

ROUTLEDGE RESEARCH IN INTERNATIONAL LAW

The ICJ and the Evolution of International Law

The enduring impact of the *Corfu Channel* case

Edited by
Karine Bannelier, Theodore Christakis and
Sarah Heathcote

The ICJ and the Evolution of International Law

The enduring impact of the
Corfu Channel case

Edited by Karine Bannelier,
Theodore Christakis and Sarah Heathcote



First published 2012
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2012 Karine Bannelier, Theodore Christakis and Sarah Heathcote selection
and editorial material; individual chapters, the contributors

The right of Karine Bannelier, Theodore Christakis and Sarah Heathcote to be
identified as editors of this work has been asserted by them in accordance with
sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or
reproduced or utilised in any form or by any electronic,
mechanical, or other means, now known or hereafter
invented, including photocopying and recording, or in any
information storage or retrieval system, without permission in
writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered
trademarks, and are used only for identification and explanation without
intent to infringe.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

The ICJ and the development of international law : the lasting impact of
the *Corfu Channel* case / [edited by] Karine Bannelier, Théodore Christakis,
Sarah Heathcote.

p. cm. — (Routledge research in international law)

Includes bibliographical references and index.

ISBN 978-0-415-60597-7 (hardback) — ISBN 978-0-203-61068-8

(e-book) 1. International Court of Justice. 2. International law.

3. *Corfu Channel* case. 4. Law of the sea. 5. Government liability
(International law) I. Bannelier, Karine. II. Christakis, Théodore.

III. Heathcote, Sarah.

KZ6275.I25 2011

341—dc22

2011016348

ISBN: 978-0-415-60597-7 (hbk)

ISBN: 978-0-203-61068-8 (ebk)

Typeset in Garamond
by RefineCatch Limited, Bungay, Suffolk



Printed and bound in Great Britain by the MPG Books Group

Contributors

Amin Ghanbari Amirhandeh is the recipient of the 2009 SATA prize of the Asian Society of International Law and a research fellow at the Center for International Space Law Studies at the University of Tehran.

Karine Bannelier has a PhD in International Law from the University of Paris-Sorbonne, and is Associate Professor at the Faculty of Law of the University of Grenoble and Director of the Master Degree on *International Security and Defense Studies*. She has published or edited five books and more than 20 articles and book chapters on international law. Her research interests include the Law of Armed Conflict, International Criminal Law and International Environmental Law.

Mohammed Bedjaoui is the former President of the International Court of Justice, Member emeritus of the Institut de Droit International, former Ambassador, former Minister of Foreign Affairs of Algeria, former President of the Algerian Constitutional Council, Member of many Academies and Scholarly Societies, Holder of *Doctorats Honoris Causa* from several universities, and the holder of many national and foreign decorations.

Mohamed Bennouna has been a Judge of the International Court of Justice since 2006 and is a Professor of International Law, Member of the Institute of International Law. He was Ambassador, Permanent Representative of the Kingdom of Morocco to the United Nations (2001–6). He was also a judge of the International Criminal Tribunal for the Former Yugoslavia at The Hague (1998–2001) and a member of the United Nations International Law Commission, Geneva (1986–98). He is the author of numerous books, essays and articles on International Law.

Henry Burmester, QC, is former Chief General Counsel in the Australian Government Solicitor's office, and before that Head of the Office of International Law in the Australian Attorney-General's Department. He has appeared as Counsel for Australia in the International Court. He is a graduate of the Australian National University and the University of Virginia.

Hilary Charlesworth is Professor and Director of the Centre for International Governance and Justice, Regulatory Institutions Network, Australian National University (ANU), and an ARC Laureate Fellow. She is also Professor at the ANU College of Law and has held visiting appointments at US and European universities.

Theodore Christakis is Professor of International Law and Director of the Centre for International Security and European Studies (CESICE: <http://cesice.upmf-grenoble.fr>) at the University of Grenoble. He has published or edited seven books and more than 35 articles and book chapters on various subjects of international law. His research areas include International and European Human Rights Law, self-determination and minority rights, issues relating to the use of force under international law and the law of international responsibility.

