THE CORFU CHANNEL CASE

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INTRODUCTION

The Corfu Channel Case arose early in the life of the United Nations Organization. As a dispute it falls into one of the two main categories that have been noted as dominating international relations since World War II, the category which includes the disputes between Communist and non-Communist states as differentiated from the disputes arising from the changing status of former colonies. It arose from incidents which occurred in 1946, the year in which the Security Council met first, and is an incident in the beginning of the "cold war," although, at the time, the relations between the United States, Great Britain, and the USSR had already deteriorated as a result of the deadlocked Foreign Ministers' Conference of 1945 in London and the failure of the Soviet Union to carry out the Yalta Agreements regarding the liberated countries of Eastern Europe.

The Security Council met first in January 1946. It agreed to postpone substantive questions until the second part of the session in September, 1946. The first substantive matter to be brought up was the complaint of the Iranian government regarding Soviet influence. Next the Soviet Union and the Ukraine asked the Council to consider the subject of British troops in Greece and Indonesia. These moves made it impossible for the Council to consider its procedures calmly before being seized with political divisions.

The Corfu Channel Case was not prominent in the news. Its

settlement did not have direct international consequences of gravity. Its value for future study will stem almost entirely from its contributions to international law. The Security Council debates on the Greek situation and disarmament which were carried on concurrently, overshadowed it in the general attention of the public.

The case was and is unique in many respects. It is the only case in which the Security Council has recommended that the parties refer their dispute to the International Court of Justice. It is the only case in which the International Court has considered a question involving security interests of the parties. It is the only case in which the International Court has considered a question involving a member of the Communist bloc. Lastly, it is the only case in which a party has refused to carry out a judgment of the Court.

Historically, the case is a typical instance in which a difference between two nations becomes a matter of international concern when it impinges on the freedom of the seas. This situation has almost always resulted in a further development of international law.

TABLE OF CONTENTS

CHAPTER I

THE ESSENTIAL FACTS

1. The Corfu Channel Incidents

The Greek island of Corfu, lying in the Ionian Sea at the Greek-Albanian border, forms a narrow but navigable strait which has its southern opening in the Ionian Sea and leads toward the Adriatic by way of the Strait of Otranto. The use of this strait by mariners was such as to warrant its being swept for mines, and this was done in 1944 by an organization established by the Allied High Command. A sweeping operation was conducted in October, 1944, and in November, 1944 the Allied High Command announced that the channel was safe for navigation. After the German surrender, the work of clearing mines from European waters was continued by an organization constituted by an international agreement signed by authorized representatives of the United States, United Kingdom, France and the Soviet Union.[1] This organization, the International Central Mine Clearance Board, included the Corfu Channel in the routes regularly listed and reported on in the series of advisories to mariners known as the Mediterranean Routing Instructions, and had the channel swept in 1945 as a precautionary measure.

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1. United Nations, Security Council, Second Year, Official Records, Supplement No. 6, Exhibit III.

On the fifteenth of May, 1946, two British cruisers, HMS Orion and HMS Superb were fired upon, while passing south through the channel, by shore batteries on the Albanian coast. The fall of shot was abeam and astern in a pattern which made it clear that the ships themselves had been the targets and that these were not warning shots.

On the twenty-second of October, 1946, the cruisers Leander and Mauritius, escorted by the destroyers Saumarez and Volage, got underway from the island port of Corfu and proceeded up the channel to the north. At 1453, HMS Saumarez was damaged by an underwater explosion presumed to be a mine. The explosion occurred in the swept channel off the Albanian port of Saranda. The damage was severe and HMS Volage attempted to take the damaged ship in tow. In the maneuvers preparatory to doing this, Volage in turn was badly damaged by an underwater explosion. It is the latter two occurrences which formed the basis for the United Kingdom side in the Corfu Channel Case.

Volage managed by good seamanship to tow Saumarez to Corfu where both ships were beached. Saumarez became a total loss and Volage suffered major damage. Forty-four British seamen lost their lives and forty-two were injured.

On the twelfth and thirteenth of November, 1946, British naval forces conducted a minesweeping operation in the waters in which the explosions had occurred. A commander of the French Navy, Capitaine de Frégate-Méstre, accompanied the operation as a foreign

observer and provided a written report on the conduct of the operation.[2] The British minesweeping forces discovered in the location where the explosions had occurred, a field of twenty-two newly laid moored contact mines. The mines were swept and two were towed to Corfu for examination from whence they were subsequently transported to Malta for more detailed analysis.

2. The Diplomatic Exchanges

The naval incidents which have been related were paralleled by certain diplomatic actions. The first correspondence which should be noted here is the distribution of Medri charts and pamphlets of the International Routing and Reporting Authority operating in conjunction with the Central Mine Clearance Board. The areas of Albanian territorial waters swept by authority of the Central Mine Clearance Board were included in these publications, and the Corfu Channel itself was included in the routes numbered 18/32 and 18/34 on the charts. The Albanian government, like the governments of other Mediterranean countries, received thirty copies of these and subsequent mine clearance information, and was thus, as the United Kingdom stated in its note of 9 December 1946 addressed to Albania, "publicly notified that the international waterway of the north Corfu Channel was once again open to navigation and it and other swept channels, wholly or partly in Albanian territorial waters,

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2. United Nations, Security Council, Supplement No. 6, Exhibit V.

were used by British and other ships in possession of these documents."[3]

The shelling of British cruisers on the fifteenth of May had brought a British note of protest to Albania. This note requested an immediate and public apology and an assurance that persons responsible would be punished. The Albanian reply to this note, dated 21 May, alleged that the commander of the coastal batteries had signalled the ships to move farther off shore, that they were not flying their flags, and that they hoisted their flags when fire was opened. This reply of Albania assumed that foreign warships did not enjoy the right of innocent passage in an international strait part of which is included in territorial waters, and added that the ships would not have been fired upon had they been recognized as British ships. The United Kingdom renewed its protest in a note on 31 May 1946, pointing out that the Albanian reply ignored rights established by international law, and that even if the Albanian government supposed that it had the right to prevent the passage, the procedure adopted for asserting it, the aiming of twelve live rounds at the vessels, was contrary to the practice of all civilized nations. The Albanian reply to this note, dated 21 June, said that there was no intention of interfering with navigation on the open sea or in the Corfu Channel provided shipping did not enter Albanian waters without permission or show aggressive intent. On 2 August,

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3. United Nations Security Council, Second year, Official Records, Supplement No. 3, p. 37.

in the concluding note to this series, the United Kingdom advised Albania that it had taken note of its reply, that it could recognize no right of a Power to set conditions for entry into a recognized international channel, that it did not agree to give prior notice of passage, and that if British ships in the channel were fired on in the future, fire would be returned.

Thus a position had been clearly taken on the matter by the United Kingdom but from the correspondence, the position of Albania was not so clear. One note had stated that the ships would not have been fired upon had they been recognized as British. The other stated that navigation in the Corfu Channel would not be interfered with provided it did not enter Albanian waters. This posed an impossible problem since the northern portion of the cleared channel was almost entirely within Albanian territorial waters.

The passage of the channel on 22 October, during which the Saumarez and Volage were mined was, as brought out in subsequent testimony of British officers, a test of Albanian intentions and an assertion of British rights. The crews were at "general quarters" for the safety of the ships.

Following the incidents of 22 October, which form the basis of the case, the United Kingdom addressed a note to the Albanian Government on 26 October. This note stated that in view of the serious incidents which occurred recently to two of His Majesty's warships passing through the Corfu Channel, and of which the Albanian authorities were no doubt aware, British minesweeping authorities would

shortly sweep the channel. A similar communication was made to the Greek government.

Albania replied on 31 October, 1946. Her note protested the violation of Albanian territorial waters by British warships. It stated that Albania had no objection to the projected minesweeping operation but that the ships engaged should not enter Albanian territorial waters. A British note referring to the previous notes of 26 and 31 October, informed the Albanian government that sweeping of the Corfu Channel would take place on 12 November. It was stated that this was being done in accordance with a unanimous decision of the Control Mine Clearance Board on 1 November that the channel should be reswept.[4] It described the area to be swept as Medri areas 18/32 and 18/34 as defined by charts in the possession of the Albanian government. It added that no ships would be stationed in Albanian waters and that the operation would be carried out in exactly the same way as the original sweeping done in October 1944 and February 1945, to which the Albanian government had raised no objection. On 11 November, Albania replied to this note, protesting the unilateral decision of the United Kingdom and challenging the propriety of facing a sovereign country with such a fait accompli. The note then proposed the establishment of a mixed commission to decide what area of the sea should constitute the channel of naviga-

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4. This resolution had contained the clause "at the first favorable opportunity."

tion to be swept. The Albanian note thus restated the Albanian position and requested that any sweeping inside Albanian territorial waters "where foreign warships have no reason to sail," would be considered a violation of Albanian territory and sovereignty, and that the damage to the two British warships had occurred in such waters.

On 9 December, 1946, after evaluating the results of the sweeping operation on the 12th and 13th of November, the United Kingdom addressed a long note to Albania. This note reviewed the history of the mine problem and the incidents leading up to the minesweeping operation, including the shelling of HMS Orion and Superb and the mining of HMS Volage and Saumarez. The note stated the United Kingdom's conclusion that the Albanian government either had laid the minefield or knew that it had been laid. It demanded an apology for the acts of 15 May and 22 October, assurance of no repetition, reparations to the United Kingdom for the damages and compensation to the relatives of the men who had lost their lives. The last paragraph stated that if no satisfactory reply were received within fourteen days, the United Kingdom would have no alternative but to bring the matter before the Security Council of the United Nations as a serious threat to, and breach of, international peace and security. The Albanian reply to this note rejected the accusations, while expressing regret for the accident.

Albania had meanwhile addressed a series of four notes to the Secretary-General of the United Nations, dated 29 October, 12, 13, and 27 November, 1946. Each of these notes protested the actions of the United Kingdom in Albanian territorial waters. The first two

were circulated to members of the General Assembly and the second two to the Department of Security Council Affairs. A letter from the representative of the United Kingdom on the Security Council, dated 10 January, 1947, and addressed to the Secretary-General of the United Nations, brought the dispute to the attention of the Security Council under Article 35 of the United Nations Charter. This letter and its enclosures became Security Council Document S/247 and opened the case in the Security Council, appearing on the Provisional Agenda at the Ninety-fourth Meeting held at Lake Success, New York, on Friday, 17 January, 1947.

