on virtually every point. He himself should be entitled to any document he wished to see. The Court was another matter. 999 cases out of 1000 to do with international law and involving the Admiralty do not come to Court and no question of production of documents arises. "[...] and it is not desirable that in the odd case which does go before a court, a totally different rule should prevail [...]".[24]

They went on to argue the relative significance of what were clearly legal issues. Even if the issue of innocent passage was engaged it was of no importance, because Britain caused no injury through its passage, while Albania did cause actual injury. Besides, the Admiralty has huge experience of what constitutes innocent passage for several generations. Examples of non-innocent passage are enumerated in the Kings Regulations, Articles 952 and 1233 (iii). Other examples include carrying out executions and the running of submarines submerged. "[...] There is no precedent to show that the passage of warships at action stations, with aircraft over the open seas available to support them, is non innocent [...]."[25] In the Admiralty's words "[...] the Squadron was moving from Corfu to join two other ships west of that island. That was, in the Attorney General's phrase, a passage from point to point by the most convenient route [...]. It is considered that the question of innocent passage depends on facts, not on phrases. If it is argued that Admiral Kinahan's phrases

22 Ibid., Beckett to Sargent, 5 November 1948.

23 Ibid., R12776/257/G, Draft Minute to Prime Minister, followed by P.M./O.S./48/90, Corfu Case, Ernest Bevin to Prime Minister, 9 November 1948.

24 ADM 1/22504, Corfu Case, Notes on the Attorney General's Memorandum of the 3rd November, USS 5th November 1948.

25 Ibid.

make the passage non innocent, the same would apply to the phrases now used by the Attorney General [...]."[26]

As for the illegality of British air reconnaissance this was by no means clear. The Albanian Government was still not recognised by the British Government. It was in an equivocal position, half-way between the status of an enemy territory and of an ex-enemy occupied country. It was not a signatory of the Aerial Navigation Conventions of 1919 and 1944, on which the legal prohibition against overflying by military aircraft is based. The general situation had not changed from a condition of total war to one requiring the strict application of the rules of peace.[27]

The contemptuous tone of the memorandum is clear from the final discussion of the criticism that the Admiralty had intended to engage in a punitive operation. The lawyer does not understand military operations. The expression "conduct of military operations" is characterised as a total misapprehension of the military situation. The right to fire back, if fired on, is:

> "[...] the right of self-defence, in the broad sense, not a mere saluting match or the return of a shot for shot like the form of a duel. When lightly armoured ships passing at slow speed at a short distance from the coast are exposed to fire from concealed shore batteries, their right of self-preservation necessarily includes not only firing of their own guns, but the calling in of all possible support to protect them from this peril [...]."[28]

The final position in November, up until the actual request of the Court, is summarised in another Admiralty memorandum. The advice of the Admiralty is that, when any documents are requested by the Albanians, the request should be refused. "The Attorney General took the view, however, that all documents except XCU and XCU1 should be produced and said that he was prepared to defend the non-disclosure of XCU and XCU1. Sir Eric Beckett, with the agreement of the Attorney General, decided to say in his opening speech that the document XCU, referred to in the Reports of Proceedings, could not be produced *on security grounds* (emphasis in text) [...]."[29]

[26] Ibid.

[27] Ibid. Clearly the Admiralty was taking its own legal advice, probably from Humphrey Waldock, who appears at a later stage in the proceedings – see below.

[28] Ibid.

[29] ADM 116/5758, Dodds, Admiralty, 19 November 1948.

V. FINALLY, THE REQUEST OF THE COURT FOR THE XCU DOCUMENTS

A. Preparations for Interdepartmental Conferences

Beckett telegrammed back from The Hague to the Foreign Office, for the attention of the Admiralty, on 15 December, that the Court had requested for its own use the document referred to as XCU before the end of the oral proceedings in January.[30] Beckett proposed a conference on the subject for the 5 or 7 January, and asked for Synnott,[31] from the Admiralty, to be present. [32] Synnott explained to his own superiors that the idea was to have an open-ended meeting, with the Law Officers also attending as advocates rather than ministers. The conference "[...] is intended to be a general discussion, and not to reach a firm and final decision [...]. Indeed, I gather they would rather prefer that the Admiralty representative should not attend to strict instructions from the Board. I therefore [...] ask your agreement to attend with an open mind but with a fairly clear idea of what we could suggest and of what we could or could not agree to [...]."[33]

Beckett confirmed these arrangements in a letter to the Solicitor General on 22 December. There should be a discussion about the arguments concerning disclosure of the document XCU. The question was to be from the point of view of success in the case. A second option, to non-disclosure, was to make deletions on security grounds of passages that have no bearing on the question that the Court has to decide. Since these passages are in fact very small, they should be made to look bigger by enlarging the blanks that their deletion involves. The lawyers' conclusions would be solely from the point of view of the prospects in this particular case. If the decision was not to disclose, nothing needs to be done, since one is simply proceeding as before. If the conclusion should be the opposite, one would have to report the matter to the Foreign Secretary and the First Lord of the Admiralty and obtain their consent to a change in the course previously decided.[34]

30 ADM 116/5758, Tel. No. 479.

31 P.N.N. Synnott, Under Secretary at the Admiralty.

32 Ibid., Tel. No. 480. Beckett explained in the telegram that the Court's request of disclosure for its use meant that the document need not be exposed to the Albanians and the Court would not have to quote its exact terms in its judgement.