Aristoteles Constantinides, received his PhD in International Law from Aristotle University of Thessaloniki, Greece. He is Assistant Professor in International Law and Human Rights and founding member of the Department of Law of the University of Cyprus, and a member of several academic networks, including the ILA Committee on non-state actors.

Olivier Corten is Professor of International Law at the Centre of International Law at the Université libre de Bruxelles in Belgium. He is the author of numerous books and articles on a broad variety of topics of international law including, recently, *The Law Against War* (Hart, 2010). His research areas include the theory of international law and issues relating to the use of force under international law.

Jean-Pierre Cot is Emeritus Professor of the University of Paris-I Panthéon-Sorbonne. He was advocate and counsel in a number of cases before the International Court of Justice. He is presently a judge at the International Tribunal for the Law of the Sea and *ad hoc* judge in cases before the International Court of Justice. Cot is president of the *Société française pour le droit international*.

Pierre d'Argent is Professor of International Law at the University of Louvain and invited Professor at the University of Leiden. He was First Secretary of the International Court of Justice (2009–11).

Katherine Del Mar is a Teaching and Research Assistant at the Faculty of Law, the University of Geneva, and a PhD candidate in international law at the Graduate Institute of International and Development Studies, Geneva. She has been an Advisor to States in advisory and contentious proceedings before the International Court of Justice.

Giovanni Distefano is Professor at the Law Faculty of the University of Neuchâtel. He also teaches public international law and international law

related to the use of force at the Geneva Academy of International Humanitarian Law and Human Rights.

Christine Gray is Professor of International Law at the University of Cambridge. Her main research interests concern, first, international law and the use of force and, second, the role of the International Court of Justice. Her principal publications include *International Law and the Use of Force* (3rd edn, 2008) and *Judicial Remedies in International Law* (1990).

Sarah Heathcote is Senior Lecturer at the Australian National University College of Law. She previously worked for the University of Geneva and Boston University and has published primarily on issues of general international law.

Etienne Henry holds a Master of Law (Neuchâtel) and a Certificate of Advanced Studies in Human Rights (Geneva). He is Teaching and Research Assistant at the University of Neuchâtel and previously worked in the Federal Office of Justice in Berne.

Stuart Kaye is currently Dean and Winthrop Professor of Law at the University of Western Australia. He previously held a Chair in Law at the University of Melbourne (2006–10), and was Dean and Professor of Law at the University of Wollongong (2002–06).

Kenneth J. Keith is judge of the International Court of Justice (2006–), judge of the New Zealand Court of Appeal and Supreme Court (1996–2006), member and President of the New Zealand Law Commission (1986–96), and law faculty member, Victoria University of Wellington (1962–64, 1966–91).

Pierre Klein is Professor of International Law and Director of the Centre of International Law at the Université libre de Bruxelles, Belgium. He has published extensively on various subjects of international law and recently co-edited with Olivier Corten a *Commentary Article by Article of the Vienna Conventions on the Law of Treaties* (Oxford University Press, 2011). His research interests include the law of international organizations and the law of international responsibility.

Rob McLaughlin has a PhD from Cambridge, and is a Captain in the Royal Australian Navy. He is an Associate Professor at the Australian National University College of Law, and has previously served as Director Operations and International Law for the Department of Defence, and Director Naval Legal Service. He has served both at sea and ashore in East Timor, Iraq, and on maritime law enforcement operations.

Djamchid Momtaz is Professor of Public International Law at the University of Tehran, member of the Institut de Droit International, member of the

Curatorium of The Hague Academy of International Law and former Chairman to the International Law Commission. He is a legal advisor to the Iranian Ministry of Foreign Affairs.

Donald R. Rothwell is Professor of International Law at the ANU College of Law, Australian National University. He has written on international security law, the law of the sea, and the law of the polar regions. His most recent book is *The International Law of the Sea* (Hart, 2010).