3. The Role of the Security Council

The first problem which the Security Council faced was that of the adoption of the agenda listing the case. The Societ Union delegate,Andrei Gromyko, immediately objected on the grounds, first, that all peaceful means for settling the dispute outside the United Nations had not been exhausted and, second, that the dispute did not threaten peace and security. The matter was brought to a vote on 20 January, 1947, and the agenda was adopted by ten votes with the Soviet Union abstaining. In accordance with Article 32 of the U.N. Charter, Albania was invited to take part in the discussion of that item of the agenda under the condition that she accept the obligations which would apply to a member of the United Nations. By 28 January a reply had been received from Albania accepting the invitation and the conditions imposed. On 10 February, 1947, Mr. Hysni Kapo, the Albanian representative, took a seat at the Council table

and the substantive discussion of the Corfu Channel Case began.

The first aspect of the case, as in most other disputes, was that of the question of the competence of the Security Council to deal with the matter. This was effectively decided by the appointment on 27 February, 1947, of a Security Council sub-committee to examine the evidence and report to the Council.[5] The sub-committee returned a report[6] to the Security Council on 20 March, 1947.[7] The Security Council continued its debate until a United Kingdom resolution which would have recommended that the two parties settle the dispute on the basis of Albania's knowledge of the existence of the minefield, was brought to a vote. This resolution was vetoed by the Soviet Union on 25 March, 1947. Poland also voted against it and Syria abstained.[8] The debate continued until a second United Kingdom resolution to the effect that both parties should immediately refer the dispute to the International Court of Justice was passed, with Poland and the U.S.S.R. abstaining.[9] This recommendation ended the Security Council's part in

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5. U.N. Security Council, Second Year, Official Records, No. 21, 114th Meeting (27 February, 1947), pp. 432-438.

6. U.N. Security Council, Second Year, Official Records, Supplement No. 10, Annex 22. Document 5/300.

7. Ibid., No. 27, 120th Meeting (20 March, 1947), p. 544.

8. Ibid., No. 29, 122nd Meeting (25 March, 1947), p. 609.

9. Ibid., No. 34, 127th Meeting (9 April, 1947), p. 727.

the affair.[10]

4. The Role of the International Court

The proceedings before the International Court of Justice were instituted by a written application[11] addressed to the Registrar of the Court by W. E. Beckett acting as agent for the United Kingdom. This application, dated 13 May, 1947, was delivered at The Hague on 22 May, 1947. Its receipt was made known by the Registrar to the Government of Albania and the Secretary-General of the United Nations. A letter[12] dated 2 July, 1947, addressed to the Registrar of the Court by the Albanian deputy-minister for Foreign Affairs, Mr. Hysni Kapo, confirmed the receipt by Albania of the United Kingdom Application, asserted that "the Albanian Government would be within its rights" in holding that a special agreement was a necessary preliminary, but went on to say that Albania accepted the decision of the Security Council, was prepared to appear before the court, and that "its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future." The letter then named as agent for Albania, Mr. Nahreman Ylli. This communication became the basis for

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10. The Security Council cannot be said to be entirely free of the matter since the United Kingdom is assured recourse to it as a remedy for Albania's subsequent failure to comply with the judgment of the International Court of Justice.

11. International Court of Justice, The Corfu Channel Case, Pleadings, Oral Arguments, Documents, Vol. I, p. 8.

12. Ibid., Vol. II, p. 25.

the assertion of jurisdiction by the Court when it was subsequently disputed.

The President of the Court, in an order dated July 31st, 1947,[13] fixed the dates for the submission of memorial, counter-memorial, rejoinder, and reply. This sequence was interrupted when on 9 December, 1947, Albania filed a Preliminary Objection[14] to the jurisdiction of the Court. The Court proceeded to receive British observations and submissions on the Albanian Preliminary Objection and on 25 March, 1948, handed down its first judgment.[15] This judgment rejected the Albanian preliminary objection and fixed time limits for the submission of subsequent pleadings.

Upon this assertion of jurisdiction by the Court, both parties filed a Special Agreement[16] which outlined two specific issues in the case and asked the Court to rule. The Court accepted this Special Agreement as the basis for its further proceedings and handed down a second judgment[17] on the merits of the case on April 9, 1949. This

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13. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders 1947-1948, p. 4.

14. International Court of Justice, Pleadings, Oral Arguments, Documents, Vol. II, p. 8.

15. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1947-1948, pp. 15-48.

16. International Court of Justice, Pleadings, Oral Arguments, Documents, The Corfu Channel Case, Vol. II, p. 29.

17. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1949, pp. 4-169.

judgment found Albania responsible for the damage to British ships and the accompanying loss of life and therefore liable for compensation. The Court based this finding on its determination of the fact that Albania must have had knowledge of the presence of the mine field. In the second part of this judgment the Court found that Albanian sovereignty had not been violated on 22 October 1946, but that British minesweeping operation on 12 and 13 November, 1946 had constituted such a violation. This finding in itself was adjudged adequate compensation to the Albanian government. The Court asserted its jurisdiction to further assess the amount of compensation due the United Kingdom[18] and reserved this decision until receipt of an Albanian statement as to which of the United Kingdom claims it disputed. In its third judgment in the Corfu Channel Case, the Court on 15 December, 1949 fixed the amount of compensation due from the Peoples Republic of Albania at £843,947. The Albanian government was absent and made no submissions except for a request for a prolongation of time limits[19] received by the Court on the day those limits expired. The compensation has never been paid.

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18. Ibid., p. 26.

19. Ibid., p. 248.

CHAPTER II

CONSIDERATION BY THE SECURITY COUNCIL

1. The Agenda Question

As has been noted, a total of five pertinent communications were received in the United Nations prior to discussion of the Corfu Channel Case by the Security Council. Four of these communications were from Albania and one from the United Kingdom. The United Kingdom note was placed on the provisional agenda of the Security Council but none of the Albanian notes were. Was this an equitable procedure and in keeping with the spirit and letter of the United Nations Charter?

The first of these communications was a telegram, dated 29 October, 1946, from the President of the Council of Ministers of the Peoples Republic of Albania addressed to the Secretary-General.[20] This telegram was a protest against an alleged version of the incidents of 22 October, and the telegram was described as a submission through the Secretary-General to the General Assembly of the United Nations of the facts alleged and a protest against them. The United Nations was requested to intervene "in order to put a stop to such provocations." This communication was circulated to members of the

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20. U.N. Security Council, Second Year, Official Records, Supplement No.2, Annex 9, p. 46 (Document 5/250).

General Assembly on 1 November, 1946. It was not brought to the attention of the Security Council except as evidence subsequent to placing the dispute on the agenda of that body at the instance of the United Kingdom. Since any member of the Security Council or of the General Assembly has the power to have an item placed on a provisional agenda of either body, as the procedural rules of these bodies provide, and this was not done, the conclusion may be drawn that the members of the United Nations did not at the time wish the dispute to be dealt with by either organ.

Article 35, paragraph 2, of the Charter provides that a state which is not a member may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligation of pacific settlement as provided in the Charter. The Albanian telegram did not refer to this article, it specifically addressed its allegations to the members of the General Assembly, and it contained no acceptance of the obligation of pacific settlement. It was, nevertheless, circulated to the members of the General Assembly who were at perfect freedom to have the matter placed on a provisional agenda, but did not do so.

The second Albanian telegram was dated 12 November, 1946.[21] It consisted of a protest against the decision of the United Kingdom to sweep the Corfu Channel for mines, and an unrelated protest against the demand of the American mission to Albania to bring two warships

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21. Ibid., p. 48.

into Durazzo for the purpose of evacuating personnel. No action was requested or suggested in this communication, which was, like the preceding one, distributed to the members of the General Assembly and susceptible to the same procedures.

The third of these telegrams, dated 13 March, 1946, referred to the previous one.[22] It gave an Albanian version of the minesweeping on 12 November, and requested that the United Nations "judge" the act and give orders for the withdrawal of British forces from Albanian waters. This telegram, according to the note preceding these documents as they are reproduced in the Official Records, was referred to the Department of Security Council Affairs. This office is an administrative division of the Secretariat which has, as one of its functions, assisting the Secretary-General in his responsibilities under Article 99 of the Charter.

A fourth telegram disputed the facts alleged by the United Kingdom and requested the Secretary-General to draw other "facts" to the attention of the Assembly of the United Nations.[23] This telegram was also referred by the Secretary-General to the Department of Security Council Affairs. The handling of the two last-named documents was the complete responsibility of the Secretary-General. Presumably the administrative occasion was taken within the Secretariat not to place the matter on a provisional agenda. As a final disposition, this is not within the power of the Secretary-General, In accordance

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22. Ibid., p. 49.

23. Ibid., pp. 49-50.

with Article 35(2) of the Charter, it would zeem mandatory that the fourth telegram be placed on the provisional agenda of the General Assembly, subject to prior acceptance by Albania of the obligations for peaceful settlement provided for in the Charter. The effect of this apparent irregularity in procedure was nullified, of course, when the dispute came before the Security Council at the instance of the United Kingdom, the same remedy being available to Albania under these circumstances as if she had managed herself to have the matter introduced. There is a difference in the opportunity afforded to air the case to public opinion, as between the Assembly and the Security Council, but the remedy available to a party is greater if the dispute is being dealt with by the Security Council. It is nevertheless worth noting that a non-member state in exercising its privilege under Article 35, paragraph 2, of the Charter would do well to make its communication state explicitly its Charter authority and the organ to which referral is sought. The risk of an administrative disposal of the request within the Secretariat might thus be reduced.

In evaluating the above actions it must be considered that the United Kingdom had been in direct communication with Albania on the matters which were the subject of the Albanian telegrams, and one of the principles of U.N. action as set forth in Article 33, is the prior attempt by parties to settle their disputes by peaceful means. There is no question but what placing such a dispute on the agenda of the United Nations while outside negotiations were in progress would hazard these negotiations. The Secretary-General might well make such consideration the basis for the <u>timing</u> of the introduction of disputes to

the provisional agenda, if not for the final disposition of application.

