

THE CORFU CHANNEL CASE: THE PRELIMINARY OBJECTION OF ALBANIA

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Although the International Court of Justice has not as yet dealt with the merits of the United Kingdom's claim against Albania in the Corfu Channel case, it will be useful perhaps to study the Court's decision upon the Preliminary Objection raised by Albania because of (a) the dramatic facts of the case, (b) the international legal issues involved, and (c) the political implications of the judgment. The interest of the legal profession in Canada in the case is all the greater because of the part played by the Bench and Bar in Canada in drafting the Statute of the Court and the presence of a Canadian judge on the tribunal.

The Facts

As part of the task of removing the mines laid in European waters during the recent war, British mine-sweepers in 1944 and 1945 swept or searched the North Corfu Channel, part of which lies within Albanian territorial waters, without objection from the Albanian Government. In November 1945 the Governments of the U.S.S.R., the United States, the United Kingdom and France agreed to co-ordinate their mine-sweeping forces and established the International Central Mine Clearance Board. As Albania possessed no mine-sweepers, the Albanian Government did not participate in this work, although it was regularly informed of the area swept, which included Albanian territorial waters. The Corfu Channel, having thus been opened to navigation, was utilized by the shipping of many nations without hindrance from Albania or Greece, the territorial powers concerned.

On May 15th, 1946, two British cruisers passing through the swept channel were fired upon by Albanian batteries, although no damage was caused. The United Kingdom Government protested to the Albanian Government against what it regarded as "a deliberate and outrageous breach of international law and maritime custom", and requested an apology and assurance that the persons responsible would be punished. The Albanian Government's reply was unsatisfactory to the United Kingdom Government, since *inter alia* it was based on the assumption that foreign warships have no right to pass through an inter-

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national strait, part of which is included in territorial waters. In the ensuing exchange of communications, the Albanian Government stated that it was not the intention to attack British ships or to interfere with navigation in the Corfu Straits, provided shipping did not enter Albanian waters without permission or show aggressive intent. The United Kingdom asserted its refusal to recognize any right to demand prior notification of passage through the Strait.

On October 22nd, 1946, two British destroyers passing through the swept channel struck mines which caused serious damage to the two ships and loss of the lives of forty-four sailors. Five days later the United Kingdom Government informed the Albanian Government of its intention to sweep the channel, whereupon the Albanian Government protested to the Secretary General of the United Nations against what it termed "the violation of territorial waters" and "provocative incursion" by British warships. On November 12th and 13th the sweeping operation was carried out and twenty-two mines were cut. Upon examination it appeared that the mines were of German manufacture and had been laid very recently. In the opinion of the United Kingdom Government, "it is certain that no mine-field could have been laid in the channel within a few hundred yards of the Albanian batteries without the connivance or at least the knowledge of the Albanian authorities" and that consequently "the Albanian Government either laid the mine-field in question or knew that it had been laid" and "has thus committed a flagrant breach of international law". Under Articles 3 and 4 of the Eighth Hague Convention of 1907, any government laying mines in wartime, and *a fortiori* in peace, is bound to notify the danger zones to the governments of all countries. No such public notification was made by the Albanian Government.

The United Kingdom Government thereupon demanded: (1) an apology for the attacks on British warships, (2) assurance that there will be no repetition of this unlawful action, and (3) reparation for the damage suffered by the destroyers and compensation for loss of life. No satisfaction was obtained from the Government of Albania.

Submission to the Security Council

The United Kingdom Government decided therefore to submit the matter to the Security Council of the United Nations. Since Albania was not a member, the Security Council, in accordance with Article 32 of the Charter, decided to invite

the Albanian Government to participate, without vote, in the proceedings with regard to this dispute, on condition that Albania should accept all the obligations which a member of the United Nations would have to assume in a similar case. The Albanian Government accepted the Security Council's decision and appointed a special representative to the Council.

The matter was subsequently discussed at a series of meetings of the Security Council and, at a meeting held on March 25th, 1947, seven States voted in favour of a resolution to the effect that the mine-field which had caused serious injury to two of His Majesty's ships with loss of life and injury to their crews could not have been laid without the knowledge of the Albanian authorities. Two States, Poland and the U.S.S.R., voted against the resolution and Syria abstained, while the United Kingdom and Albania, the parties in interest, did not have a vote. This resolution, having failed to obtain the concurring vote of one of the five permanent members of the Council, was under Article 27 of the Charter ineffective. At a later meeting of the Security Council on April 9th a resolution was passed recommending "that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court".