33 Ibid., *Corfu Case* to the Secretary from P.N.N. Synnott, USS, 21 December 1948.

34 ADM 116/5758, Beckett to the Solicitor General, Sir Frank Soskice, 22 December 1948.

B. The First Conference, 4 January 1949

A first meeting held on 4 January was inconclusive. Present were the Attorney General, the Solicitor General, Sir Eric Beckett, Foreign Office, Mr. Wilberforce, Legal Advisor, Mr. P.N.N. Synnott, Admiralty, and Commander Sworder. The Solicitor General was now taking the lead and summarized the arguments against disclosure around the issues of punitive retaliation and aerial reconnaissance. In favour of disclosure he argued that one was "[...] in the realm of pure law, and the question was whether, if the XCU were not disclosed, the Court might assume the worst [...]". On balance he was in favour of disclosure. There was general discussion showing considerable difference of opinion and uncertainty. One strong argument in favour of disclosure had been that the greater part of the detailed features of XCU had already been disclosed in the course of evidence and pleadings. So it was agreed to hold another meeting with Humphrey Waldock,[35] with the particular object of going through the details of XCU in order to check how much of its contents had or had not already been disclosed, and of re-examining the arguments in an earlier note by Waldock, that the disclosure of XCU would be fatal.[36]

On the same day the Admiralty wrote an extended minute to Beckett on the security dimensions of disclosure if it were still decided to submit the XCU to the Court exclusively for its own use and not for publication generally. This was considered feasible and would have the advantage of explaining to the Court what the security concerns of the British Government were. The valid security objections "[...] are not so strong to prevent their being disclosed to the Court alone [...]". Indeed, "[...] there would be advantages in keeping all these passages in the body of XCU disclosed to the Court, to illustrate and prove our original security objection, and possibly to some extent to divert attention from the more dangerous political passages in that order [...]".[37]

The Admiralty minute stressed repeatedly that it would still have to be argued that the XCU document was only part of a wider picture and that for a naval person, as distinct from a non navy person, such as the Solicitor General, the preparations of the squadron had not been excessive. It was normal military practice to prepare for every eventuality. "Naval

[35] Who had been an Admiralty legal advisor during World War II and was now Professor of International Law at Oxford University.

[36] Ibid., Minute kept by Synnott of the Admiralty, 4 January 1949. This note was not traced at the time of writing.

[37] Ibid., J.G. Lang to Beckett, 4 January 1949.

Commanders, who are responsible for the safety of their forces against every hazard, always overinsure [...]"; when the order "Prepare for sea is given in harbour, even in the calmest weather, the same full preparations are made [...] as would be made if the ship was preparing to sail into a hurricane [...]".[38]

The Admiralty minute then went on to detail the elements of XCU that were top secret and could not be disclosed. These were specified as follows:

> Para. 6(a) Reference to C.B. 1806, which is the Balkan States Intelligence Report, is secret, both as to its existence and content;
>
> Para. 6(b) The statement that air photographs were obtained of the Saranda defence area, after the shooting episode of May 15, was kept secret. Operational conditions in the aftermath of war could justify this, but difficulties were experienced and policy was to keep flights over Albania secret, in case, in future the Albanians would shoot at all aircraft;
>
> Para. 7 It was stated that the Greeks should not be informed of the intended passage, and one does not want to alert the Greeks now to this policy;
>
> Para. 7 The last sentence states that preparations for the passage should be disguised as preparations for a full calibre firing. This refers to the practice by which orders for operations in war, and even for exercises and passages in peace, may be accompanied by deception, known in military parlance as a Cover Plan. Both this practice itself, and the extent to which it is employed, are secret.
>
> With respect to XCU1:
>
> Para. 8 This paragraph discloses information about the method by which signal communications are organised, and also details of frequencies used. These are all secret and are not allowed to be disclosed to any non-British authority.[39]

38 Ibid.

39 ADM 116/5758 XCU Brief by USS 22/12.

C. The Second Conference, 5 January 1949

On this occasion Waldock was present, in addition to Mr. Mervyn Jones of the Foreign Office and Sir John Lang, of the Admiralty. A record of the discussion was made by Synnott. On the basis of this discussion it was agreed that the Solicitor General should consider the matter and reach a conclusion as to whether or not the XCU should be disclosed. The Law Officers would then send a minute to the Foreign Secretary and the First Lord, recommending the action to be taken.

A number of striking features of these notes are, as follows. It was thought that the strengthening of the squadron and the fact that its intention was to test the autumn cruise worked against disclosure, but were not fatal. The fact that orders showed an expectation of hostilities and called for "excessive" countermeasures, especially the role of aircraft, also marked against disclosure, but "could be explained away". A more decisive consideration was the following: "'Retaliatory' action of 1 hour's duration is excessive, yet if we do not reveal XCU, we can show we did nothing". This point was marked "much against disclosure". As to whether all of the above destroyed the innocent character of the passage, Shawcross and Waldock disagreed. As for the effect of a decision against the innocence of the passage on the outcome of the case, the comment was: "Anybody's guess. The Court might think that laying mines without warning was excessive." The general appraisal of XCU was that it showed a primarily non-aggressive intention. The passage was not innocent, but was "nothing more than a peccadillo."