When all such administrative problems are settled and an item is placed on the provisional agenda, its first deliberative obstacle is the debate on the adoption of the agenda. This is a procedural matter and it may be ventured that were it not, a Soviet veto would have blocked Security Council consideration before the substance of the Corfu Channel dispute was ever taken up. The vigorous arguments of Mr. Gromyko against the adoption of this agenda are inconsistent with the previous efforts of Albania to bring the matter before the United Nations. He stated that the case should not be an appropriate matter for Security Council consideration because the possibilities for peaceful settlement had not been exhausted, citing the proposed mixed commission, and further that the dispute did not constitute a threat to peace and security.[24] It is inconceivable that in view of overwhelming opinion assuring adoption of the agenda, the Soviet delegate took advantage of an opportunity to verbally attack the United Kingdom for purely propagandistic reasons. He abstained from the vote and all other members, including Poland, voted in favor of adoption. Members of the Security Council at this time were:

Australia
Belgium
Brazil
China
Colombia
France
Poland
Syria
United Kingdom
United States of America
Union of Soviet Socialist Republics.[25]

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24. U.N. Security Council, Second Year, Official Records, No. 6, Ninety-fifth Meeting (20 January, 1947), p. 115.

25. Ibid., p. 117.

As a general thing, the argument that the Security Council should not interfere as long as the parties may be able to reach a reasonable settlement has served as well to justify a refusal to take up questions with which members do not wish to deal for any political reason.

The invitation which was issued to Albania was only mandatory under Article 32 if the Security Council considered the question a "dispute" within the meaning of the Charter. There was no such specific determination by the Council but it was implied by the invitation and the question was handled as a "dispute" by tacit consent thereafter. The imposition of conditions upon Albania, as provided for by Article 32, tends to confirm the opinion that the Security Council was acting under Article 32 rather than Article 31. There is an obligation to issue an invitation in the case of a dispute under Article 32, but the Security Council has the option of inviting a non-member to participate in the discussion of any "question" under Article 31.

2. The Competence of the Security Council

Further discussion of the dispute by the Security Council was delayed pending the arrival of Mr. Hysni Kapo to represent Albania. There was some discussion in the Security Council regarding the scheduling of the next discussions. It was suggested by the Chinese delegate that a definite date should be named on which the Council would resume discussions regardless of the presence of an Albanian represen-

tative.[26] It was finally decided to treat this as an administrative detail and authorize the President of the Security Council to communicate with the Albanian government regarding the probable date of arrival of its representative, and to allow him to set the date for the next meeting as he saw fit and with regard to his information from the Albanians. The dispute itself was thus first discussed on 18 February, 1947, when Mr. Kapo took his seat at the Council table.[27] As has become almost customary, the dispute was introduced by speeches from the parties. The United Kingdom's case was introduced first by Sir Alexander Cadogan at the 107th meeting,- a meeting which was devoted entirely to this presentation. Documentary evidence had been circulated to members of the United Kingdom and other evidence was deposited with the Secretary-General. Sir Alexander, after reviewing the incidents and the diplomatic exchanges, reported the British conclusions as drawn from their examination of the recovered mines. The most significant of these was that the minefield had been laid in the swept channel no more than six months prior to the explosions on 22 October.[28] This conclusion was based on the lack of rust and marine growth found on the mines. The resulting responsibility of Albania was argued under Rule Number 8 of the 1907 Hague Convention and existing international law. Sir Alexander asked that the Council

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26. U.N. Security Council, Second Year, Official Records, No. 8, 97th Meeting (31 January, 1947), p. 139.

27. Ibid., No. 15, 107th Meeting (18 February, 1947), p. 293.

28. Ibid., p. 297.

recommend settlement of the dispute by direct negotiation under Article 36 of the Charter, after making a finding of fact without which such a negotiation could not succeed. He submitted the following conclusions for adoption:

> (1) That an unnotified minefield was laid in the Corfu Straits by the Albanian Government or with its connivance resulting in serious injury to His Majesty's ships and loss of life and injury to their crews.
>
> (2) That the United Kingdom and Albanian Governments should settle the dispute between them on the basis of the Council's finding in (1) above, and that, in the event of a failure to settle, either party may apply to the Council for further consideration of the matter.
>
> (3) That the Security Council will retain this dispute on its agenda until both parties certify that it has been settled to their satisfaction.
>
> (4) That, since the laying of mines in peacetime without notification is unjustified and an offence against humanity, and since it is the duty of governments to remove promptly mines laid in time of war, the Security Council reminds all States, whether members of the United Nations or not, that it is incumbent on them to sweep or permit to be swept all parts of their territorial waters where there is reason to suspect the presence of mines.[29]

The Albanian case was presented by Mr. Kapo at the 109th meeting. Mr. Kapo asked why the British request received on 10 January, 1947, was immediately placed on the agenda of the Security Council whereas the Albanian request had not yet been considered. This point was not dealt with in subsequent debate, conceivably because it was not relevant and because there was no prejudice to Albania's case, in spite of Kapo's implication.

Mr. Kapo continued with the Albanian version of the incidents.

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29. Ibid., p. 306.

He introduced the Greek civil war as a factor in Albania's militaristic posture and made a long speech about the role of the British military missions in Albania vis à vis the Communist government, a role which, according to Mr. Kapo, was responsible for the deterioration in United Kingdom--Albanian relations. As Sir Alexander Cadogan stated in reply, the lengthy description of Albanian grievances in this speech only served to strengthen the probability of Albanian connivance in the mining of British vessels. The first stage in the substantive handling of the dispute, therefore, consisted of the presentation of the case of each of the parties by means of speeches before the Security Council.

Examination of the press reaction to these speeches is useful at this point in providing historical perspective. The issue aroused little interest among American commentators. There was good factual coverage of the debate in the Security Council but the American press carried no editorial comment. The dispute also received good coverage in the British press. The Irish Times on 20 February devoted its leading article to the subject and said: "We have no particular interest in the verdict. We do, however, have a deep interest in the fact that the British Government invoked the international authority of the United Nations in the cases of Albania and Palestine." An article in the Moscow New Times alleged that the incident had been fabricated by the United Kingdom to inflame the already embittered relations between the countries.[30]

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30. U.N. Secretariat, Survey of Opinion on the United Nations, No. 8, Vol. II/8 (24 February, 1947).

After the presentation by each party of its side of the dispute, the Security Council began to debate its competence to deal with the matter under the Charter. The issue was opened by an Australian proposal for the establishment of a subcommittee to examine the matter for the Security Council in order to expedite the handling of the case and eliminate extraneous considerations. Australia accompanied its proposal by submitting a resolution that the Security Council appoint a subcommittee to examine all the evidence and make a report to the Security Council.[31] Thus the Council was provided with a sort of dummy question around which it could debate the real issue, that of its competence. The President of the Council, Mr. F. van Langenhove, of Belgium, called attention to Rule 33 of the precedural rules of the Security Council requiring that the discussion be confined to the motion on appointment of a subcommittee, but this rule was not strictly enforced and the main arguments were on the competence of the Council.[32] The U.S.S.R. and Poland argued that peaceful means of settling the dispute outside the United Nations were not exhausted and that since there was no threat to the maintenance of peace and security, the Security Council could not consider the matter. The United Kingdom reply was that the former Albanian proposal of a mixed commission was not intended to settle the main issue and therefore could not be cited as an Albanian attempt at peaceful settlement that had been

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31. U.N. Security Council, Second Year, Official Records, No. 18, 111th Meeting,(February 24, 1947) p. 364.

32. Ibid., p. 382.

[illegible]

[illegible]

[illegible]

rejected by the United Kingdom. This mixed commission would have been dealing with a question already settled on an international basis by the Mediterranean Routing Instructions. The Albanian replies to the United Kingdom notes had shown at once, said Sir Alexander, that there was no hope at all of an amicable settlement between the two nations without outside assistance.[33]

A point of order was raised during this debate by the United Kingdom representative, the question being whether as a party to this dispute he could vote on the question of the appointment of a subcommittee, a question which he took to be procedural. The representative of the U.S.S.R. argued that the Council's decision and all others relating to the dispute or its handling were substantive from the moment the dispute was adopted as an agenda item. The President of the Security Council ruled that the barring of the parties from voting by Article 27 of the Charter related only to decisions taken by the Council under Chapter III of the Charter, and that his ruling was, therefore, that a party could not be barred from voting on the establishment of a subcommittee such as that proposed by the Australian delegate. The complete avoidance in his ruling of a statement regarding the procedural aspect of the decision is an example of the hedging that enables a political body to survive questions that might split a legalistic deliberation irrevocably. The President went as far as necessary to provide a clear ruling and not an inch further, avoiding the focus of difference as well as he could. The subcommittee was

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33. Ibid., p. 385.

voted for and appointed on 27 February, 1947, the Soviet Union, Poland, and Syria abstaining.[34] The members of the committee were selected, after a general expression of opinion on the part of most members, by the President whose selection was then approved by vote of the Council. The United Kingdom voluntarily refrained from this vote.[35] In appointing this subcommittee, the Security Council in effect affirmed its competence in the matter.

The argument that the continuance of a dispute is not likely to endanger the maintenance of peace and security has been put forward in many cases. Brazil in particular has argued forcefully that a dispute should only become the object of the Council's consideration if its continuance is likely to endanger the maintenance of international peace and security. In another case the Brazilian representative stated: "To seek redress in the Security Council before the traditional means of settlement have been exhausted would amount to transferring to that body all the diplomatic difficulties resulting from the relations between States."[36] Such a restricted view was not taken in this case and has not generally been taken by other members of the Security Council. It remains a serviceable public

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34. The reasons for the Syrian abstention were not clear at the time as the representative of this country did not express himself in the Council. Mr. Lange of Poland who had voted for the adoption of the agenda, had been replaced by Mr. Mochalowski, but he returned to later sessions. U.N. Security Council, op. cit., No. 21, 114th Meeting (27 February, 1947), p. 432.