Procedure

In conformity with the Security Council recommendation, the Government of the United Kingdom on May 13th referred the dispute to the Court by an application under Articles 36 (1) and 40 (1) of the Statute of the Court. In the Application it was contended that the Court had jurisdiction under Article 36(1), as being a matter specially provided for in the Charter of the United Nations, on the grounds (a) that the Security Council recommended its reference to the Court; (b) that the Albanian Government accepted the invitation of the Security Council to participate in the discussion of the dispute on the condition of accepting all the obligations a member of the United Nations would have to assume in a similar case; and (c) that Article 25 of the Charter provides that the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter.

The Albanian Government itself took no steps to refer the dispute to the Court, but, by letter of July 2nd, 1947, to the Registrar, acknowledged receipt of the United Kingdom appli-

cation and, in reply, addressed a statement to the Court to the following effect:

(1) The United Kingdom Government did not comply with the Security Council's recommendation that the Governments refer the dispute to the Court, because it acted by a unilateral application in the absence of an acceptance by Albania of Article 36 of the Court's Statute or of any other instrument of international law whereby the Albanian Government might have accepted the compulsory jurisdiction of the Court.

(2) The United Kingdom is in error in attempting to justify this proceeding by invoking Article 25 of the Charter of the United Nations, since this would involve compulsory jurisdiction of the Court, which does not exist in the present case.

(3) "The Albanian Government would be within its rights in holding that the Government of the United Kingdom was not entitled to bring the case before the Court by unilateral application without first concluding a special agreement with the Albanian Government."

(4) "The Albanian Government for its part fully accepts the recommendation of the Security Council. Profoundly convinced of the justice of its case . . . it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court. Nevertheless, the Albanian Government makes the most explicit reservations respecting the manner in which the Government of the United Kingdom has brought the case before the Court in application of the Council's recommendations, and more especially respecting the interpretation which that Government has sought to place on Article 25 of the Charter with reference to the binding character of the Security Council's recommendations. The Albanian Government wishes to emphasize that its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future."

The President of the Court, on July 31st, 1947, issued an order fixing the time limits within which the Memorial of the United Kingdom and the counter-Memorial of Albania were to be presented to the Court. The United Kingdom's Memorial was duly presented, but, instead of a counter-Memorial, the agent of the Albanian Government submitted a Preliminary Objection based on the allegation that the Court did not possess

jurisdiction to pass judgment upon the dispute, since the United Kingdom's application, being unilateral, was inadmissible as being contrary to the provisions of Article 40(1) and Article 36(1) of the Statute of the Court.

The President of the Court thereupon made an order calling upon the United Kingdom Government to provide a written statement of its observations and submissions in regard to the Preliminary Objection. The United Kingdom statement alleged that: (a) it had fully complied with the recommendation of the Security Council immediately to refer the dispute to the Court; (b) the Albanian Government in its letter of July 2nd had fully accepted the recommendation of the Security Council and expressed its readiness to appear before the Court and to accept its jurisdiction in this case; (c) the Albanian letter was accepted by the President of the Court as a document which satisfied the conditions laid down by the Security Council for the appearance before the Court of a state not a party to the Statute; (d) in these circumstances the jurisdiction of the Court is fully established; (e) there is nothing in the Statute or Rules of the Court which prevents a proceeding being formally instituted by the applicant even though the jurisdiction of the Court is established by a "reference" by the parties or by a "special agreement"; (f) the United Kingdom's application and its acceptance by the Albanian Government constitute an agreement to submit the case; (g) the Albanian Government's letter of July 2nd is a waiver of any possible objection to any alleged formal irregularity in proceedings, and (h) having once consented to the jurisdiction, the Albanian Government cannot afterwards withdraw its consent. The President's order concerning the Memorial and counter-Memorial involved a recognition of the Albanian Government's acceptance of jurisdiction which cannot now be contested.

The United Kingdom therefore submitted to the Court that the Preliminary Objection should be dismissed and the Albanian Government called upon to deliver its counter-Memorial without further delay.

Since no member of the Court was of Albanian nationality, the Albanian Government availed itself of the right provided by Article 31(2) of the Statute and designated Dr. Igor Daxner, President of the Chamber of the Supreme Court of Czechoslovakia, as Judge *ad hoc*.