The conference considered what the Court could infer if XCU was not disclosed. It was unlikely to infer that a punitive expedition had misfired, because of the speed and formation used. The Court would not infer espionage as this would be the worst way of carrying it out. The Court could only infer negative consequences from previous and subsequent observation of the gun positions. It would see that the security considerations were really genuine, especially vis-à-vis the Russian judge. So non-disclosure would not lead to seriously damaging inferences.[40]

Nonetheless, under the rubric "Other considerations affecting disclosure of XCU", the conference left open the procedure already mentioned in the Admiralty minute, discussed above,[41] that the document XCU could be disclosed to the Court, with the deletions proposed. Finally,

[40] ADM 1/22704 Corfu Case, Notes of a Meeting held on 5 January 1949 re XCU.

[41] At footnote 34.

the conference enumerated, in opposition, Admiralty and Foreign Office considerations; disclosure might damage the reputation of the Royal Navy, while non-disclosure would be more consistent with previous attitudes; the Foreign Secretary might think that the obligation of honour to the Court should be set on the other side.[42]

The conclusions of the Solicitor General were written up and sent by the Law Officers' Department to the Admiralty on 7 January 1949. The Law Officers' Department informed the Admiralty that the Solicitor General had decided "from a purely legal point of view, it would be preferable to accept the risk entailed by non-disclosure of the Operation Order XCU to the certain harm of disclosure." There was a memorandum attached, prepared by the Solicitor General and agreed by the Attorney General.[43]

The memorandum asked whether "we ought as lawyers, advising from a purely legal standpoint" to recommend disclosure. While disclosure is "for the use of the Court", the presence of Slav judges means whatever is disclosed will probably become public property. The expression "from a purely legal point of view" was equivalent to "how the Court would take it". One must weigh serious prejudice that may result from failure to disclose from the undoubted harm of disclosure. From the purely legal point of view the balance was against disclosure.

The Solicitor General went on to consider issues "[...] apart from the purely legal aspect". Most importantly there was the reputation of Britain. It should be coming to the Court and putting its cards on the table. Soskice's views were very convoluted. As this was the stage at which he considered the significance of disclosure for the Court's understanding of the merits of Britain's case, it is necessary to quote him in full:

> "[...] No doubt there are documents which are so confidential that no state can be expected to produce them, but unfortunately in this case the document may be thought to be the vital document without which proof is impossible. Wider political implications are clearly involved. In the first place the possibility [...] cannot be ruled out that the Court may refuse to find in favour of the British claim on the general ground that it cannot be affirmatively satisfied of the 'innocence' of the British warships passage through the channel [...]. Furthermore, if by any chance the contents of

[42] Ibid.

[43] ADM 1/22704, Reed to Lang, 7 January 1949, Law Officers' Department to Admiralty.

> XCU should ever become discovered in any hostile quarter, it may be alleged that the British claim, if it succeeds, was enabled to do so by what is virtually a fraud in the Court. On the other hand, we would have thought that if XCU were disclosed, that part of it at least which seems to imply that a bombardment of up to an hour or over was in contemplation as at least a possibility, would profoundly shock public opinion abroad and also in many quarters at home. XCU also makes it clear that an aircraft carrier with a combat Air Force was to be available for support in the operation if necessary. It would clearly be disastrous if the claim were dismissed because a vital document was withheld. At the same time, we think that the danger of this is probably remote. The non-Slav members of the Court may understand a certain reluctance on our part to disclose to certain members of the Court a document which contains technical secrets (although of course this particular part of the document could be covered up or obliterated when shown to the Court). The reaction of the public at home also has to be taken into account. For ourselves we would have thought however that on balance more harm in the political sphere would come from disclosure than from non-production [...]."[44]

The Foreign Secretary responded on 8 January that he would bring the matter to the Cabinet Defence Committee.[45]

VI. Further and Final Exchanges involving the First Lord of the Admiralty, the Attorney General, the Lord Chancellor and the Prime Minister

Lang presented a memorandum to the First Lord to prepare him for the Defence Committee meeting. It included the minutes of the 5 January conference and the Solicitor General's memorandum. While not disagreeing with the latter, Lang commented that the Solicitor General made rather heavy weather of the threat of retaliatory action. Also the memorandum had ignored the possible damage to the reputation of the Royal Navy which could come with the publication of "some of the more flamboyant parts of the exercise memoranda". All of this pointed to "the expediency of continuing to withhold XCU from the Court".[46]

44 Ibid., Memorandum, Corfu Channel Case.
45 Ibid.
46 ADM 1/22704, Corfu Strait Incident.

In the preparatory work for the First Lord it is interesting to note how they understood the differences between legal and political considerations affecting the case. As a lay person, Synnott thought expediency rather than legal principles should determine the question which is better, production or non-production, to gain an favourable judgement of the two claims – precisely the issue that the lawyers were defining as the purely legal standpoint.[47]

