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International Right of Innocent Passage v State's Right of Non-Intervention: A Look Back at the Watershed Corfu Channel Case

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In an age where the world seems to be on the brink of warfare and international turmoil, it becomes useful to peruse the precedents on international relations through the years. The subject matter of this study is the first case heard by the International Court of Justice after its establishment in 1945. The case of The United Kingdom of Great Britain and Northern Ireland v People's Republic of Albania, famously known as the 'Corfu Channel Case' of the year 1949 appears to be one of contemporary importance as it looks into matters of jurisdiction, non-intervention, equity, and the right of innocent passage. The proceedings in this case were initiated by The United Kingdom against Albania over explosions damaging its vessels and crew which occurred while they were passing through the Corfu Channel falling within the territorial control of Albania. The UK accused Albania of violating their right of innocent passage in peacetime, recognized by the principles of international law. This research report focuses on the facts and legal principles discussed in this case and further analyzes its outcome and impact.

Keywords: *corfu channel, non-intervention, Britain, Albania, international law.*

TIMELINE

On 22 October 1946, several British Vessels were passing through the Corfu Channel when violent explosions occurred, resulting in substantial damage to life and property. Following this,

in November 1946, in a spirit of vengeance, British and Allied Warships carried out mine-clearing operations in the channel showing flagrant disregard for Albanian Sovereignty. The issue concerning this incident was originally raised by the UK on May 22, 1947 before the United Nations Security Council which recommended it to be heard by the International Court of Justice where it was finally heard and decided in a series of three judgments, concluding on December 15, 1949 .

CAUSE OF ACTION

The fact-matter of this case¹ arose in 1946, out of explosions of mines by which two British Warships (*Saumarez and Volage*) suffered damage while passing through the Corfu Channel in 1946. A total of forty-four crew members were killed and forty-two were injured. The Allied Forces thereafter, conducted mine-clearing operations in the channel without the consent of Albania. The UK moved proceedings on May 22nd, 1947, and accused Albania of having laid or allowed a third state to lay the mines after minesweeping operations had been carried out by the Allied Naval Authorities.

QUESTIONS IN ISSUE

1. Whether Albania was responsible for the damage to life and vessels belonging to the UK resulting from the explosions of mines on 22 October 1946.

Albania, by majority decision, was held not complicit, but negligent for the reason that it:

- Should have known about activities being carried out on its soil,
- Should have warned any ships passing through that channel of the danger, and
- Should have made efforts to penalize the wrongdoers.

2. Whether the British Naval Forces had violated Albanian sovereignty by carrying out mine clearing operations in the territorial waters of Albania, after the incident of 22 October 1946?

The court held:

¹ *United Kingdom v Albania* [1949] ICJ Rep 244

- By majority decision, Britain was not in violation of Albanian sovereignty in its act of passing through the Corfu Channel as it had the customary right of innocent passage, and
- By unanimous decision, the British Naval Forces were guilty of illegal intervention after the explosions when, in a vengeful manner, it carried out the mine-sweeping exercise in the channel.

JURISDICTION (PRELIMINARY OBJECTION)

Albania, at the initial stages of the proceedings, objected to the jurisdiction of ICJ over this matter.² According to the UN Charter,³ a non-member state is not bound to subject itself to the jurisdiction of the ICJ unless it submits to it voluntarily. Albania argued that since it was not a member of the UN at that time, and it had not expressly agreed to submit this matter to the ICJ under Section 36 of the UN Charter, which lays down ‘The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.’⁴, it was out of the competence of the ICJ to hear this case as for Section 36 to apply, both nation-parties had to expressly subject themselves to the jurisdiction of ICJ, and Albania, had not done so.⁵

Further, it was contended that the communication by the Security Council ‘that the United Kingdom and Albanian Governments **should** immediately refer the matter to the International Court of Justice in accordance with the statute of the court’⁶ was merely a recommendation and not a binding order. However, the ICJ, in its first ruling, fifteen to one overruled this objection by stating that Albania had voluntarily submitted itself to ICJ’s jurisdiction *qua* communication dated July 2nd, 1947, wherein it had expressly consented to submit this matter to ICJ.

² International Court of Justice, *Documents of the written proceedings* (1950)

³ Charter of the United Nations 1945, art 92

⁴ United Nations Charter 1945, art 36

⁵ Harding F. Bancroft and Eric Stein ‘The Corfu Channel Case: Judgment on the Preliminary Objection’ (1949) 1(4) *Stanford Law Review* <<https://www.jstor.org/stable/1226351>> accessed 23 September 2023

⁶ ‘International Court of Justice. The Corfu Channel Case’ (1948) 2(1) *The International Law Quarterly* <<https://www.jstor.org/stable/763118>> accessed 23 September 2023

The one dissenting opinion was given by Dr. Igor Daxner, Albanian Judge *ad hoc* who examined the historic use of the term 'recommend' and held that it did not have an authoritative effect, but an advisory one.⁷ Therefore, it can be logically concluded that if a state wishes to contend the jurisdiction of the ICJ, or any other international tribunal for that matter, it must make its non-submission clear, in unmistakable terms, and at the earliest possible time.

