

CASE COMMENT

**UNDERSTANDING THE NUANCES OF INNOCENT PASSAGE THROUGH CORFU
CHANNEL CASE**

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Introduction

When we discuss the rights of states over the territorial sea, we talk about coastal states that exercise sovereignty not only over the territorial waters but also over air space above the territorial sea in addition to its bed and subsoil. However, according to an Article of the UN Convention of 1982, sovereignty is to be duly exercised subject to this Convention and other rules of international law. It throws light on the fact that the coastal state has the exclusive right to appropriate the natural products of the territorial sea.

But, on deeper analysis, we realize that the term sovereignty is not used in an absolute or exclusive sense, and an exception to it is the right of innocent passage of the ships of other states. Thus, some facilities are provided to other states by the coastal state for international transport and communication.

Innocent Passage

The doctrine of innocent passage reconciles the interests of the world community on one hand and the coastal states on the other. The interests of the former lie in the fact that trade should be secure, economical, and able to expand, whereas the latter's interest lies in the ability to avert and ward off the dangers to their security and well-being, which might be costly, politically and economically.

According to Article 17 of the 1982 Convention, it is stated that ships of all states, whether coastal or land-locked enjoy a right of innocent passage through the territorial sea. The term passage may be defined as passing through the territorial sea from high seas to high seas and proceeding to and from a port. Entry upon the territorial sea for any other purposes is not passage, although it may not be unlawful. Further, a ship must have the intention of traversing the territorial sea, and if it enters for any other purposes, even though its action amount only to passing in a sense defined, it is not an innocent passage.

In Article 18, the passage is defined as navigation through the territorial sea, which is ongoing and prompt. But, the term passage includes stopping and anchoring but only as long as the same is related to ordinary navigation or are rendered necessary by force majeure or distress or to render help to persons, ships, or aircraft in danger or distress.

In article 19, the term innocent is defined by mentioning that the passage remains innocent as long as it does not prove to be prejudicial to the peace, good order, and security of coastal states and takes place in conformity with these articles and other international law rules. The said article illustrates that the acts of spying, fishing, causing marine pollution, launching or taking on board any aircraft, any other activity not having a direct bearing on passage shall be considered prejudicial to the peace, good order, and security of the coastal state.

Further, the passage of foreign shipping vessels shall not be construed innocent if they do not abide by such laws and regulations as the respective coastal state may create and publish with the intention to prevent these vessels from fishing in the territorial sea.

Article 20 states that in the territorial sea, submarines and other underwater vehicles are needed to duly navigate on the water's surface and show their flag. As per Article 23, foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous nuclear substances shall, while exercising the right of innocent passage through the territorial sea, have the required documents and files and observe special precautionary measures established by international agreements.

There is a grey area on the position of warships in this regard. This is because neither in the United Nations Convention on the Law of Sea, 1982 nor in the broad ambit of customary international law throw any light on the issue of innocent passage of warships. Some states insist on the previous authorization of the coastal state for their transit, and other states insist on the prior notification to the coastal state for their transit. Therefore, it is observed that coastal states consider the passage of warships as an infringement of their sovereignty or a disturbance or threat to their national security. The states which have claimed an unrestricted right of passage have contended that this right has in practice been exercised for an extended period and been recognized by nations from time immemorial.

Facts of the case

On the 15th of May, 1946, warships belonging to Britain without permission or approval from the Albanian Government pass through the Channel. Owing to this fact, they were shot by the latter. Yet again, on October 22, 1946, a troop of British warships, which consisted of two destroyers and two cruisers, four in all, departed from the port of Corfu and made a north-bound journey passing through the Channel. Unfortunately, two destroyers struck the mines in the North Corfu Strait and were extremely harmed. This tragedy caused several fatalities as well.

Post the second tragedy of the explosions, the Government of the UK wrote a letter to the Albanian Government putting forth the former's decision to sweep the Corfu Channel within a short while. A reply from the latter was duly received on the 31st of October, 1946, which made it clear that the Government of Albania would not give its approval for the same lest the operation took place out of the limits of its territorial waters. In the meantime, at the behest of the UK Government, The International Central Mine Clearance Board made a decision by a resolution dated 1st of November, 1946, stating that a further sweep of the Channel should take place subject to the consent of the Albania Government.

To give effect to this resolution, the Government of the UK formally intimated the Government of Albania that the said sweep would take place on the 12th of November, 1946. This was yet again objected to by the Government of Albania that strongly protested against His Majesty's unilateral

Governmental decision. Albania put forth that it did not contemplate it problematic that the fleet of Britain should undertake the sweeping of the said Corfu Channel but supplemented that before the said sweeping was carried out, it considered it very important to come to a firm decision as to what area of the sea would be considered to be a part of this Channel and wished for the institution of a Mixed Commission for the same. It was concluded by the Albanian Government that any instance of sweeping without the due consent from it inside the limits of the territorial waters of Albania where warships of foreign nations have no valid purpose to sail would be construed as an intentional infringement of the Sovereignty of Albania.