The Court cannot be stopped from making deductions, but they will temper their deductions "[...] by recognition of the fact that, in spite of provocation greater than occurred in the May incident, the British ships did nothing warlike or retaliatory [...]". Also non-production is more consistent with previous behaviour, since nothing has happened to justify a change. Revelation of the reconnaissance action and "retaliatory action" will only explain the failure hitherto to produce the documents. Little credit will come from last minute and unwilling production of the documents in the way of the doctrine of maintaining the prestige of the Court, compared to the direct harm which will follow from the Court "[...] making substantially correct inferences concerning our previous reluctance to production [...]".[48]

Meanwhile, there was a further significant development among the lawyers, that was brought to the Prime Minister's attention on the morning of 11 January 1949, in preparation for his meeting with the Foreign Secretary in the afternoon. The Foreign Office sent to 10 Downing Street a copy of the Solicitor General's Memorandum to the Foreign Secretary. The latter had considered it in his meeting of 10 January with the Law Officers. More importantly, the Foreign Office also sent Beckett's minute of that meeting. The latter minute discloses that the First Lord was present with the two Law Officers. In addition the Lord Chancellor attended. The subject of the meeting was the above memorandum. The Law Officers endorsed the memorandum, while the Lord Chancellor disagreed. Beckett noted three points. The Lord Chancellor thought the documents did not disclose much more than was apparent without them, while there were bound to be adverse inferences from non-disclosure. What follows deserves to be quoted at length as it represents another view of "the purely legal aspect" of disclosure:

> "(2) The Court had shown full consideration for any security objections to disclosing the documents but had, by the Order

47 Ibid.

48 Ibid., Synnott, USS, 8 January.

> which they had made, indicated most clearly that they considered these orders were documents relevant to the case and should be disclosed. The Lord Chancellor considered that it was, from a general point of view, particularly unfortunate that the Government of the United Kingdom, of all Governments, should in such an event be the Government which refused to disclose a document, a refusal which he thought was contrary to the spirit of the whole of H.M.G.'s towards the Court.
>
> (3) The documents in fact were material to the case and from the point of view of pure honesty the Court should have them [...]."[49]

Despite these categorical words, to be found in the Prime Minister's files, the Prime Minister decided at his meeting with the Foreign Secretary on 11 January to adopt the course advocated by the First Lord. This was to be followed up with a further exchange of minutes between the Prime Minister and the First Lord.[50]

The First Lord finally took up Synnott's line of argument in his minute to the Prime Minister of 12 January. He decided, on advice from Lang, to make the best of the failure to advise of the squadron orders by expressing regret that the orders had not been produced earlier and that there might be place for a separate investigation of responsibility for this failure.[51] He followed Synnott's distinction between expediency and legal principle – which course, production or non-production of XCU, will gain a judgement favourable to Britain. He followed the rest of Synnott's minute *verbatim.*

The Prime Minister acknowledged the memorandum the same day and agreed that the document XCU should not be disclosed. He said a copy of his minute would go to the Foreign Secretary, the Lord Chancellor and the Attorney General.[52]

The Attorney General intervened in response to the Prime Minister's minute. He reported a discussion he had had with the Solicitor General about the pressure the Court might put on the latter to disclose the

[49] PREM 8/1312, Minute by W.E. Beckett, 10 January attached to Minute of Christopher McAlpine, Foreign Office, to J.L. Pumphrey, 10 Downing Street, 11 January 1949.

[50] PREM 8/1312, G.R. Prime Minister I.S., 12 January 1949.

[51] ADM 1/22704, Prime Minister, Corfu Strait Incident Hall, 12 January 1949; also Lang to First Lord, Timing of Albanian Counter Claim North Corfu Channel Incident, 12 January 1949.

[52] Ibid., C.R.A. to First Lord of the Admiralty.

document XCU. It might ask him "[...] to state, on his responsibility as Counsel, that there is nothing in the document which could possibly affect any issue in the case [...]". The Court might also say that, given the refusal to disclose the document, it could not regard it as affirmatively proved that the passage of the squadron had been innocent. In the light of this Shawcross asked for the Solicitor General to have the discretion to disclose the document to the Court, if in his view the situation "made disclosure of the document practically unavoidable [...]".[53]

The Prime Minister responded, the next day after consultation with the Foreign Secretary, that it was not possible to give such a wide discretion to the Solicitor General. "[...] The views of the Foreign Secretary, Minister of Defence, and the First Lord of the Admiralty are against disclosure after a careful consideration of all the factors [...]." If the contingencies mentioned by the Attorney General were to arise the Solicitor General should refer back for instruction.[54]

VII. Beckett's Final Presentation of the XCU Issue before the Court and his Post Mortem on the Case

It has not been the ambition here to place the British archival material on the disclosure of the documents XCU and XCU1 alongside the pleadings and decision of the Court, other than to explain the context of the Court's request and its own decision on the question of innocent passage of the fateful squadron. However, it is not without interest to note briefly the final presentation of oral argument to the Court by Beckett himself, and also his own printed conclusions, as they are preserved in the National Archive.

