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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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