Akiho Shibata is a Professor of International Law at the Graduate School of International Cooperation Studies, Kobe University, Japan. His main fields of study are international law-making, the Antarctic Treaty System and international environmental law. He served as a legal consultant for Japan's Ministry of Foreign Affairs (2001–10) and was a research fellow at the Australian National University School of Law (2009).

Matthew Zagor is a Senior Lecturer at the ANU College of Law where he teaches refugee law, human rights, environmental and public law. In 2010 he was Deputy Director of the Australian National University's Centre for European Studies. His recent research has focused upon the principle of legality and judicial rhetoric, the rediscovery of constitutional 'faith' in the United Kingdom, the potential role of the European notion of constitutional patriotism in Australian legal thought, the construction of refugee identity through legal narrative, and perspectives of legality in the Occupied Palestinian Territories. He has worked as a community and government lawyer, refugee advocate, and part-time Member of the Migration and Refugee Review Tribunal.

Preface

Just over sixty years ago, in 1949, the International Court of Justice (ICJ) handed down its first judgment in the *Corfu Channel* case. In diffusing an early Cold War dispute, the Court articulated a set of legal principles which, some sixty years later, continue to shape our appreciation of the international legal order.

Many of the issues dealt with by the Court in 1949 remain central questions of international law, including due diligence, forcible intervention and self-help, maritime operations, navigation in international straits and the concept of elementary considerations of humanity. The Court's decision has been cited on numerous occasions both in the literature and in international litigation.¹ In a short essay written in 2002, Malgosia Fitzmaurice described the *Corfu Channel Judgment* as 'one of the finest and one of the most important, if not prophetic, in the history of the World Court'.² The word 'prophecy' was also used to describe the *Corfu Channel Judgment* by Judge Simma in the *Oil Platforms* case.³ Indeed, the relevance of this judgment goes far beyond the subject matter dealt with by the Court in 1949, extending to pressing contemporary problems such as trans-boundary pollution, terrorism or piracy. In short, it was and remains a thoroughly modern decision – a landmark for international law; and one which today warrants reconsideration.

Taking a critical approach, this book examines the decision's influence on international law generally and on some fields of international law in particular, such as the law of the sea or State responsibility. The book collects the commentary of a distinguished set of international law scholars, including several current and former international Judges. The aim is to consider not only the history of the

1 As former ICJ President Bedjaoui explains in Chapter 1: 'The solutions developed for the resolution of the "*Corfu Case*" attracted a seal of approval and became the *benchmark for later jurisprudence*. In no less than 18 cases, did the Court continue to be influenced by the *Corfu Channel case*.'

2 M. Fitzmaurice, 'The *Corfu Channel Case* and the Development of International Law', in N. Ando, E. McWhinney, and R. Wolfrum (eds) *Liber amicorum Judge Shigeru Oda* (The Hague: Kluwer, 2002), Vol. 1, p. 119.

3 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, *ICJ Reports* 2003, Separate Opinion of Judge Simma, p. 327, para. 5.

Corfu Channel Judgment and its contribution to the development of international law, but also its resonance in many contemporary problems of international law.

The book is divided into six parts. Part I is presented in the form of a 'roundtable': 'Views from the Bench: the legacy of the *Corfu Channel* case'. In this part, a former ICJ President (Mr Mohammed Bedjaoui, Algeria), a current member of the ICJ (Judge Mohamed Bennouna, Morocco), and a current member of the International Tribunal for the Law of the Sea (Judge Jean-Pierre Cot, whose father Pierre Cot was lead Counsel for Albania in this case) address various aspects of the case, providing respectively, an overview of the case's importance for international law in general; its legal relevance to an important specific contemporary topic; and finally, how this case is, from the perspective of the Bar, to be distinguished from the conduct of international litigation today. Together these contributions explain why this Judgment has become one of the most often quoted pieces of international case law.

Part II, 'The historical and institutional framework', presents the history of this case and provides a perspective on the relations and interactions between the ICJ and the United Nations Security Council.