35. Ibid., p. 438.

36. U.N. Security Council, Second year, Official Records, No. 80, 189th Meeting (August 20, 1947), pp. 2105 ff., quoted in Leland M. Goodrich and Anne P. Simons, The United Nations and the Maintenance of Peace and Security, p. 270.

vote [illegible] or was adopted on 21 [illegible] ary, [illegible] 7, [illegible] Soviet [illegible] ion, Pola [illegible] and [illegible] Syria abstaining. [illegible] The members of [illegible] agreed [illegible] general agreement [illegible] the Tr [illegible] that was [illegible] all.[24] [illegible]

[illegible] agreed [illegible]

[illegible] Council [illegible] Security [illegible]

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24. The record of [illegible] representative of [illegible] change [illegible] vote [illegible] been replaced [illegible] U. N. Security [illegible] February, 1947), p. [illegible]

25. Ibid., p. 455.

26. U. N. Security Council, [illegible] Meeting (August 26, 1947 [illegible] quoted in [illegible] Goodrich and Anne P. Simons, The United Nations and the Maintenance of Peace and Security, p. [illegible]

argument against the consideration of disputes which from the point of view of any State, it is politically undesirable to discuss.

The establishment of the subcommittee introduced a procedural point worthy of notice. One authoritative commentary asserts that the establishment of the subcommittee of the Security Council on the question, although viewed with no great enthusiasm by Albania, was not blocked by the Soviet Union.[37] This is true but misleading for in fact the Soviet Union attempted to block the subcommittee but was prevented from doing so by the President's ruling on the voting rules of the Council.

The subcommittee mandate was quite general in nature. It was set forth in the Australian resolution, by which the subcommittee was to be appointed to "examine all the available evidence concerning the above mentioned incident and make a report to the Security Council not later than 3 March 1947."[38]

3. The Subcommittee of the Security Council

The Corfu Channel Case at this point hinged on a number of disputed facts regarding alleged past causes of conduct. These facts, if determined, would be used to further ascertain whether Albania was or was not responsible for the damage by mines to the British vessels in the Strait. The subcommittee's instructions left it complete leeway in an entirely broad field of action. It was not restricted as to what evidence it might use but, on the contrary, enjoined to examine

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37. Ibid., p. 187.

38. U.N. Security Council, Second Year, Official Records No. 17, 110th Meeting (20 February, 1947), p. 364. The date was later changed to 10 March, 1947 because of the delay caused by debate.

all available evidence. It was not asked to recommend nor were the facts which it was to determine defined. Thus the subcommittee was left to interpret its own function as well as further the Security Council's actions. It was composed of Mr. Eduardo Zuleta Angel of Colombia as chairman, Mr. Hasluck of Australia, and Mr. Lange of Poland.

In returning the submittee report, each member spoke before the Security Council, giving his individual views. Mr. Angel first described the subcommittee's interpretation of its duties as being that of a rapporteur which had carefully analyzed and studied the allegations and counter-allegations of the parties concerned so as to introduce order, method and system into the study of the problem without actually submitting any conclusions or facts. The subcommittee's analysis had reduced the dispute to two questions upon which the Security Council should concentrate. These were:

> (1) Did a minefield exist in the swept channel opposite Saranda Bay on 22 October, or did it not?
>
> (2) Was this minefield laid by Albania or with the connivance of the Albanian Government or was it not?[39]

The report of the subcommittee itself indicated the narrowness of agreement achieved even in the privacy of such committee deliberation.[40] With regard to the damages and loss of life suffered by the British ships, the report stated that no conflicting evidence existed. However, no agreement had been reached concerning the existence of the

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39. Ibid., No. 27, 120th Meeting (20 March, 1948), p. 544.

40. U.N.Security Council, Second Year, Official Records Supplements, No. 10, Annex 22.

minefield, nor whether the mines which had caused the damage were part of a field located in the subsequent sweeping operations. The Polish member prepared an appendix to the report in support of his opinion that the report did not fulfill the task set by the Security Council in that it was not a report "on the facts of the case."[41]

In their speeches incident to returning the report, the Colombian and Australian members stated that their conclusions were that the minefield must have been known to Albania, although there was not sufficient proof to allow a conclusion that Albania had laid it. The Polish representative stated that the evidence did not support the accusations that had been made against Albania, that there was little that the Security Council could do, and suggested that it would be appropriate to invoke Article 33 of the Charter calling upon the parties to settle their dispute by the means listed in that article.[42]

The subcommittee held a total of ten meetings. Representatives of the parties to the dispute and the Greek representative to the United Nations were questioned. There is no explanation in the United Nations documentation for the failure of the French Government to allow Commander Mestre, the foreign observer who accompanied the maneuvering expedition on 12 and 13 November, to be examined as was requested by the subcommittee.[43] Upon the return of this report at its 120th meet-

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41. Ibid., Appendix I.

42. U.N. Security Council, Second Year, Official Records, No. 27, 120th Meeting (20 March, 1947), pp. 556-557.

43. The French Ambassador's letter is reproduced in the subcommittee report. Captain Mestre appeared later in the Court hearings.

ing on March 20, 1947, the Security Council resumed its debate on the subject.

4. The United Kingdom Resolution

The allegations attached to the report by Poland by means of the Polish appendix set off Security Council criticism which was led by the United Kingdom. In conclusion to this speech, the United Kingdom representative introduced a resolution which carried a finding of Albanian connivance and a recommendation that the parties settle their dispute on the basis of that finding.[44] Ensuing debate centered on that resolution. The Albanian representative, Mr. Hysni Kapo, had continued to sit in the meetings of the Security Council and now spoke at length on the whole matter without introducing any new considerations. He was supported by the Soviet delegate. The Belgian, Australian, and United States delegates expressed their agreement with the Colombian delegate's findings as stated in the subcommittee's report. The United States proposed two amendments to the United Kingdom resolution.[45] The first of these made the responsibility of the Albanian government stem from its knowledge of the mines rather than from its connivance in laying them. The second amendment deleted a provision of the resolution containing a general reminder to all States that it was incumbent upon them to sweep or permit to be swept all parts of their territorial waters where there

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44. Ibid., p. 567.

45. Ibid., p. 589.

is reason to suspect the presence of mines. This amendment has been used to demonstrate avoidance by the Security Council of the setting up of legal precepts of international conduct as compared with the Assembly,[46] although the substitution proposed in this amendment, to the effect that the Security Council:

> 1. Considers that the laying of mines in peace time without notification is unjustified and an offense against humanity.

seems to support standards of international conduct without dealing specifically with the application of international law to minesweeping, a separate matter not directly connected with the dispute. As it turned out later in the Court proceedings that the minesweeping operation conducted by the United Kingdom was a violation of Albanian sovereignty, an expression by the Security Council on the duties of a state in this regard might have been contradicted.

A second amendment was proposed by Mr. Parodi, the delegate of France.[47] Mr. Parodi agreed with the conclusions expressed by the resolution but wished the resolution to express more clearly the steps of reasoning by which the conviction had been reached. As written it seemed to imply that the Security Council had clear proof that Albania had knowledge of the minefield. The expression introduced was, "that this minefield could not have been laid without the knowledge of the Albanian government."

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46. Goodrich and Simons, op. cit., 209.

47. U.N. Security Council, op. cit., p. 596.

is reason to suspect the presence of [illegible]. This case [illegible] upon such temporary [illegible] Security Council [illegible] up of legal precedents of international [illegible] Assembly[46] although the [illegible] the [illegible] that the Security Council:

> 1. Considers that [illegible] of [illegible] peace [illegible] without justification is [illegible] an offense against humanity.

[illegible] concept [illegible] standards of international conduct [illegible] [illegible] with the [illegible] it is [illegible] ing, a separate matter [illegible] directly [illegible]. As [illegible] not [illegible] front [illegible] operation conducted [illegible] sovereignty, an expression [illegible] the duties of a state in [illegible].

A [illegible] was [illegible] the delegate of France.[47] Mr. Parodi agreed [illegible] expressed by the resolution but asked that [illegible] clearly the [illegible] of [illegible] the condition [illegible]. As written it seemed to imply that the Security Council [illegible] that [illegible] had knowledge of [illegible]. [illegible] the [illegible] the knowledge of the [illegible] government."

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46. Woolsey and Simons, op. cit., [illegible].

47. U.N. Security Council, op. cit., p. 596.

The United Kingdom accepted the two amendments proposed. Introduction of such amendments provides some evidence that the conclusions embodied in a final resolution have been reached by independent reasoning.

The Polish delegate introduced another resolution at this point which asserted that all peaceful means of settlement had not been exhausted and called upon the parties to settle the dispute by means of their own choice, as provided in Article 33 of the Charter. Debate continued until the amended United Kingdom resolution was brought to a vote. This resolution in its final form stated that the laying of mines in peacetime without notification is unjustified and an offense against humanity, that an unnotified minefield had caused damage and loss of life to His Majesty's ships and crews, a minefield that could not have been laid without the knowledge of the Albanian government, and recommended that the two parties settle their dispute on the basis of these findings. This resolution was defeated, failing to obtain the affirmative vote of the Soviet Union.[48] Poland joined the U.S.S.R. in voting against it and Syria abstained, presumably for the reason expressed in a speech just prior to the vote, that of a lack of direct factual evidence to support the finding. The resolution that had been proposed by Poland was now withdrawn by that delegate apparently in the hope that the case would be dismissed. When the President ruled that the question would remain on the agenda, the Soviet delegate attacked this ruling.[49] A vote on this procedural matter was

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48. Ibid., p. 609.

49. Ibid., p. 611.

forestalled by adjournment on a motion of the United Kingdom.

At the 125th Meeting on 3 April, 1947, the Corfu Channel Case was again taken up by the Security Council. The United Kingdom delegate reviewed the case and then introduced a resolution which recommended that the parties to the dispute refer it to the International Court of Justice.[50] This resolution was supported by the United States. It was also supported by Brazil, but the Brazilian delegate criticised the handling of the case up to that point on the legalistic grounds referred to previously. It was the fear of this delegate that the Security Council would become a lower court for all disputes between nations. He felt that the Security Council, a political body, could not be limited, as a court is, to considerations of proofs, facts, circumstances, and laws, but that its limitations lay in the nature of disputes with which it would deal and that these must endanger the maintenance of peace and security. Therefore, in such cases as the one at hand, the Security Council should immediately refer the parties to the International Court of Justice rather than deal with the substance of the question itself.[51] Other speeches contained expressions which bore on the effect of the resolution combined with obligations of the parties under the Charter. The Australian delegate, Colonel Hodgson, seemed to take the opposite from the Brazilian's view. He asserted that "the Council is intended to occupy a position comparable to that of the International Court of Justice in relation to justiceable disputes."[52] He reminded Albania

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50. Ibid., 125th Meeting (3 April, 1947), p. 685.