Beckett's closing speech to the Court made the following points concerning the "test" character of the passage. Orders were not to sail in a threatening fashion, that is, guns were "to be in fore and aft position". The Navy was also only to use the channel "when essential", "[...] in other words when the Commander in Chief had occasion to use it for some proper purpose [...]". The passage was both a test and the use of a convenient route. "[...] It was left to the Commander in Chief as to how and when this passage should be made [...]."[55] Beckett notes that there was dispute from Admiral Moullec that "it was not the true reason" that the squadron had simply used the channel as a route to rendezvous with the aircraft carrier Ocean and the destroyer Raider, carrying out exercises in

53 PREM 8/1312, Hartley Shawcross to Prime Minister, 13 January 1949.
54 PREM, Person and Secret, CRA to Sir Hartley Shawcross, 14 January 1949.
55 ADM 116/5758, Closing Addresses to the Court, at p. 96.

the Adriatic. Beckett comments that such is only Admiral Moullec's opinion "[...] and not within the competence of a Naval expert to express. The Autumn cruises of the fleet are not pleasure cruises but exercises for training crews. In using this channel the Commander in Chief used the shortest route from Corfu to the rendezvous in the open sea [...]."[56]

Beckett then stated that the Court was now in possession of all the factors relating to the passage of 22 October. They have not got XCU. This abbreviation stands for "exercise Corfu". It was called exercise not operation. The document contains secret matter relating to Naval procedure which all navies have. It was recognised that legitimate grounds to refuse to submit a document may exist. The Court may make inferences from non-disclosure, but these must be consistent with the rest of the evidence. For instance it is legitimate to assume that XCU contains references with respect to gun positions,

> "[...] but it is not legitimate to infer ulterior motives such as have been insinuated by Professor Cot.
>
> THESE ORDERS OR OPERATIONAL ORDERS PRESCRIBE ACTION WHICH MIGHT HAVE TO BE TAKEN IN CERTAIN EVENTUALITIES, I.E. IF THE SHIPS WERE FIRED AT FROM THE SHORE, AND I SUBMIT THEY ARE NOT RELEVANT TO THIS QUESTION AT ALL.
>
> On the issue of innocent passage, the burden of proof is on our opponents to show it was not innocent. The question is what did our ships do, not what might they have done. Did the squadron do any act prejudicial to Albanian security.
>
> When a passage has taken place and no guns have fired is it relevant what, if any, orders about firing in certain eventualities may have been given? It may be, but I do not agree it to be permissible to enquire into the motive of the passage. But we have fully and frankly placed before the Court documents which bear upon this, namely the Admiralty telegrams. It should not therefore be inferred against us that XCU contained anything inconsistent with these telegrams [...]."[57]

56 Ibid.

57 Ibid., at p. 97.

Beckett accepts that deliberate reconnaissance of coastal defences by a ship is not allowed, but reconnaissance was not made, as Admiral Moullec says, "because of the orders XCU, which are military orders". Observations were not made until after the SAUMAREZ was mined, and the naval officer looked around to see where the trouble was coming from "[...] from positions he had been warned about in XCU. There was nothing in XCU ordering ships to engage in any such reconnaissance [...]".[58]

Beckett noted allegations were made "[...] that our ships had orders to do something more than fire back [...]. Further, after the two destroyers had been blown up and hostile action was suspected the two large cruisers took no offensive action. If there had been anything in XCU about offensive action they would have carried it out then [...]."[59]

With respect to XCU and innocent passage Beckett came to say by way of conclusion:

> "[...] Assuming we had a right to this passage and during our passage the Albanians had taken no steps to molest us to let us through, surely it could not be said that such a passage was other than innocent. Then surely it must follow that the passage was innocent even if Albania did molest us during the passage. This must be so because the innocence of the passage cannot depend on whether Albania harboured such an intention or not.
>
> Our ships made the passage through the channel and in spite of the mining of two destroyers we took no hostile action against Albania. XCU cannot have contained any instructions which would authorise anything except the whole peaceful passage through the straits [...]."[60]

In his final report on the case, Beckett, as the Agent on the Corfu case, made a few remarks about the XCU aspect of the case. Most of his report simply sets out what the Court said. In particular the decision about the innocent passage of the squadron allowed that Britain asserted its right in a reasonable manner, in the circumstances. The Court assumed that the main purpose of the voyage in October had been to assert a right that had been denied the previous May. The Court saw this as the real object and did not seem interested in British arguments that there were additional

58 Ibid.
59 Ibid.
60 Ibid., at p. 98.

reasons for the passage, viz., the desire to meet other ships on manoeuvres in the area.[61] As for the XCU document:

> "[...] Although they had called for the production of XCU, they did not at all criticise its non-production on the grounds of naval secrecy. Further, they refused to draw any adverse inferences from its non-production which would be inconsistent with the other facts which had been proved before them, and in particular the conduct of our ships on 22nd October before and after they were mined [...]."[62]

CONCLUSION

The British Administration clearly considered the issue of production of the XCU document to be of capital importance. The Law Officers, the Foreign Office and the Admiralty debated it intensely for about three months. The Foreign Secretary, the First Lord of the Admiralty, the Lord Chancellor and the Prime Minister were engaged. The Prime Minister was the person who took the final decision. In other words the issue could not have been taken more seriously. However, the outcome was never in any doubt. It was assumed the document could be safely concealed and the question was considered, pragmatically or expediently, what would happen if that course was taken.