Part III, 'Procedural and evidential issues before the World Court', presents three contributions (including one by Sir Kenneth Keith, Judge at the ICJ and another by M. Henry Burmester, Chief Counsel (retired), Australian Government Solicitor) concerning some important 'Procedural and evidential issues before the World Court', issues that are still of a great interest for international lawyers today.

The last three parts of the book present twelve chapters discussing substantive subject matters and the resonance of the *Corfu Channel Judgment* in some important fields of contemporary international law such as the 'Law of the Sea' (Part IV); some of the 'Fundamental Rules of International Law' (Part V), including those relative to the use of force and recourse to self-help, or those concerning trans-boundary harm or the concept of 'elementary considerations of humanity'. The final part considers 'Issues of state responsibility' raised by the 1949 decision and still highly topical today, such as the limits of complicity as a ground for responsibility, aspects of fault, damage and contribution to injury in the law of State responsibility as well as problems in relation to reparations and compliance with ICJ Judgments.

This book is the result of a collaboration between the ANU College of Law of the Australian National University⁴ and the Centre for International Security and European Studies (CESICE) of the Law Faculty, University of Grenoble, France.⁵ It brings together many of the papers presented on 29 October 2009 at an international workshop organized and hosted by the ANU College of Law, Australian National University, in collaboration with the Centre for International Security and European Studies (CESICE) of the University of Grenoble and with the support of the French Embassy in Australia.

⁴ See <http://law.anu.edu.au/>.

⁵ See <http://cesice.upmf-grenoble.fr>.

Contents

<i>List of contributors</i>	xi
<i>Preface</i>	xv
 PART I	
Views from the Bench: the legacy of the <i>Corfu Channel</i> case	1
1 An international contentious case on the threshold of the Cold War	3
MOHAMMED BEDJAOUI	
2 The <i>Corfu Channel</i> case and the concept of sovereignty	16
MOHAMED BENNOUNA	
3 The bar	21
JEAN-PIERRE COT	
 PART II	
The historical and institutional framework	39
4 The <i>Corfu Channel</i> case in perspective: the factual and political background	41
ARISTOTELES CONSTANTINIDES	
5 The International Court of Justice and the Security Council: disentangling Themis from Ares	60
GIOVANNI DISTEFANO AND ETIENNE HENRY	
 PART III	
Procedural and evidential issues before the World Court	85
6 The basis of the Court's jurisdiction and the scope and usefulness of <i>forum prorogatum</i>	87
HENRY BURMESTER	

7	The International Court of Justice and standards of proof	98
	KATHERINE DEL MAR	
8	'Naval secrets', public interest immunity and open justice	124
	KENNETH J. KEITH	
 PART IV		
	Law of the Sea	147
9	International straits: still a matter of contention?	149
	STUART KAYE	
10	Dangerous waters and international law: the <i>Corfu Channel</i> case, warships, and sovereignty irritants	164
	ROB MCLAUGHLIN	
11	Peacetime maritime operations	181
	DONALD R. ROTHWELL	
 PART V		
	Fundamental rules of international law	199
12	The Court's decision <i>in silentium</i> on the sources of international law: its enduring significance	201
	AKIHO SHIBATA	
13	Intervention and self-help	211
	THEODORE CHRISTAKIS	
14	A policy of force	226
	CHRISTINE GRAY	
15	Foundational judgment or constructive myth? The Court's decision as a precursor to international environmental law	242
	KARINE BANNELIER	
16	The interaction between international humanitarian law and human rights law and the contribution of the ICJ	256
	DJAMCHID MOMTAZ AND AMIN GHANBARI AMIRHANDEH	
17	Elementary considerations of humanity	264
	MATTHEW ZAGOR	