51. Ibid., p. 686.

52. Ibid., 127th Meeting (9 April, 1947), p. 721.

that if it failed to appear before the Court a judgment could be given against it. He concluded that the Security Council recommendation would be binding and that Albania was bound by it because of her acceptance of the obligations of a member.

The Soviet representative insisted that whereas it would have been more proper to bring the case to the International Court of Justice originally, the investigation had revealed no basis for "dragging Albania before the International Court of Justice."[53] The President, speaking as the representative of China, answered the argument that the case should have gone to the International Court of Justice originally, by pointing out that whereas Albania could not originally have been compelled to appear, not being a member of the United Nations, she was now bound by both the United Nations Charter and the Statute of the Court. The United Kingdom's resolution passed with all votes affirmative except for the Soviet Union and Polish abstentions. A general debate on the powers and duties of the Security Council inspired by the restrictive Brazilian position, ended inconclusively and the Security Council's role in the Corfu Channel Case came to an end.[54]

Article 33 of the Charter was designed to insure that the parties to a dispute would make an effort to settle the dispute

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53. Ibid., p. 725.

54. The Security Council had dealt with the case in the following meetings: 95th, 96th, 97th, 98th, 107th, 109th, 111th, 114th, 120th, 121st, 122nd, 125th, 127th.

before referring it to the Security Council.[55] The majority of the Council supported the view of the United Kingdom that the circumstances required the Council to do more than merely urge the parties to reach a settlement.

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55. Goodrich and Simons, op. cit., p. 274.

CHAPTER III

THE INTERNATIONAL COURT OF JUSTICE AND THE CORFU CHANNEL CASE

1. The Jurisdictional Dispute

The International Court of Justice was established concurrently with the United Nations, as provided for by the United Nations Charter and the Statute of the Court which is annexed to and forms an integral part of the Charter. The Court met first in April and May, 1946, when a Solemn Inaugural Session was held. During this period the judges drew up the Rules of the Court and elected the Chamber for summary procedure. It met again in February-March, 1947, for the annual election of the Chamber and to deal with other administrative matters. In May, 1947, the Court received notification of the first case that was to come before it, the Corfu Channel Case.[56]

The Security Council resolution calling upon the parties to submit their dispute to the Court had been adopted on 9 April, 1947. On 22 May, 1947, the United Kingdom addressed an application to the Court for consideration of the case. There seems to have been no question raised of the obligations of the United Kingdom in this respect but actually, under subsequent interpretation, there was only a moral obligation to carry out the Security Council's recommendation.

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56. International Court of Justice, Yearbook 1947-1948, p. 15.

The United Kingdom in arguing for the jurisdiction of the Court took the position that recommendations of the Security Council were binding but this view was not supported. How did Albania stand now? Albania had accepted the obligations of a member of the United Nations in appearing at the Security Council, but as in the case of the United Kingdom, this obligation was only moral, and a considerable degree less than that of the United Kingdom. There was no other basis for the Court's jurisdiction as far as Albania was concerned. It must be noted that had Albania initiated proceedings in the Court, the United Kingdom would have been bound to appear, having accepted the compulsory jurisdiction of the Court.

One may speculate upon the effects of the side issue of Albania's candidacy for membership in the United Nations, upon her actions with respect to the Court. On 9 July, 1947 the Security Council referred the application of Albania, together with those of several other states, for membership in the United Nations, to its Committee on the Admission of New Members. The actions of Albania with respect to the Security Council Resolution were a natural consideration for this Committee which was instructed to present its report on 10 August, 1947. On 18 August, 1947, the Security Council voted not to recommend Albania for membership.[57] Among the considerations mentioned in the plenary session was the mining of the Corfu Channel.[58]

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57. U.N. Security Council, Second Year, Official Records, No. 179, 186th Meeting (18 August, 1947), p. 2037.

58. Ibid., pp. 2035-2036.

The claim of the Government of the United Kingdom as set forth in its Application, was as follows:

> (1) That the Albanian Government either caused to be laid or had knowledge of the laying of the mines.
>
> (2) That two British destroyers were seriously damaged and forty-four personnel of the Royal Navy lost their lives because of the mines so laid.
>
> (3) That the loss and damage were due to the failure of the Albanian Government to fulfill its international obligations and act in accordance with the dictates of humanity.
>
> (4) That the Court shall decide that the Albanian Government is internationally responsible for the said loss and injury and is under an obligation to make reparation or pay compensation to the Government of the United Kingdom therefor; and
>
> (5) That the Court shall determine the reparation or compensation.[59]

The first communication received from Albania by the Court was a letter dated 2 July, 1947.[60] This letter, addressed to the Registrar of the Court, was dated at Tirana and signed by Hysni Kapo, Deputy Minister for Foreign Affairs of Albania. The letter, which was to be the basis for the assertion of jurisdiction by the Court, made the following observations:

> (1) The United Kingdom was not entitled to refer the dispute to the Court by unilateral application.
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> (2) Article 25 of the U.N. Charter cannot be used to justify the United Kingdom proceeding, since it relates only to "decisions."

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59. International Court of Justice, Pleadings, Oral Arguments, Documents, The Corfu Channel Case, Vol. I, p. 9.

60. Ibid., Vol. II, p. 25.

The claim of the [illegible]

In his application, [illegible]

(1) That [illegible]
[illegible] or had [illegible]

(2) That [illegible]
[illegible]
[illegible]

(3) [illegible]
of [illegible]
[illegible]
[illegible]

(4) [illegible]
[illegible]
[illegible]
[illegible]

(5) [illegible]
[illegible]

[illegible] Minister [illegible] Letter, [illegible]

[illegible] following [illegible]:

(1) [illegible]
[illegible]

(2) [illegible]
[illegible]

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5. [illegible] Internal Revenue, Inspector, Electric [illegible] Corporation [illegible] Corporation [illegible], Vol. [illegible], p. 5.

6. Ibid., Vol. 17, p. 70.

(3) The Albanian Government "would be within its rights" in holding that a Special Agreement between the two parties was a necessary preliminary to Court consideration.

(4) The Albanian Government accepts the Security Council's recommendation and is prepared, notwithstanding the irregularity of the United Kingdom's action, to appear before the Court while making explicit reservations about the manner in which the case was brought to the Court and emphasizing that its acceptance of the Court's jurisdiction cannot constitute a precedent for the future.

The letter concluded by appointing as agent for Albania, Mr. Kahreman Ylli.

On the basis of the Special Application received from the United Kingdom and the Albanian letter described above, the Court set the time limits for United Kingdom Memorial and Albanian Counter-memorial, as 1 October, 1947, and 10 December, 1947, respectively.[61] The United Kingdom memorial was submitted as required. As previously noted, the Security Council had disposed of Albania's application for membership on 10 August, 1947, more than a month after the Albanian letter of 2 July, 1947. There is thus a circumstantial indication that Albania's "Preliminary Objection,"[62] received by the Court on 9 December, 1947, the day before the Counter-memorial was due, reflected a change of policy toward the United Nations based on the rejection of her application for membership.

Under the Rules of the Court, before the hearings on a case begin, a party may file a preliminary objection to the jurisdiction of the Court. In such cases, the proceedings on the merits of the case

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61. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1947-1948, pp. 5-6.

62. International Court of Justice, Pleadings, Oral Arguments, Documents, The Corfu Channel Case, Vol. II, p. 9.

are suspended until this preliminary point is resolved. The preliminary objection raised by Albania was on the ground of the inadmissibility of the United Kingdom's application as the means of bringing the case to the Court. It insisted that a Special Agreement was a necessary preliminary.[63] It was thus that a number of important rulings concerning jurisdiction came to be written in the first case before the International Court.

When a preliminary objection has been made, the Court sets limits for the submission of instruments known as observations and submissions. In these appeared the United Kingdom's written agreement for jurisdiction. In public sittings held on February 26th, 27th and 28th, and on March 1st, 2nd, and 5th, 1948, the Court heard oral arguments on behalf of the respective parties. Dr. Igor Daxner, President of a Chamber of the Supreme Court of Czechoslovakia, was designated as the Albanian judge, ad hoc.

The argument of the United Kingdom in support of the jurisdiction of the Court was based upon two separate lines of reasoning. Sir Hartley Shawcross, Counsel, requested that they be considered independently. One foundation of the argument was an interpretation of the United Nations Charter which would have made Albanian acceptance of jurisdiction mandatory because of the Security Council resolution and her acceptance of the obligations of a member. The other

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63. Article 40, paragraph 1. of the Statute of the Court:
1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

argument for jurisdiction was the Albanian letter of 2 July.

The Albanian argument followed the lines set forth in its preliminary objection. The Court's judgment, by fifteen votes against one (Judge Daxner), rejected the Preliminary Objection submitted by the Albanian Government and set the time limits for the filing of subsequent pleadings.[64] There were two separate opinions appended. One was Judge Daxner's dissent. The other was a separate opinion of Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badani Pasha, and Krylov, who concurred in the judgment but wished to add to the opinion. This added separate opinion is of importance for the suggestion that it contains as to a legal interpretation of Article 25 of the United Nation's Charter. These seven judges expressed the wish that the other argument concerning jurisdiction had been dealt with by the Court. In their opinion, the United Kingdom had not established that compulsory jurisdiction existed for Albania because of the action of the Security Council. In this way the judgment of the International Court of Justice on March 25, 1948, supported the interpretation of the Charter which distinguished between Security Council "recommendations" and "decisions," finding the former not binding.