Oral Proceedings

At public sittings from February 26th to March 5th, 1948, the Court heard oral arguments from the agents and counsel of the two Governments. Since this was the first occasion on which an inter-governmental dispute was argued before the International Court of Justice, the agents made short addresses in which they referred to the historic nature of the proceedings, affirmed the desires of their Governments to promote the solution of international difficulties by pacific means, and expressed their confidence that the International Court of Justice would follow the path of its predecessor, the Permanent Court of International Justice, in establishing the rule of law between nations.

The agent and counsel for Albania emphasized the wish of their Government to develop the authority of international law and stated that this was proved by the readiness to appear before the Security Council, the acceptance of the Security Council's recommendation, and the willingness to appear before the Court. They maintained that in fact the Preliminary Objection demonstrated their Government's attachment to law because it was based upon an insistence upon the strict observance of legal formality. As a small country itself, Albania was particularly dependent upon the protection of law and felt that such protection depended in this case upon the administration of law according to the strict wording of the Charter of the United Nations and the Statute of the Court.

It was pointed out that no compulsory jurisdiction existed in the present dispute and the letter of July 2nd was to be interpreted as a readiness of Albania to appear before the Court, although its appearance was intended only to demonstrate the irregularity of the United Kingdom's procedure in submitting a unilateral application. It was repeatedly asserted that the Albanian Government wished that the dispute be solved by a judgment of the International Court of Justice.

The agent and counsel for the United Kingdom commenced by pointing out that, if the Albanian Government was in fact so eager to have the case settled by the International Court, the alleged procedural irregularity (which was vigorously denied by the United Kingdom) could be immediately cured by the two agents signing a "special agreement" worded as follows:

The agent of the Government of Albania and the agent of the Government of the United Kingdom on behalf of their respective Governments agree that the dispute formulated and defined in the resolution

of the Security Council of April 9th, 1947, shall stand referred to the Court of International Justice.

While it was expected that the Albanian agent would already have authority to sign such an agreement, it was pointed out that it would be a simple matter to obtain authority by telephoning his Government.

On behalf of the United Kingdom Government it was then argued that (a) the resolution of the Security Council resulted in the establishment of compulsory jurisdiction for the Court in the present case under Article 36(1) of the Statute of the Court, and (b) that if it were decided that no compulsory jurisdiction existed, Albania had by its letter of July 2nd voluntarily accepted the jurisdiction of the Court and waived any possible objection to the alleged irregularity of unilateral application.

Judgment

The Court, in delivering judgment on March 25th, by fifteen votes against one (Mr. Justice Daxner dissenting), decided to reject the Preliminary Objection because the Albanian Government's letter of July 2nd, 1947, was interpreted as (1) "a waiver of the right subsequently to raise an objection directed against the admissibility of the application founded on the alleged procedural irregularity of that instrument", and (2) "constituting a voluntary and indisputable acceptance of the Court's jurisdiction". In the opinion of the Court, "while the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form". Furthermore, "the institution of the proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction". "There is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its judgment No. 12 of April 26th, 1928, Page 23, 'the acceptance by a state of the Court's jurisdiction in a particular case is not under the Statute subordinate to the observance of certain forms such as for instance the previous conclusion of a special agreement'."

The Court further interpreted the reservation made in the letter of July 2nd as "intended only to maintain the principle and to prevent the establishment of a precedent as regards the future".

Having decided that jurisdiction was conferred by the voluntary acceptance of Albania, the majority of the Court (eight judges) considered that there was no need to express an opinion on the argument of the United Kingdom to the effect that certain provisions of the Charter of the United Nations and of the Statute of the Court established the existence of a case of compulsory jurisdiction. A minority of the Court (seven judges — from France, Mexico, Poland, Yugoslavia, Belgium, Egypt and the U.S.S.R.) — who concurred with their colleagues on the issue of voluntary acceptance of jurisdiction — delivered a separate opinion in which they stated that they felt obliged to pass upon the question of compulsory jurisdiction.

Their decision was that, "having regard to (1) the normal meaning of the word 'recommendation', a meaning which this word has retained in diplomatic language, as is borne out by the practice of the Pan-American Conferences, of the League of Nations, of the International Labour Organization, etc., (2) the general structure of the Charter and of the Statute which founds the jurisdiction of the Court on the consent of States, and (3) the terms used in Article 36, paragraph 3, of the Charter and to its object which is to remind the Security Council that legal disputes should normally be decided by judicial methods, it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction".