Shawcross seriously wrestled with the idea of disclosure and ensured that it would become an issue within the British administration. However, even he considered that the option "my country, right or wrong, my country" was inevitable. Beckett became impatient with him, partially because of Shawcross's indecisiveness, but also because he, Beckett, simply wanted to win the case. The Lord Chancellor made a last minute, categorical demand that the XCU document be disclosed, but he appears not to have been part of the final decision-making. This was by the Defence Committee of the Cabinet, consisting of the Prime Minister, the Defence Minister, the Foreign Secretary and the First Lord of Admiralty.

The Admiralty could not really accept that they ever had any seriously hostile intent towards Albania, which would rob the squadron's passage of its innocent character. They mounted an impressive philosophical argument that the actions of the squadron, *taken as an action of the Royal Navy, which was implementing agreed national policy,* were not legally questionable.

61 LCO 2/4515, Report by the Agent on the Corfu case, Confidential Print, p. 5.
62 Ibid., p. 5.

However, the fact remained: the rule of law meant it was for the Court to make the final determination of the character of the Royal Navy's actions in the light of all the relevant documents, which had to include the document XCU. The lawyers, particularly the Law Officers, and above all the Lord Chancellor, could see that. However, it is the lawyers who were not prepared to insist on that point, to fight their corner with any consistency. The lawyers' own definition of their legal responsibility – and this was most marked in the case of Beckett, the Foreign Office Legal Advisor – was to judge what tactics would most likely win the case. This they defined as the purely legal standpoint. It is ironical that the Admiralty defined that same question as one of expediency. The Admiralty was much more resolute about the course of action which it wanted to see followed. It prevailed with the Prime Minister.

The Admiralty's cool assessment of how the Court would judge the Royal Navy's actions, in the absence of disclosure of XCU, was justified. It must have been helped by Beckett's final speech to the Court, which was, at the very least, economical with the truth about the XCU document. In my view Beckett went as far as to mislead the Court about the probable contents of the document. It does appear that the *ethos* of the profession of international lawyer was not as strong as either the call of national loyalty or the ambition of the barrister simply to win a case.

PUBLIC RECORD OFFICE

Ref.: ADM 1 22704

No. 0321/13 5th October, 1946.

MEMORANDUM.

THE USE OF THE NORTH CHANNEL, CORFU
(Short Title XCU)

References. Chart No. 206
Map 1/100000 GREECE. Sheet Z2. KERKIRA.
Map 1/50000 ALBANIA. Sheet 26 (iv). SARANDA
Air photographs.
C.B. 1806 (D) (11/43).

On 15th May 1946 while I was approaching CORFU ROADS by the North Channel in H.M.S. ORION with H.M.S. SUPERB in company, the squadron was fired on by unseen batteries on the Albania Shore in the vicinity of PORTO EDDA (SARANDE).

2. Since that date action has been proceeding through diplomatic channels and the Albanian Government have been informed that His Majesty's Government insist on their right to use the North Channel for the passage of H.M. Ships without prior notification being given to the Albanian authorities. The Albanian Government have also been informed that in the event of H.M. Ships being fired on again, fire will be returned.

3. It has been decided to test the Albanian reactions to the above diplomatic notes by making use of the North Channel, Corfu, on 22nd October 1946 for the passage of H.M. Ships MAURITIUS, LEANDER, SAUMAREZ and VOLAGE from Corfu to Argostoli. H.M.S. OCEAN will be in the offing so that air spotting will be available if required. The Commander-in-Chief Mediterranean will adjust the programmes of H.M. Ships LEANDER, OCEAN and RAIDER accordingly.

4. It is my intention to sail from Corfu Roads p.m. on 22nd October with the two cruisers and the two destroyers and follow Medri route 18/34 through the North Channel. Hands are to be at Action Stations with the armament at short notice to open fire but all the armament is to be kept trained and layed in the normal securing positions unless and until the Albanian batteries open fire. The number of men in exposed positions is to be reduced to the minimum essential. Cruisers are to wear ten breadth ensigns and destroyers eight breadth ensigns at the ensign staffs.

5. Two spotting aircraft from H.M.S. OCEAN are to be airborne and in W/T touch with H.M.Ships but these aircraft are to remain out of sight of Albanian territory and territorial waters until ordered to close. H.M. Ships OCEAN and RAIDER will be to the westward of Corfu.

6. Further instructions will be given regarding the tactics to be followed if the Albanian batteries open fire but the following information is promulgated now:–

(a) Minefields.

The area in which ships can operate is restricted by QBY 257 and 539. All known minefields in QBY 539 are SOUTH of Latitude 39°49' North but the northern portion of this QBY is not to be entered except in emergency. As regards QBY 257, ships may operate in that portion bounded by a line joining:-

(i) SCOTENI point on MERLERA.
(ii) 39° 54' 6" North: 19° 53' 30" East.
(iii) 39° 49' 36" North: 19° 51' 0" East.

The minefield shown on plan 1013 of C.B. 1806 (D) (11/43) in Sarande Bay can be disregarded.

(b) Gun positions and air photographs.