One prominent legal writer stated that from this judgment it can

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64. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1947-1948, pp. 15-29.

be soundly inferred that if in the future, a State desires to object to the jurisdiction, it should do so at the first possible opportunity and in clear and unmistakable language."[65]

In the same article the Charter interpretation was dealt with in more specific terms. The enforceability of a recommendation, said the writer, had been confused with its binding effect. In the Charter a recommendation as to <u>terms</u>[66] of settlement (i.e. merits) possesses no obligatory effect for the parties, but nothing in the preparatory work refers to a recommendation dealing only with <u>procedure</u>[67] of settlement. It is conceivable that a recommendation as to terms should stand on a different footing than one as to procedure only, but it must be admitted that no such distinction appears from the language.

In anticipation of the judgment of the Court, the two parties had prepared a "Special Agreement" which they now requested the Court to accept as the basis for further proceedings in the case. This the Court did in an order made on March 26, 1948.[68] This agreement submitted to the Court for decision the following questions:

> (1) Is Albania responsible under international law for the explosions which occurred on the 22nd October, 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay

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65. John M. Jones, "Corfu Channel Case Jurisdiction," Grotius Society, <u>Problems of Public and Private International Law</u>, Vol. 35 (1949) p. 111.

66. Italics mine.

67. Italics mine.

68. <u>Ibid</u>., p. 53.

compensation?

(2) Has the United Kingdom under international law violated the sovereignty of the Albanian Peoples' Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November, 1946, and is there any duty to give satisfaction?

The Court had taken from May 22, 1947 until March 25, 1948 to assert its jurisdiction. It returned a judgment on the merits on 9 April, 1949, having heard extensive arguments and made its own investigation of certain technical matters.

The Albanian Government designated Bohuslav Ecer, Doctor of Law and Professor in the Faculty of Law at Brno, as the judge ad hoc for the remainder of the case. Mr. Ecer took the place of Mr. Daxner. In order to deal with the technical problems which arose, the Court made use of a Technical Commission, appointed by order of December, 1948. This Commission made written replies to specific questions, visited the scene of the incidents and was further interrogated by the Court. The parties were allowed to file observations with regard to the statements of the experts. One of the more important conclusions of this Commission, based upon experiments actually conducted, was that "...to place a minefield accurately, as was done, requires a reasonably good visibility so that definite cross-bearings on the coast can be taken, as there is only one lighthouse in the vicinity." And, "If done in daylight, it can unhesitatingly be said that the operation must have been noticed by the Albanian authorities."[69]

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69. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1949, p. 149.

2. Judgment on the Merits

The judgment of the Court was stated in two parts, replying to the corresponding questions posed by the Special Agreement.[70] The first part, by a vote of eleven to five, gave judgment that the Peoples' Republic of Albania was responsible under international law for the explosions and for the damage and loss of human life which resulted therefrom. (By ten votes to six, the Court reserved for further consideration the assessment of the amount of compensation.)

On the second question, by fourteen votes to two, the Court gave judgment that the United Kingdom did not violate the sovereignty of the Peoples' Republic of Albania by reason of acts in Albanian waters on October 22nd, 1946, and unanimously, that this sovereignty was violated in the course of the operations on the 12th and 13th of November, 1946, and that this declaration by the Court constituted in itself appropriate satisfaction. The judges dissenting in the first part of the judgment relating to Albanian responsibility, were Judges Winiarski, Badawi Pasha, Kaylov, and Azevedo, and ad hoc Judge Ecer. The opinion has been called "notable for relying upon broad principles of law, apparently deemed to be self-evident and stated without citation of precedent or authority."[71] What were the grounds for dissent?

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70. Ibid., p. 36.

71. Quincy Wright, "The Corfu Channel Case," American Journal of International Law, Vol. 43, (1949), p. 491.

The opinion of Judge Azevedo was a lengthy one. He agreed in finding Albania responsible, but not that the Court could determine the amount of compensation. It is interesting to note that his opinion contains a sentence which asserts that "Albania was bound by the Security Council decision to accept the Court's jurisdiction."[72] He dissented from the majority in taking the restrictive view of the Special Agreement, stating that it was not a question of competence for the Court but one of determining the contents of the petitum. The adoption of a special agreement, he said, presupposes mutual renunciations, limiting the effect of the Court's decision to the main fact of recognition of responsibility, and regarding essentially the purpose of international justice as being to declare the right.[73]

Judge Basdevant accepted the whole of the operative part of the judgment but stated that he could not accept the reasons[74] given by the Court in support of its jurisdiction to assess the amount of compensation.

Judge Winiarski of Poland stated in his dissent that a finding of such exceptional gravity against a State required a degree of proof which had not been attained in this case. He also believed that, in submitting a special agreement, the parties had put an end to the proceedings instituted by the unilateral application, and therefore the

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72. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1949, p. 90.

73. Ibid., p. 97.

74. Italics mine.

Court would not adjudge compensation.

Judge Badawi Pasha based his dissent on the quality of the circumstantial evidence. Said he, "...the most reliable doctrine takes the view that proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing, unusual, and contrary to the way of the world." In his opinion the evidence of the experts remained conjectural. He did not find that the Special Agreement allowed the Court to decide what compensation should be paid the United Kingdom and the Court could not go beyond that agreement.

Judge Krylov disagreed that (a) connivance had been proved, (b) cognizance of the mines had been proved, or (c) that the culpa of Albania had been proved. He considered that the Court should interpret the Special Agreement restrictively and not adjudge compensation. At no point did he deal with the basis of the affirmative majority finding that Albania must have had knowledge of the minefield.

Judge Zoricic, in an opinion differing from the other dissents in its extreme brevity, found that there was insufficient factual evidence to support Albania's knowledge of the presence of mines.[75]

Judge Ecer's opinion is the most direct refutation of the Court's finding. He concluded that the Albanian government's knowledge of the minelaying had not been judicially established, and that the Court should keep strictly to the terms of the Special Agreement.

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75. Ibid., pp. 37-38.

On the second question put by the Special Agreement regarding the violation of Albanian sovereignty on the two separate occasions, the only dissent was with regard to the incident of the 22nd of October, 1947. This passage by British ships on the day of the mining was found by fourteen votes to two not to have been a violation of Albanian sovereignty. The Court found unanimously that the subsequent minesweeping operation had constituted such a violation.

Judge Krylov, in his dissent regarding the passage of October 22, 1946, found that the British ships were misusing the right of passage by attempting to intimidate the Albanian authorities with a display of naval power.[76] Judge Azevedo, on the other hand, asserted that no such right existed for warships as distinguished from merchant ships. Judge Ecer, in his opinion, stated that there was no conclusive law on the subject of innocent passage so that the actions of both parties could be legally justified.

The above summation of the dissenting opinions is necessarily brief and contains omissions. It is presented not to illustrate the judicial points considered by the dissenting judges, which were of a great number, but for a brief examination as to difference of opinion as among the sixteen judges of different nationalities. In such an examination there is a pattern of division between the judges of Soviet bloc origin and others. The main issue that was resolved by the Court as distinguished from the legal questions put to it, was the question of Albanian responsibility. The fact that this was the

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76. Ibid., p. 75.

main issue is attested by the fact that Security Council deliberations had concerned themselves mainly with this question, and that much of the greater part of the opinions, stated jointly or separately, dealt with this aspect of the case. All four of the Soviet bloc judges dissented from the majority opinion which was in opposition to the interests of a Communist state. It is the unanimity of the Communist vote against the majority opinion which is of significance. This significance is perhaps accentuated rather than diminished by the dissent of Badawi Pasha, who, in political terms, disagreed with the West. It must be added that in the written dissents, there is little duplication and every evidence of independent reasoning as among the dissenters. Might one conclude that a Communist judge is on his own in justifying his opinion if not in arriving at it?

The opinions of the Court were of a different pattern with regard to the second question of the Special Agreement, regarding Albanian sovereignty. This opinion dealt with two separate incidents. The Court was unanimous in one finding. The dissents in the other were the Soviet Krylov and the Brazilian Azevedo. There is no similarity whatever in the judicial writing in which these dissents are expressed. Judge Azevedo's opinion seems to be a sincere and honest attempt to ascertain the law regarding innocent passage of warships, in which he arrives at a different conclusion from the majority. Judge Kaylov, on the other hand, charges that the United Kingdom violated this right by attempting to intimidate Albania. In doing so he departs from the judicial standard as though inevitably drawn to political accusations.

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Another view is expressed by Professor Oliver J. Lissitzyn,[77] who finds it more noteworthy that the judges of the nationalities of the Communist states did not on all occasions take the position most favorable to the contentions of those states. The Soviet, Polish, and Jugoslav judges joined the majority in upholding the jurisdiction of the Court against the objections of Albania. The Polish and Yugoslav concurred in the view that Albanian sovereignty had not been violated by the peaceful passage, differing here from the Soviet and Brazilian judges. The Polish and Yugoslav judges concurred in assessing the amount of compensation, from which the Soviet judge dissented.

This discussion would be incomplete without reference to the separate opinion of Judge Alvarez.[78] This opinion is in concurrence with the majority, but Judge Alvarez wished to give prominence to certain considerations of a legal character in support of that judgment. In this opinion Judge Alvarez advances a theory of a new international law founded on <u>social interdependence</u>, a law which often comes into collision with the "old international law." He related to this the new function of the Court, a function not expressly conferred on the court which preceded it, i.e., "that of creating and formulating new precepts, both for old problems where no rules exist and also for new problems."

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77. Oliver J. Lissitzyn, <u>The International Court of Justice</u> (New York, 1951), pp. 56-57.

78. <u>Ibid</u>., p. 39.

79. <u>Ibid</u>., p. 40.

A criticism of this opinion and the theory which it sets forth, while a worthy project, is beyond the scope of this essay. It will suffice to indicate its departure from accepted ideas by observing that these ideas hold that the peculiar quality of law which makes it a necessity in any political society, resides not in its subject matter nor ethical content, but in its stability. Law gives to society that element of fixity and regularity and continuity without which no coherent life is possible. Judge Alvarez' theory seems to be a serious attempt to deal with the fact that contemporary international law has become a bulwark of the existing order and has suffered a corresponding decline in the respect it receives.