PRINCIPLE OF STATE RESPONSIBILITY AND COMPLICITY

The UK accused Albania of having laid mines in the waters with the ill intent of causing harm to vessels passing through the channel. Having submitted the fact of state sovereignty of Albania over the channel, the UK stated that it was not possible that another state could have laid the mines without Albania's knowledge.

The court was thus, faced with a question:

- Whether Albania was directly responsible for the damage (Responsibility), or
- Albania had allowed Yugoslavia to lay the mines there (Complicity), or
- Albania had been negligent in being ignorant about acts being done on its territory (negligence).

The court by a vote of 11 to 5 held Albania guilty of negligence stating that it ought to have known the activities taking place on its soil. Further stating that it had failed to warn other ships passing through that channel and to make efforts to punish the wrongdoers.

However, in light of established legal principles, to establish direct responsibility, or complicity for that matter, Albania's guilt had to be proved **beyond any reasonable doubt**, which it was not. The Soviet Judge Krylov dissented from the bench on this matter and stated that the state cannot be condemned on a grave charge as this one, merely based on probabilities⁸ and this in today's context appears to be a more accurate view of the matter.

⁷ Manley O. Hudson, 'The Corfu Channel Case: Significance of First Ruling by Present Court' (1948) 34(6) American Bar Association Journal <<https://www.jstor.org/stable/25716451>> accessed 23 September 2023

⁸ Quincy Wright, 'The Corfu Channel Case' (1948) 43(3) The American Journal of International Law <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/corfu-channel-case/0EC67FF2DD96DF857ECE09C2B7BD5396>> accessed 23 September 2023

THE LAW OF THE SEA

While studying this case, one has to analyze the facets of intervention by one state into the sovereignty of another. The court thought that although the passing of ships on October 22, 1945, was not an act of intervention, the subsequent mine-clearing operations carried out by the Allied nations certainly constituted one.

DOCTRINE OF INNOCENT PASSAGE VS DOCTRINE OF NON-INTERVENTION

It can be inferred that a vessel carrying the flag of a nation in peacetime, **as a matter of customary right**⁹, is to be allowed the **‘the right of innocent passage’** from the straits and waterways within the territorial jurisdiction of another state for navigation without the prior consent of that state. However, the extension of this right by carrying out operations such as the mine-clearing done by the British and Allied Forces is not permissible without the consent of Albania and is an encroachment upon its sovereignty. Thus, the ICJ unanimously held the UK guilty of intervention in Albanian sovereignty.¹⁰

This case had a deep bearing upon similar cases that followed, especially in the areas of the doctrine of innocent passage, and the law of the sea. The behavioral rules for persons and vessels on the high seas are largely framed by customary rules of mutual respect and tolerance. One of these rules is the right of innocent passage, which allows ships to pass through another state’s waters without prior consent. This rule was interpreted in this case at length. Also, the extent to which this rule can be stretched was examined. The outcome, as stated earlier was largely in favor of safeguarding the right to innocent passage. The term ‘Innocent Passage’ is defined under international law as referring to a ship or aircraft’s right to enter and pass through another’s territory so long as it is not prejudicial to the peace, good order, or security of the other side. Therefore, it remains to be seen what constitutes an ‘innocent’ passage, and when a passage ceases to be innocent. If a state has recently been in direct combative conflict with another, do the ships belonging to the recent enemy nation have the right to innocent passage? If yes, then does that not create an interference or even invasion risk for the home state? The law of the sea

⁹ *Ibid*

¹⁰ International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (1949)

still has gaping holes; however, this case was instrumental in laying its foundations in the ICJ's rulings.

HUMAN RIGHTS CONSIDERATIONS

This was also one of the first international cases wherein human rights were allowed to influence the decision substantially. This verdict was a departure from stringent rules of procedure. Rules of **equity** drove the trial and evidentiary rules were relaxed where circumstances warranted such relaxation. Not only Albania was accused of laying mines, but Britain was also tried for the allegations of extra-legal intervention.

Judge Alvarez, one of the judges on the bench, while giving his concurring judgment stated that international law was entering into a new era, and several changes would need to be made to make 'a new international law' to fit the emerging global scenario where archaic rules of justice administration are not practicable.