No guns or gunflashes could be seen on 15th May. Fire was opened as H.M. ships were turning in Medri route 18/34 to a southerly course off DENTA point and continued until ships appeared to be out of range off MARCHETTA rock. Calibre of gun believed not to exceed 4-inch. Subsequently air photographs of the whole area were obtained. The most likely positions for the guns and the P.R.U. observer's comments are as follows:-

(i) MR 315795. 4 gun CD position. Two emplacements occupied by possible guns under covers.
(ii) MR 337795. Signs of considerable fresh activity, trenching etc., but no CD guns visible.
(iii) MR 344800. Possible occupied 4-gun L.A.A. position
(iv) MR 304800 and 307797. Unoccupied position with much trenching, probably fairly new. No guns visible, no large emplacements.
(v) MR 333763. 4-gun CD position – unoccupied. No activity.

The positions at (i) and (ii) seem the most probable.

7. This memorandum is classified TOP SECRET as it is essential that our intention should not become known to the Greeks particularly in Corfu. Commanding Officers addressed may communicate the contents of this memorandum to those officers who will be required to plan the operation, and when it becomes essential to make further preparations it is suggested that they should be disguised as preparations for a full calibre firing on the passage to Argostoli.

H.R.G. KINAHAN
Rear-Admiral Commanding
First Cruiser Squadron.

Distribution

The Commanding Officers, H.M. Ships MAURITIUS, LEANDER and OCEAN.
The Captain (D), 3rd Destroyer Flotilla.

Copies to:

The Commander-in-Chief, Mediterranean Station (afloat)
The Commander-in-Chief, Mediterranean Station, (Malta).

PUBLIC RECORD OFFICE

Ref.: ADM 1 22704

Enclosure No. One to Mediterranean Letter
N°. 1947/516/3/10 dated 1st October 1948

TOP SECRET

H.M.S. MAURITIUS at Famagusta,
13th October, 1946.

N°. 0321/13

MEMORANDUM

XCU ONE - PLAN OF OPERATIONS
(Further memorandum XCU dated 5th October, 1946) Tab A

PRELIMINARY MOVEMENTS

(a) Ships taking part will be organised in three groups:–

Group I	–	H.M. Ships MAURITIUS and SAUMAREZ
Group II	–	H.M. Ships LEANDER and VOLAGE
Groupe III	–	H.M. Ships OCEAN and RAIDER

(b) Groups I and II leave Corfu reads p.m. 22nd October and proceed northwards in MEDRI route 18/34(b). Speed: 10 knots, interval between groups: 2 miles.

2. (a) The Rear-Admiral Commanding First Cruiser Squadron will inform H.M.S. OCEAN of his intended time of sailing from Corfu. H.M.S. OCEAN is to sail from Githian so as to be in position S.W. of Corfu at that time.

(b) One spotting aircraft for each cruiser is to be airborne when Groups I and II leave Corfu roads but is to remain at least 10 miles from the Albanian coast in the area between MEHLERA Island and Cape Drasti until ordered to close by the Rear-Admiral Commanding First Cruiser Squadron.

RESTRICTIONS

3. (a) It is emphasised that we must take NO action against the Albanian faroes unless and until they commit a hostile act.

(b) Every endeavour must be made to avoid damage to civilian property. Opening salvoes must be directed well clear of the village and the process of ranging is to be carried out as if "danger to the troops" existed in the village.

METHOD

4. (a) Ships

(a) A.F.C.T. is to be started in the vicinity of BARCHETTA rock but all armament is to remain in the normal securing position unless and until the Albanian batteries open fire.

(b) Lockouts are to be organised so that all likely Albanian gun positions are under constant watch throughout the passage of the channel.

(c) If the Albanian batteries take no action Groups I and II will turn to the westward off Cape Kiephali and proceed to Angostoli.

(d) If the Albanian batteries open fire Group I is to operate North of QBY 539 and East of QBY 257. Group II is to operate in MEDRI route 18/34 South of DENTA point, except when turning.

Cruisers are to open fire on the gun positions as soon as they can be located, using air spotting.

(e) Destroyers are to be prepared to carry out direct bombardment if ordered to do so.

(f) Cruisers are to operate their W.A. Radar from the time of leaving Corfu until ordered by the Rear-Admiral Commanding First Cruiser Squadron.

5. Aircraft

(a) Spotting aircraft are to class the cruisers when ordered to do so by the Rear-Admiral Commanding First Cruiser Squadron. Unless the gun positions are pointed out to them they are to carry out a reconnaissance over the KARANIE district at a safe height.

(b) There are likely to be A.A. guns in the area and the presence of Albanian fighters cannot be ruled out.

(c) H.M.S. OCEAN is to operate a Combat Air Patrol in her vicinity throughout the operation and until our forces are well clear of the Albanian coast.

DURATION OF THE OPERATION

6. Should the Albanian guns open fire it is hoped that retaliatory action will be completed within an hour.

TARGET IDENTIFICATION

7. Five known targets are given in paragraph 6(b) of my memorandum XCU (No. 0321/13 of 5th October, 1946). Tab A.

They are to be identified by the numbers one to five given to them in that paragraph. Further targets are to be numbered in sequence.

COMMUNICATIONS

8. (a) Air Spotting

(i) Ship	Call Sign	Spotting Aircraft Call Sign	Frequency
MAURITIUS	King 1	Able 1	144 mo/s
SPARE	"	Able 2	124 mo/s
LEANDER	King 3	Able 3	130 mo/s
OCEAN	"	Able 0	All three

(ii) Ships are to set watch on their appropriate spotting waves and establish communication with their aircraft on sailing (see paragraph 2(a)).