PART VI

Issues of state responsibility	293
18 State omissions and due diligence: aspects of fault, damage and contribution to injury in the law of state responsibility	295
SARAH HEATHCOTE	
19 The limits of complicity as a ground for responsibility: lessons learned from the <i>Corfu Channel</i> case	315
OLIVIER CORTEN AND PIERRE KLEIN	
20 Reparation and compliance	335
PIERRE D'ARGENT	
21 Conclusion	357
HILARY CHARLESWORTH	
<i>Index</i>	363

Part I

Views from the Bench

The legacy of the *Corfu Channel* case

1 An international contentious case on the threshold of the Cold War*

Mohammed Bedjaoui

I recall, once more, that formula from British Admiralty: 'to learn to behave oneself. All nations, Mr. President, large and small, strong and weak, must learn to behave themselves. They must learn by looking to the International Court of Justice which, in its wisdom, can teach them how.

(Concluding words of Pierre Cot in his oral pleadings as Counsel on behalf of Albania, January 22, 1949)¹

I am very grateful to the editors of this book on the *Corfu Channel* case, whose topicality, some sixty years after the event, remains relevant today. It provides me with an opportunity, which is greatly appreciated, to reread after a long time, the three judgments to which this dispute gave rise and to rediscover with delight, the well-established merits of these historical decisions.

1.1 Tense exchanges in the Security Council

To learn the most from this case, one needs to recall its context: the Cold War was just beginning. At this war's frontline, in the months of February to April 1947, the superpowers were already vigorously flexing their muscles. To my mind, the moment when the *Corfu Channel* dispute first went before the Security Council was integral to the legal history of what was already a set of tense exchanges between the superpowers. The Security Council was in its very first year of existence. This case was the first and last time that this central organ of the United Nations would recommend that two States refer their dispute to the International Court of Justice to resolve their differences. Sir Alexander Cadogan, the Permanent Representative of the United Kingdom to the United

* Initial translation from the French by Reia Anquet.

1 A loose translation by L. Gardiner, *The Eagle Spreads His Claws: A History of the Corfu Channel Dispute and of Albania's Relations with the West*, Edinburgh and London: William Blackwood and Sons Ltd, 1966, p. 211. The original French version can be found in *ICJ Pleadings, Oral Arguments, Documents: The Corfu Channel case*. Oral proceedings (first part), Vol. IV, p. 699.

Nations in New York, used modern – and today fashionable – terminology, when he accused Albania, in a failed draft resolution, of having committed a *crime against humanity* by not having told States that a danger existed in navigating the Channel which was awash with naval mines. In these words one can hear the first echoes of present-day international criminal law. But the *Corfu Channel* case would also distinguish itself at this point by being the first time that the veto was used. This highly ranked British diplomat, disappointed to see his proposed resolution crushed by a Soviet veto, rashly remarked that its use was regrettable.² This was an unexpected criticism of a use of the right of veto by one of its holders. Andrei Gromyko's was delighted. Savouring the poignancy of the moment, he reminded Cadogan that it was in fact the United States and the United Kingdom that had first suggested that a right of veto be included in the United Nations Charter. It was then the turn of the Colombian Representative to remind the Council that it was due to the *obstinacy* of the superpowers that this mechanism was introduced and locked into the system.³

1.2 A perfect trial

But the *Corfu Channel* case also has a number of other distinguishing features. First, it was *the first contentious case to be officially filed with the newly created International Court of Justice*,⁴ which was also taking its first steps. It is, above all, a case in which a jurist can find all the different possible facets of a contentious case: a first set of hearings where the Court's *jurisdiction* is questioned, resulting in a first

2 *Official Records of the Security Council, Second Year, Hundred and twenty-fifth Meeting*, April 3rd 1947, no. 32, p. 684.

3 On this bitter debate which lasted three months, Leslie Gardiner wrote:

When the first awkward tussle before the Security Council ended at Lake Success, it might have been thought, by a novice in such affairs, that every aspect of the situation and every shade of opinion had already been weighed and sifted and taken account of; that the decision, to recommend Albania and the United Kingdom to take their quarrel to the International Court, was for a mere formal pronouncement of guilt or innocence, in an atmosphere of judicial calm, undisturbed by political considerations, uncorrupted by nationalistic and ideological threats and sulks. So one might have thought.