Post these communications, 'Operation Retail' occurred on the 12th and 13th of November, 1946. One of the facts gained particular prominence. This was the fact which stated that the North Corfu Channel constituted a frontier in between the States of Greece and Albania and that a portion of it is entirely within the limits of the territorial waters of the said states and also that the given strait is of particular importance to the state of Greece due to the reason of traffic flow to and from Corfu port.

Issues Involved

The Government of the United Kingdom claimed that the mines which caused the said explosions were laid between 15th of May to 22nd of October 1946 by or with the knowledge of the Government of Albania. Thus, it was clear that Albania was solely accountable for the unfortunate casualties and would require to compensate the UK Government. Another question of importance was raised related to the presence of special agreement with regard to the actions of the Royal Naval Force in the waters of Albania on the 12th and 13th of November, 1946 when the UK Government conducted a minesweeping operation known as the 'Operation Retail' without the consent of the Albanian Government.

According to the UK, the said passage on the 22nd of October, 1946, was a clear case of innocent passage. As per the principles of International Law, it very well had a right to innocent passage through the North Corfu Channel route. It was recognized worldwide as an international highway, and consent of a particular state could not have been mandatory. The Government of Albania refuted this by stating that the Channel did not fall into the category of international highway through which

everyone has a right to pass based on the argument that it was a route of secondary importance and not the only necessary path available. This route was primarily used by the traffic of local nature to and from the ports of Corfu. Thus, that concluded that their consent regarding passage was important.

Hence the primary issues surrounding the case were:

1. Whether North Corfu Channel can be considered an international highway?
2. Whether Albania can be held responsible for the explosions which resulted in terrible damage and casualties. Whether they had a duty under the ambit of International Law to pay damages for the same?

Held by the Court

Upon delving into the matter, the Court found that the Channel was indeed used for the purposes of international navigation. Hence, in the Hon'ble Court's opinion, North Corfu Channel was to be considered as an international highway through which innocent passage can be successfully carried out without requiring any special permission from any particular state. Moreover, it was held that such a passage could not be stopped during the period of peace. The UK Government contended that the Government of Albania never alerted them of the danger that was inevitably approaching the British warships.

As per the tenets of state responsibility, the Government of Albania had a duty to send a prior warning to the British ships concerning the dangers involved ahead. No initiative was taken by the Government of Albania to stop the preventable disaster. But the obligation of Albania with regard to imparting such notification depended on their having knowledge of the same before the 22nd of October, 1946.

The Court finally concluded that the Government of Albania was accountable for the said explosions under the ambit of international law and also for the damage and fatality that ensued. Finally, it was held that the Government of Albania had a duty to pay damages to the Government of the United

Kingdom. Further it was held that the Government of the United Kingdom did not violate the Sovereignty of the Government of Albania by their actions on the Albanian waters on 22nd of October, 1946.

However, in this case, several judges in their dissenting opinions made observations on the issue of innocent passage of warships. Justice Alvarez felt that since war had been outlawed in the United Nations Charter, the mission of warships can only be to secure legitimate defense of countries to which they belong. Justice Krylov argued that there was no right of innocent passage through the territorial sea. Justice Azevedo said that the position of warships in respect of passage was different from that of merchant ships.

International Law Commission had proposed that a state might make innocent passage of warships subject to prior authorization or notification, but the state should generally grant innocent passage. In 1989, the US and USSR made a crucial joint statement that 'All ships including warships enjoy the privilege of innocent passage through the territorial sea in accordance with the principles of international law, for which no prior intimation or approval is required. However, as it is a joint statement made by two states, it hence does not have a binding value on the other states.

Conclusion

Hence, the Hon'ble International Court of Justice ruled that during peacetime, the warships of the other states may pass through the territorial waters of a state. It was decided that Albania was guilty of causing such significant loss to Britain by firing at them or by laying mines in their path. Hence, it was a clear violation of International Law since it was a well-established principle of customary international law that foreign vessels have a right of 'innocent passage' through the territorial waters. The Coastal state's right to take the 'necessary steps' in the territorial sea to prevent passage which is not innocent is laid down under Article 25 of the UNCLOS, 1982. However, what necessary steps coastal states may take are not provided in the Convention except that the coastal state may suspend for an interim period in specific portions of the limits of its territorial sea the innocent passage of international vessels if such suspension is essential for the protection of its security, including weapon exercises. Such suspension comes into force only after having been duly punished.

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