3. The Judgment as to Compensation

The Court had reserved this judgment pending receipt of Albanian observations on the amount demanded from it by the United Kingdom. By a Court order, June 25th, 1949 was set as the time limit for these observations. In another order, this date was extended to July 1st, 1949, at the request of the Albanian Government. In an order made on November 9th, 1949, the Court directed the examination of the United Kingdom claims by naval experts designated by the Court, the Albanian Government having failed to defend its case.[80] On 15 December, 1949, the Court fixed the amount of compensation due at £843,947, approximately that claimed by the United Kingdom. The amount awarded was based on the replacement cost of the destroyed HMS Saumarez, cost of repair to the destroyer HMS Volage, and the cost of pensions and other grants made

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80. Ibid., p. 238.

by the United Kingdom to the victims and their dependents. Judge Krylov and Judge Ecer dissented.

Albania, as has been noted, did not appear before the Court in this part of the case, although the ad hoc judge, Ecer, remained seated in these hearings and voted. She has refused to pay the compensation and the United Kingdom has attempted to recover the sum by other means, one of which became an issue in the Monetary Gold Case brought to the International Court by Italy in May, 1953.[81] An amount of gold that had been removed from Rome by Germany during the Second World War, became subject to conflicting claims. The question as to whether the gold belonged to Italy or Albania was submitted to arbitration under an understanding between the United States, the United Kingdom, and France that if the Albanian claim were to be upheld, the gold would be given not to Albania but to the United Kingdom in partial satisfaction of the claims arising from the Corfu Channel Case. At the same time it was left open for Italy to apply to the International Court of Justice for a decision as to whether, by certain claims of Italy against Albania, there would remain another Italian claim and, if so, whether this claim of the British should receive priority. The arbitrator upheld the Albanian claim in the first case and Italy brought the issue to the Court, but the Court decided on June 15, 1954, that it could not adjudicate the Italian claim in the absence of Albanian consent.

The obligation of Albania to pay the sum seems uncontestable.

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81. Goodrich and Simons, op. cit., pp. 337-338.

Article 94 of the Charter imposes upon Albania the obligation to comply with the decisions of the Court in the Corfu Channel Case. It further gives the United Kingdom recourse to the Security Council and empowers the Security Council to make recommendations or decide upon measures to be taken to give effect to the judgment.

4. Principles Embodied in the Judgments

The Corfu Channel Case has been found notable by writers on international law for the scope and number of the points of law that appear from the judgments rendered. The following principles are cited by John M. Jones as appearing in the judgment on merits:[82]

> (a) Evidence in International Law: Where a charge of exceptional gravity is brought against a state, conclusive evidence establishing a high degree of certainty is required.
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> (b) Methods of Proof: Exclusive territorial control exercised by a state has a bearing upon the method of proof available to establish its knowledge of an unlawful act. Another state must be allowed more liberal recourse to inferences of fact and circumstantial evidence.
>
> (c) Circumstantial Evidence: In international law circumstantial evidence is subject to the criterion that it may have no reason for reasonable doubt.
>
> (d) Disclosure of Documents: The Court cannot derive from refusal to disclose documents any conclusions differing from those to which the actual events gave rise.
>
> (e) Responsibilities of States: These responsibilities extend to giving an explanation and showing, up to a point, what the State has done to investigate what *prima facie* appears to be an act contrary to international law. Denial will not suffice.

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82. John M. Jones, "The Corfu Channel Case - Merits," British Yearbook of International Law, Vol. 26, 1949, pp. 447-453.

(f) Responsibilities of States: These responsibilities include a mere omission if, as a result of that omission, damage is sustained by another state in the course of lawful activity.

(g) Damages: Where a special agreement empowers the Court to decide whether compensation is due in respect of the breach of international law, it also has jurisdiction to decide whether reparation is due.

(h) Damages: The Court seems to accept the doctrine that extenuating circumstances may mitigate the amount of damages due in respect of a breach of international law.

(i) Straits in Maritime Law: States in time of peace have the right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent. Conversely, there is no right for a coastal state to prohibit such passage through straits in time of peace.

(j) Straits in Maritime Law: The decisive test of an international strait is its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.

(k) Innocent Passage: A passage does not cease to be innocent for the purpose of this rule because its purpose is to assert a right which has been unjustly denied.

(l) Intervention and Self-help: The Court has condemned intervention. Self-help as distinguished from self-defense is now no longer allowed.

(m) The Interpretation of Treaties and Special Agreements: It is not necessary for a judge to use any rules of interpretation.

(n) The Interpretation of Treaties and Special Agreements: The Court used as elements in interpretation the history of the Special Agreement and the subsequent attitude of the parties.

(o) Interpretation of Treaties and Special Agreements: The Court interpreted the Special Agreement in the light of various declarations of the parties which preceded it.

These points have been repeated here for the purpose of indicating the importance of the Corfu Channel Judgments in international law. They are in themselves opinions requiring in each case legal support.

CHAPTER IV

COMMENT AND CRITICISM

1. Special Features of the Case

In taking up the Corfu Channel dispute, the Security Council became seized of a clearly drawn East-West dispute. The extent of the agreement developed in Security Council discussion was that the question was susceptible of solution on a legal basis and should, therefore, be referred to the International Court of Justice. Voting on the two resolutions placed before the Council was divided, the Soviet bloc finding itself in isolated support of Albania.

Although in many cases there has been a feeling in the Council that the parties concerned could better settle their dispute themselves, considerable difference has existed as to whether the Council should indicate how the settlement should take place. There have been numerous occasions when members felt that a resolution should be adopted but have considered that the terms of a particular proposal went beyond the Council's authority.[83] The Corfu Channel Case is the only case which has been referred to the International Court of Justice by virtue of a Security Council recommendation to the parties to the dispute. In two other cases where some members advocated the referral by the parties to the Court, the proposals failed to obtain

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83. Goodrich and Simons, op. cit., pp. 278-279.

the support necessary for adoption. Only six members voted in support of such a recommendation in the Anglo-Egyptian dispute and less than the required majority of the Assembly in consideration of the treatment of Indians in South Africa. Opinion was expressed that the Yugoslav complaint regarding Trieste and the National Chinese charges against the Soviet Union were more suitable for consideration by the Court, but nothing further was done in this direction.[84]

It must be borne in mind that the recommendation for referral to the Court in the Corfu Channel Case was only made after the Soviet Union had vetoed a resolution that would have in itself constituted a judgment. Undoubtedly the fact that the events under consideration had passed and were not in the process of further development was a large factor in the ability of the Council to deal at all with it.

The parties directly concerned have seldom agreed that a matter was suitable for consideration by any organ of the United Nations. In this case, Albania did accept the invitation to participate in Security Council discussion and eventually agreed with the United Kingdom on the questions to be submitted to the Court. Even these facts cannot stand independently, for Albania must certainly have had its candidacy for membership in the United Nations as a consideration, and the "Special Agreement" was an Albanian legal tactic after the field of argument had been clearly shown in other hearings, before the Court.

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84. Goodrich and Simons, op. cit., p. 335.

It is very unusual for states to allow a question involving security interests to be brought forth for settlement on a legal basis. In the case of the Corfu Channel, Albania did dispute the jurisdiction of the Court whereas the United Kingdom was the proposer of the Security Council resolution. Jurisdiction was established only by a judgment of the Court, although it has been argued that Albania eventually intended to submit.

The large number of points of law established or affirmed make the Corfu Channel Case prominent in all modern case-books of international law. One of the reasons for the existence of this number of points is the fact that the Court was called upon to settle four separate issues. These were: its jurisdiction, the two questions asked in the "Special Agreement," and the competence to adjudge the amount of compensation. In addition, the Court was compelled to evaluate a large mass of evidence leading to rulings on the use and nature of evidence in international disputes.

In connection with the problem of evaluation evidence, the International Court is authorized in Article 50 of its statute to entrust to an individual bureau, or commission, or other organization, the task of making an inquiry on giving an expert opinion. Only in connection with the Corfu Channel Case has the Court exercised this power.[85] Certain points of fact were contested by the parties. In order to obtain an expert opinion, the Court, in an order of 17 December, 1948,

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85. Goodrich and Simons, op. cit., p. 174.

defined these points and asked for an expert opinion from a committee consisting of three naval officers.[86] A report was made in writing to the Court.[87] This resulted in further questions which led to an on the spot investigation, a second report, and individual questions and replies in writing.

One of the most significant features of the case stems from the Joint Separate Opinion rendered by the seven judges on the question of the compulsory jurisdiction for Albania. This opinion in rejecting the assertion of the United Kingdom that recommendations of the Security Council were binding on members, supports this often questioned thesis, although not with the full force of a judgment or advisory opinion, and must be considered in an interpretation of the obligations of members under Article 25 of the U.N. Charter.

As a final element of singularity, the case carries the individual opinion of Judge Alvarez of Chile. It is possible to attach too much importance to this feature of the Court's judgment, but it has a certain relevance to the entire proceedings and conceivably would lead to certain conclusions on the part of state's parties to dispute as to what might be expected of the Court. The several references to "new international law" would indicate that Judge Alvarez at least thought that the case had been settled on law which had not existed before and that the Court was qualified to make such law. This is not a judicial process but a legislative one.

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86. Commodore J. Bull, Royal Norwegian Navy, Commander S. A. Foreshell, Royal Swedish Navy, and Lieutenant Commander S.J.W. Ellferrich, Royal Netherlands Navy.

87. International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders, 1949, p. 142.

2. Charter Interpretation

The main interest of the case in the procedural sense and considered as a whole, stems from its bearing on the interpretation of Chapter III of the United Nations Charter relating to the peaceful settlement of disputes. A conservative interpretation of Chapter III would still allow the United Kingdom, under Article 35(1) to bring a dispute of the nature of the Corfu Channel dispute to the attention of the Security Council, as one which might lead to international friction. Such an interpretation would further, in acceptance of the literal wording of Article 34 of the Charter, permit the Security Council to investigate the dispute "in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." Prior to this determination, there is no power provided for the Security Council to deal with the dispute or situation. In order for the Security Council even to recommend appropriate procedures or methods of adjustment including legal settlement, it must be acting under the powers conferred by Article 36 which restricts the field of action to "a dispute of the nature referred to in Article 33 or a wituation of a like nature." This is a dispute "the continuance of which is likely to endanger the maintenance of peace and security." In determining the powers of the Security Council bestowed by the Charter, careful and conservative reading of the text of Chapter VI leads to the conclusion that it was written with the principle in mind that the main function of the Security Council was the maintenance of peace and security and

and that the introduction for its consideration of additional issues of a less serious nature should be restricted by the Charter.