CIRCUMSTANTIAL EVIDENCE

Since a country holds near absolute internal sovereignty over its territory, it becomes practically impossible for the victim state in a matter like this to implicate the accused state through direct evidence. This issue was also discussed by the ICJ and it was observed, *'The fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. Because of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to **inferences of fact and circumstantial evidence.**'*¹¹

Therefore, this case set a precedent to the effect that where it is unreasonably difficult for a state to furnish direct proof of a certain incident, circumstantial proof would be admissible if it 'forms a continuous and conclusive chain to clarify only one determination.' It can be seen that by admitting such evidence, the burden of proof was shifted from the accuser to the accused,

¹¹ *United Kingdom v Albania* [1949] ICJ Rep 244

reversing the presumption of innocence. Subsequently, such admission of circumstantial evidence became a trend in the ICJ.

QUANTUM OF COMPENSATION

The Albanian side contended the jurisdiction of the ICJ to determine damages and therefore, absented its representation from the hearings relating to compensation. The court while declaring itself competent to do so, fixed the quantum of **monetary compensation** at **£843,947/- due to Britain**.¹² After this amount was determined, Albania sought to re-establish its representation in the court to present its counterclaims. However, this request was denied by the ICJ citing continued disregard of the proceedings by Albania.

It is therefore clear that the quantum of damages was determined and declared **ex-parte** despite the willingness shown by the Albanian side to represent itself. It is an established principle of jurisprudence that an order to the detriment of one party is not passed in that party's absence, and without giving that party a reasonable **right of being heard**. However, this principle was overridden in this case, which is erroneous, incorrect, and repugnant to the basic rights of the accused party.

FIRST RULING AFTER WORLD WAR II

This judgment of the ICJ was especially significant as it was the first time that an international tribunal had heard, tried, and decided a case, after eight years of complete dishevelment of Public International Law during WWII.¹³ It was to be seen what influence would the war have on international justice administration, and whether there would be a shift of bias towards the victor states.

For the substantial part of this case, the interests of both states were fairly weighed against each other, and the verdict was determined in keeping with the principles of natural justice.

¹² William W. Bishop, 'The Corfu Channel Case (Assessment of the Amount of Compensation)' (1950) 44(3) *The American Journal of International Law* <<https://doi.org/10.2307/2194039>> accessed 23 September 2023

¹³ 'International Court of Justice. The Corfu Channel Case' (1948) 2(1) *The International Law Quarterly* <<https://www.jstor.org/stable/763118>> accessed 23 September 2023

However, in some instances, it would seem that procedural aspects of the proceedings had been relaxed in favor of the UK, and tightened against Albania.

ENVIRONMENTAL CONCERNS

The importance that is attached to environmental issues was not the norm in the age where this case belongs. However, environmental concerns arising from spontaneous explosions in the sea were also addressed herein.

USE OF FORCE

The question concerning Britain's intent behind the minesweeping activities was decided as well. Justice Krylov, the Soviet Judge on the Bench also observed that these operations were carried out to show intimidation towards Albania, to make it known that the Allied Forces could use force to overthrow the Albanian side if needed. Use of force by states against each other, in peace times, is *inter alia* undoubtedly an act against internal sovereignty. A state which is territorially, and financially stronger than another cannot be permitted to use systematic threats against another relatively weaker state, as that would be an absolute violation of the principle of equity.

NON-COMPLIANCE BY ALBANIA

As stated earlier, the court awarded **£843,947/- due to Britain** in its final judgment on merits. However, Albania renewed its stance that the ICJ lacked jurisdiction to award damages, and citing this reason, refused to pay the outstanding amount. On May 8th, 1992, in a settlement agreement, Britain agreed to grant Albania 1,574 KG of Contentious Nazi Gold recovered from Rome, and Albania agreed to pay Britain \$2 Million. This settlement was finally approved in 1996 when socialism came to an end in Albania.¹⁴

CONCLUSION

This case is one of great significance as it was the first of any kind to be decided in the International Court of Justice since its inception in 1945. The questions raised against its

¹⁴ Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* (4th edn, Leiden 2005)

jurisdiction clarified when ICJ may try a case, and when it may not. The proceedings were largely chaotic, and laced with undertones of sovereigns looking to overdo each other, in a trial aimed towards laying down the fine line distinguishing territorial control from territorial tyranny. Three separate judgments were given in this case. The first, overturning Albania's preliminary objection against jurisdiction, the second, on the merits, and the third, deciding the quantum of compensation. Though it has been known that the ICJ does not follow the principle of precedent, as every case varies in its facts and circumstances, this case has nonetheless become a guiding light for other such cases relating to the law of the sea, circumstantial evidence, and jurisdiction.