(Gardiner, 1966, p. 195)

The author demonstrates his writing skills in 'telling the tale' of the case. One can admire the 'show room' of the Table of Contents: I. Corfu: These yellow sands, II. The Mainland: A hint of woe; III. Recommended routes: Sour-eyed disdain; IV. Cruisers under fire: Too rash a trail; V. Mischief in the Channel: Some tricks of desperation; VI. Home with 'Volage': Exposed unto the sea; VII. A show of force: Enter mariners; VIII. Veto at Lake Success: A confused noise within; IX. The Yugoslavian's tale: Observation strange; X. Justice at The Hague: All sanctimonious ceremonies; XI. Time to pay: The strongest oaths are straw; XII. After the storm: Calm seas, auspicious gales.

4 This contentious case had been preceded by the request for an advisory opinion on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*. But the priority was given to the *Corfu Channel* case which was attributed the top position in the Court's General List.

judgment (dated March 25, 1945) rejecting the preliminary objection raised by a contesting party; a second set of hearings in which a *detailed examination* is undertaken and which is concluded by a second judgment (dated April 9, 1949); and finally a third set of hearings focused on the assessment of the amount of compensation for the injury sustained by a party, which resulted in the judgment of 15 December, 1949.⁵ The case is in this respect valuable, for it constitutes what can be called a 'comprehensive' or 'complete' case.

The unique nature of the case is not, however, limited to these features. Albania, having contested the International Court's jurisdiction to set the amount of compensation, refused to appear for the third set of hearings. Consequently, the Court applied, and this too would be 'a first', the procedure by default found in Article 53 of the Statute.⁶ Perhaps because it was the Court's first case, it felt obliged to handle the case's 'every aspect'.

1.3 A memorable year

The year in which the Court handed down its final judgment in the *Corfu Channel* case distinguishes itself from others. In the Court's history, 'the vintage year of 1949' is to be remembered. Indeed, the Court prospered throughout the course of the whole year. With its General List successfully full, the Court could have been but delighted with promise of productivity, which boded well for the fulfillment of its mission of legal activity of the highest order. The Court was far from envisaging the long, miserable and barren years to come. At this point, it could savour its moment of full and prolific activity, as in that single year of 1949 it was able to hand down no less than 12 judgments!⁷

5 One could even consider that the *Corfu Channel* case also had a fourth phase, that [...] concerning the *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th, 1954: ICJ Reports 1954, in which the United Kingdom [...] was awarded this gold as partial compensation owed by Albania under the *Corfu Channel* judgment.

6 The Court had already well defined its role and that of an appearing party (ICJ Reports 1949, pp. 237–238, 245, 246, 247, 252 and following pages).

7 *Corfu Channel* case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 4; *Corfu Channel* case, Order of April 9th, 1949: ICJ Reports 1949, p. 171 (Assessment of the amount of compensation due from the People's Republic of Albania); *Reparation for injuries suffered in the services of the United Nations, Advisory Opinion*: ICJ Reports 1949, p. 174; *Corfu Channel* case, order of June 24th, 1949: ICJ Reports 1949, p. 222 (Assessment of the amount of compensation due from the People's Republic of Albania); *Colombian-Peruvian Asylum* case, Order of October 20th, 1949: ICJ Reports 1949, p. 225; *Interpretation of Peace Treaties*, Order of November 7th, 1949: ICJ Reports 1949, p. 229; *Anglo-Norwegian fisheries* case, Order of November 9th, 1949: ICJ Reports 1949, p. 233; *Corfu Channel* case, Order of November 19th, 1949: ICJ Reports 1949, p. 237; *Competence General Assembly (admission new Members)*, Order of December 2nd, 1949: ICJ Reports 1949, p. 241; *Corfu Channel* case, Judgment of December 15th 1949: ICJ Reports 1949, p. 244 (Assessment of the amount of compensation due from the People's