The dissenting opinion of Mr. Justice Daxner not only set forth his view that no compulsory jurisdiction existed but in considerable detail elaborated the reasons supporting his belief that the reservations contained in the letter of July 2nd were intended to apply to the present case rather than, as was the opinion of the other members of the Court, "to retain complete freedom of decision in the future". He therefore accepted the Albanian contention that willingness to appear before the Court was motivated by the desire to establish that the irregularity of the United Kingdom's application prevented the Court from exercising jurisdiction in determining the merits of the case.

Special Agreement

Following the delivery of the Judgment and of the separate and dissenting opinions, an unexpected and dramatic development occurred. With the consent of the Court, the agent for Albania arose and announced that five hours previously the

United Kingdom agent and he had signed a special agreement to establish the Court's jurisdiction, irrespective of what might be the decision on the matter of the Preliminary Objection. The Court was asked for decisions on the following questions:

- (1) Is Albania responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters and for the damage and loss of human lives which resulted from them, and is there any duty to pay compensation?
- (2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on October 22nd and 12th and on November 13th, 1946, and is there any duty to give satisfaction?

The United Kingdom agent then rose to confirm the statement made by his Albanian colleague; he indicated that the agreement was the result of an approach made by the Albanian authorities to the United Kingdom Foreign Office a few days previously.

Political Implications

It is an unhappy feature of recent constitutional changes in certain countries that the Judiciary is no longer independent. One of the bases of government in democratic nations is that neither the legislative nor the executive branches of government exercises control over the operation of judicial functions. Indeed these two branches are subject to the operation of law as interpreted by the Judiciary.

In an unfortunately increasing number of countries, however, the Judiciary became an instrument used by the executive and legislative agencies for the promotion of political objectives. In these countries judicial decisions depend upon ideology and expediency rather than upon basic principles of law.

In a period when ideological considerations exercise so potent an influence in so many spheres of national and international life, it is a matter of profound satisfaction that the members of the International Court of Justice, in rendering their first decision, have reflected a devotion to established methods and principles of international jurisprudence. At a time when so little unanimity is to be found in international conferences and so much friction in the various phases of inter-relationship between nations, it is most salutary to note that the regular members of the International Court of Justice were of one opinion on the basic point at issue.

Nations will be all the more ready to submit their disputes to the Court when they can do so in the confidence that the

decision will rest upon established jurisprudence rather than upon political criteria. The machinery for the pacific settlement of international disputes will therefore be called into operation more frequently than would otherwise be the case. With growing dependence upon the reliability and integrity of the Court, there will be decreasingly less risk of resort to war in the solution of differences arising in every field of international intercourse.

It is particularly interesting to observe that in this decision the International Court of Justice has, as has been noted above, relied upon a decision of the Permanent Court of International Justice. There is nothing in the Statute of the new Court to require it to accept the decisions of its predecessors as binding upon it, but the members have apparently proceeded on the assumption that it is their duty to build on the foundations already laid rather than to establish another new code of international law. Consequently the decision of the Permanent Court has been quoted and followed without any comment on the advisability or necessity of accepting established judicial precedents.

I. JUSTICE UNDER THE ENGLISH REGIME

The present great and universal Complaint arises from the Delay, and Heavy Expence of Justice; formerly the King's Courts sat once a week at Quebec, Montreal and Three Rivers; From these lay an Appeal to the Council, which also sat once a Week, where Fees of all Sorts were very low, and the Decisions immediate; At present the Courts sit three Times a Year at Quebec, and twice a Year at Montreal, and have introduced all the Chicanery of Westminster Hall into this impoverished Province, where few Fortunes can bear the Expence and Delay of a Law Suit; The People are thereby deprived of the Benefits of the King's Courts of Justice, which rather prove Oppressive and ruinous than a Relief to the Injured; This, with the weight of Fees in General, is the daily Complaint, not but a great deal might be said of the Inferior Administrators of Justice, very few of whom have received the Education requisite for their Office, and are not endowed, with all the Moderation, Impartiality, and Disinterestedness that were to be wished. (Lieutenant-Governor Guy Carleton to the Earl of Shelburne, December 24th, 1767)