A more literal interpretation of Chapter VI requires the introduction of something that is not in the text, and that is either a power to make recommendations on cases which fall short of endangering international peace and security or a power to proceed without a specific determination as to the gravity of the dispute. The latter is the power which the Security Council has preempted in its practice and represents a liberal interpretation of Chapter VI in which the literal wording of the text is not allowed to restrict the Security Council from dealing with a particular dispute.

The question arises as to whether in dealing with a dispute such as the Corfu Channel case, the Security Council does not tacitly infer it to be a dispute which endangers international peace and security, although it may not so resolve in a formal decision. This implies a decision, even if informal, and there is no evidence that such decisions take place. As a matter of fact, although the Soviet Union in the Corfu Channel Case argued that the case should not be considered as it did not endanger international peace and security, the argument of the United Kingdom was not in direct refutation of this but rather that the Security Council was not restricted to such matters, and that hence the argument of the Soviet Union had no validity. This, in practice, has been the decision of the Council as a body.

This practice has established a pattern of officially ignoring the point that the Charter requires a preliminary evaluation by the

Council of a dispute to determine its relation to the maintenance of peace and security. By doing this, the Council avoids much argument as to precedent and preserves its privilege of dealing with all questions on a political basis rather than a legalistic one. There is no question of the fact that this gives this important body a freedom of action that broadens its scope. There are two objections to such a position. First, as was argued by the Brazilian member in the Corfu Channel Case, the Council may thus open its proceedings to any diplomatic difference that arises in a busy world, to the detriment of its main function, the maintenance of peace and security. This objection assumes that because the Council considers one dispute it must deal with all others of like gravity which are brought before it. However, this has not been the case, and the Council may abstain from considering a case for political reasons as well as decide to take it up for the same kind of reason. In this sense, the establishment of great freedom of action for the Council has had no adverse effect on its functioning to preserve peace and security. The second objection is more serious. If such a body can ignore certain terms of the international covenant which gives it its legal foundation, then it can deal similarly with other provisions. The legal value of the agreement itself becomes less if it is not carried out. This, it seems, is the precarious path along which all covenants based upon political agreement must pass if they are to evolve so as to survive changing circumstances and not be shattered by the first shift in political alinement which occurs.

The question of obligatory action by a non-member was not subjected to interpretation once Albania had accepted the obligations of a member. The questions rather revolved around what these obligations were. In this case, therefore, the condition imposed by the Security Council upon Albania, general as it was, seems to have been adequate to protect the Council and the United Kingdom from irresponsible actions by a non-member state, even if insufficient to insure satisfaction.

Of great interest among the several interpretations of the United Nations Charter which stem from the Corfu Channel Case is the distinction apparent between the obligatory nature of a Security Council decision under the provisions of Article 25 and the non-obligatory nature of a recommendation. There is nothing in the Charter that makes a Security Countil recommendation binding upon members, but under Article 25 members have bound themselves to carry out the decisions of the Security Council. Additional interest in the effect of the Corfu Channel Case upon this point comes from the fact that a quasi-legal decision was taken on it in the Joint Separate opinions.[88] The United Kingdom argument that in this case a recommendation of the Security Council bound Albania to accept the jurisdiction of the Court, impelled seven judges of the Court to write a separate opinion to the effect that the United Kingdom argument had not convinced them. This

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88. For support of this view, see Leland M. Goodrich and Edward Hambro, Charter of the United Nations, Commentary and Documents (2nd ed.), Boston, 1949, pp. 208-209; and "Charter of the United Nations," Hearings before the Committee on Foreign Relations 79th Congress, 1st Session, Revised Edition, p. 81, quoted in John M. Jones, "Corfu Channel Case--Jurisdiction," Grotius Society, Problems of Public and Private International Law, Vol. 35 (1949), p. 98.

was not a judgment for the Court itself did not rule upon this question, basing its decision on other arguments. It must, however, be given weight in the interpretation of Article 25 and its influence there is to restrict the binding actions of the Security Council to "decisions."

3. Jurisdiction of the Court

The question of jurisdiction became complicated not because Albania was not a party to the Statute of the Court nor a member of the United Nations, but because there was no formal instrument, such as the special agreement or written application referred to in Article 40 of the Statute, which related to Albania's participation in the Court proceedings. Since the proceedings of an international court of law have no coercive force, their eventual effectiveness is dependent upon the acceptance by the sovereign states party to the dispute of the competence of the court to deal with the matter, and, eventually, the finding which the Court makes. It therefore appears extremely important that this question of the willingness of the parties to submit the dispute to a legal settlement be clearly established before the Court proceeds. Some requirement for the execution of a formal legal instrument for this purpose assumes a real virtue therefore. The nature of international law seems to preclude a court assuming a jurisdiction established in the manner of the Corfu Channel Case, However, the United Nations Charter requires that members comply with the decisions of the Court, so that if a formal finding that jurisdiction has been established is handed down, members of the United Nations

and states who have accepted the obligations of members must accept this jurisdiction in the particular case being dealt with by the Court. There is, therefore, no question of the obligation of Albania to comply with the decision of the Court, in spite of the fact that the argument against the Court's jurisdiction made in support of the preliminary objection seems well founded. The fact that it was necessary for the Court to go somewhat beyond established law to thus assert its jurisdiction, and that it did so, again lends coloration to its proceedings that cannot avoid consideration by states parties to disputes. This is the fact that led to Jones' comment in his article, "It can be soundly inferred that if in the future a State desires to object to the jurisdiction, it should do so at the first possible opportunity and in clear and unmistakable language."[89]

It is possible to extend the conclusions from a single case too far. It would require a great deal of additional support to demonstrate a general moral effect resulting from a Security Council Resolution. The actions of Albania could be used in partial demonstration of such an argument, for Albania at no time subsequent to the recommendation specifically disputed the jurisdiction of the Court, but only the manner in which it had been established. There is the implication in her proceedings that she will eventually appear before the Court on the merits of the case. Her reactions to the Security Council decision on her membership make an evaluation of the influence upon Albania of the Security Council resolution very difficult.

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89. Jones, op. cit., pp. 91-111.

4. The Special Agreement

The usefulness of the compromis or special agreement in proceedings before an international tribunal is clearly demonstrated in this case. It enables the Court to deal with the points at issue upon which the parties have agreed to accept the Court's decision. It protects both the parties and the Court from disagreeable surprises. In this case it seems to have represented the high-water mark of agreement.

The seemingly insignificant omission from the agreement of the question of the amount of compensation to be paid the United Kingdom in case of a finding in its favor became a major problem and it was necessary in this case, as it had been in the problem of jurisdiction, for the Court to make a broad assumption of power in a separate judgment. It is not clear from the Court documents whether the insertion of a clause in the Special Agreement to specifically provide for this decision was considered in the drafting of the Special Agreement. There is no remedy for Albania from the Court's finding, however, that such a clause was unnecessary.

5. Evaluation of Evidence

In both the Security Council's considerations and the hearings of the International Court, it was necessary for evidence to be evaluated. The evidence introduced to the Security Council was entirely that brought forward by the United Kingdom in support of its case. The Security Council relied upon a subcommittee to examine this evidence and report, and the subcommittee availed itself of experts. It

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is doubtful if such evidence could have much more weight in influencing decisions of the Council than the simple statement of its content by the state presenting it. It is a fact that the expressions and votes of the members of the Sedurity Council will represent their national policies and not a verdict as to what has or has not been proved in evidence.

The International Court, on the other hand, has theoretically eschewed any considerations of national interest and is in a position to make an impartial evaluation of evidence. The difficulty here is that the consideration of evidence by an international tribunal automatically gives the advantage to the more powerful state which can bring more resources into play in building its case. It is for this reason that the International Court should restrict itself to the application of law to predetermined facts which should be matters of agreement between the parties.

6. Effect of Non-compliance

A question that may be asked is whether Albania's refusal to execute the judgment of the Court and pay compensation, has not lowered the standing of the Court. In one sense it must, but the effectiveness of the Court's action is nonetheless great. The legal points established in its findings are not affected by the non-compliance of a party. There is no question in world opinion but that the Court found the Albanian government responsible for the loss of life and property sustained by the United Kingdom, and the refusal of Albania to pay the sum of money assessed as compensation is an insignificant

factor in relationship to an international decision accomplished on the dispute. Furthermore, the United Kingdom still has a remedy under Article 94 of the Charter.

7. The Maintenance of International Peace and Security

It will not be asserted that the handling of this case by the organs of the United Nations prevented a breakdown of international peace and security. The days of punitive expeditions and reprisals by European nations are over. It can be said that the existence of the United Nations provides an outlet for the expression of national indignation which, in other times, has been constrained to hostilities for lack of another means of expression. The needs of a sovereign nation to react in the international field are provided for in the General Assembly and the Security Council. Generally speaking, military measures are distasteful to governments because they are final and irreversible processes and are undertaken only as a last resort, frequently in satisfaction of popular national feeling. Some satisfaction of such sentiment can be provided by the public exposition of a nation's case before an international body. In taking note of this capacity of the United Nations organs to provide outlets for national impulses it must be observed that aside from the Security Council's recommendation that the United Kingdom and Albanian governments should immediately refer the dispute to the Court, the United Kingdom would have been fully entitled to refer the case directly to

the Court under Article 40 of the Statute.[90] The competence of the Court would, as a separate matter, have had to be established.

One of the features of greatest interest in the overall view is the participation of a non-member in the activities of the Security Council and International Court and the accompanying acceptance of the responsibilities of a member.

As for the Security Council itself, perhaps the greatest contribution of the Corfu Channel Case to its practice in the maintenance of peace and security, was the affirmation of freedom of action under the Charter accompanied by the restrictive interpretation of Article 25. The problems of the Security Council in dealing with disputes become primarily those of selection of which cases should be dealt with and can be effectively dealt with. It should come as no surprise to a political body to discover that "politics is the art of the possible."

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