(b) Inter-communication

(i) Manoeuvring waves are as follows:-

Group I	–	72.5 mo/s
Group II	–	65.34 mo/s
Group III	–	65.74 mo/s

Watch on these waves is to be ordered by the Senior Officers of Groups.

(ii) Force Wave.

Senior Officers of Groups are to detail a guard on force wave (4205 kc/s WH/T). Watch is to be set and communication established at 0800H 22nd October.

TOP SECRET

(iii) Shadowing Wave.
Should communication not be established at 0800H 22nd October on Force wave or should communication on Force wave fail, Senior Officers of Groups are at once to set watch on shadowing wave (230 kc/s).

(c) Area Broadcast
Ships are to read their own "M" or "MD" series as appropriate.

(d) C.A.P. Communications

(i) Cruisers of groups I and II are to set watch on 124 mo/s, and be prepared to direct fighters of the C.A.P. from the time of sailing (see paragraph 2(a)).

(ii) Call signs. Ships to use their own. C.A.P. aircraft as appropriate.

(e) Inter-force air wave
Senior Officers of Groups are to set watch and establish communication on Inter-force air wave (4000 kc/s) on sailing (see paragraph 2(a)).

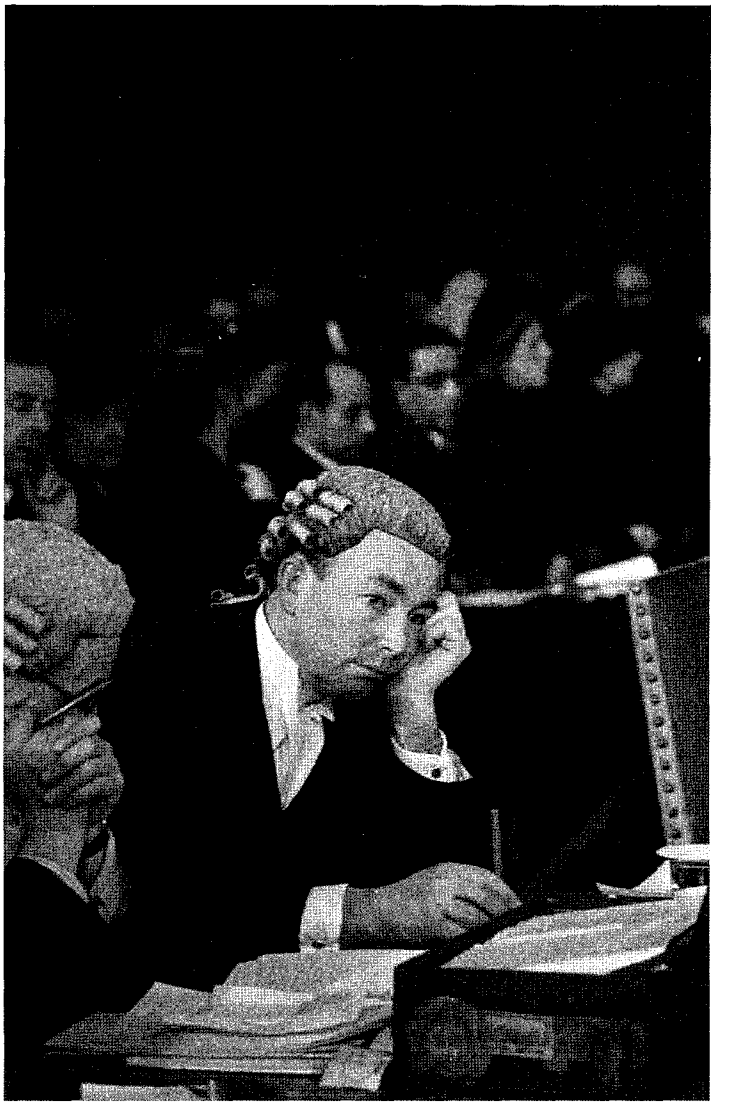
(f) At 1000B on 22nd October H.M.S. OCEAN will fly off an aircraft to test spotting frequencies with the cruisers at Corfu.

REAR-ADMIRAL COMMANDING
FIRST CRUISER SQUADRON

Distribution
The Commanding Officers, H.M. Ships MAURITIUS and LEANDER
The Commanding Officer, H.M.S. OCEAN (with an additional copy for supply to H.M.S. RAIDER).
The Captain (D), 3rd Destroyer Flotilla (with an additional copy for supply to H.M.S. VOLAGE)
(Copies to: The Commander-in-Chief, Mediterranean Station (Afloat)
The Commander-in-Chief, Mediterranean Station (Malta).

I certify that this paper has been in the custody of the Commander-in-Chief Mediterranean Station since its receipt and has suffered no alteration.

1st October 1948 for ADMIRAL



Shawcross at the Hague Court in 1948: "[...] Parties to litigation are not entitled to use merely those documents which they think will assist their case and to suppress others which are inimical to it. [...] As it is, we retain great misgiving about the propriety of what is being done, which we can only justify on the principle 'my country [...] right or wrong my country'." Hartley Shawcross to Prime Minister, 3 November 1948, ADM 1/22504. Getty Images / Hulton Archive.