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The International Court of Justice and the Security Council: Disentangling Themis and Ares

Prof. Giovanni Distefano and Mr Etienne Henry[♦]

Quidquid latine dictum sit, altum sonatur.

Prologue

The authors will endeavour to analyse three main issues which were raised during both proceedings which took place firstly before the SC and later before the ICJ. The first topic is linked to the quintessential question of the nature and functions of both organs under the UN Charter and the Statute of the ICJ. In this regard the SC appeared to play as the apprentice witch, yet shedding beneficial light on the two organs respective fields of competence (the 'learning by doing' approach) as well as on their different functions (jurisdictional vs. executive). Already in 1925, the PCIJ had affirmed that the Council of the League of Nations could not be considered as a 'tribunal of arbitrators' (*Mossoul case*). The second theme is related to the legal effect of a SC recommendation under Article 36 (3) of the UN Charter, notably with regard to the establishment of the ICJ's jurisdiction[1]. The *Corfu Channel* case is the first and – till nowadays – the only case for which the SC explicitly recommended the referral of the dispute to the International Court of Justice (ICJ) under Article 36 (3) of the UN Charter. In other words, can a SC resolution, adopted in accordance with Article 36 (3)

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[1] The more general question as to the ICJ's jurisdiction will not be dealt here with, refer in this volume to the contribution of Mr. Henry Burmester.

constitute an autonomous head of jurisdiction for the ICJ? Last, but not the least, the role of the SC as a fact-finder or 'investigator' (the question whether the SC were acting in the context of Article 34 aroused during its meetings) will be likewise reviewed. Indeed, from the outset, the SC initiated a factual investigation of the incident; it even established a Sub-Committee entrusted with the task – according to the words of the Australian representative – of merely 'establishing the facts' and not of adjudicating between the parties. Yet, as the 1949 ICJ Judgement on the Merits shows, the factual determination made by the SC (itself or through its aforementioned Sub-Committee) won't be disregarded, to say the least, by the ICJ. All these three topics share a common ground, that is to say the institutional interactions between two of the principal organs of the United Nations in the pursuit of the UN goals; furthermore, all of them reveal, especially from the perusal of the SC official records, that the UN organ upon which Member States have conferred the 'primary responsibility for the maintenance of international peace and security' (Article 24 (1) of the UN Charter), happened to act in a still uncharted province of the Charter; hence, its practice will definitely have a strong impact on the interpretation of its relevant provisions.

General observations on the respective functions and powers of the Security Council and the International Court of Justice in light of the Corfu Channel Case

As the US representative stressed just before the SC's deferral of the dispute to the ICJ, SC's functions:

> 'have well been defined in the Charter, and we can neither broaden them nor reduce them. Should misconception or misapplication bring about an attempt to do so, the result will be *the practical disarticulation of our Organization*'[2]

After a failed attempt to solve the dispute through direct negotiations, the United Kingdom lodged a complaint against Albania before the Security Council of the United Nations (SC) under Article 35 of the United Nations Charter (UN Charter) in order to exert more pressure

[2] *Official Records of the Security Council*, Second Year, 125th Meeting, p. 686.

on Albania[3]. In a first stage, Sir Alexander Cadogan, the British delegate to the SC, had expressed the wish that a resolution be adopted with the recommendation 'under Article 36 of the Charter settlement of the dispute by direct negotiation, after making the finding of fact without which such direct negotiation cannot succeed'[4]. The draft resolution submitted by the UK contained a paragraph which clearly attributed the laying of the minefield to the Albanian Government. The proposal read as follows:

> '*The Security Council* […] 1. *Finds* that an unnotified minefield was laid in the Corfu Channel 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.'[5]

It then recommended to the parties 'to settle the dispute on the basis of the Council's finding'. The acceptance of this proposal would have automatically implied the acknowledgment of the international liability of Albania. It would have amounted not only to 'recommend appropriate procedures or methods of adjustment' but also 'to recommend [...] terms of settlement' in the meaning of Article 37 of the UN Charter as it clearly dealt with the substance of the dispute. The British draft went so far as to qualify Albania's deeds as an 'offense against humanity'[6].

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[3] R. Dennett, 'Politics in the Security Council', *International Organizations* 3, 1949, p. 424. It must also be reminded that Albania had, just before UK's seizure of the SC, seized, quite inappropriately, the GA.

[4] *Official Records* …, op. cit.,107th Meeting, p. 306. According to the Australian representative the two aims were closely intertwined: the establishment of facts is instrumental in order 'to determine what is the appropriate method of resolving the dispute' (Ibid., 111th Meeting, pp. 362-363). Article 36 of the UN Charter reads as follows: '1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.'

[5] Ibid., 120th Meeting, p. 567.

[6] Ibid. The use of the notion of 'offense against humanity' is at odds with the then emerging notion of 'crimes against humanity' as enshrined in Article 6 letter c) of the Charter of the Nuremberg international

The political tensions and the partisan attitude adopted by some SC members made it unthinkable that an agreement could arise as to the merits of the dispute. In this respect, the discussion which took place later on, dealing with various more or less complex questions of facts[7], casts doubts on the possibility for the SC to reach an impartial finding in this matter[8]. Several members of the Council seemed to have already made up their mind and expressed their judgment – although not publicly – even before the commencement of the debates[9]. Moreover, the lack of a formal contradictory procedure, the formal absence of suitors and

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military Tribunal. Such a wording seems tailored in order to encourage Albania and her political allies to dig their heels in. The phrase will be eventually deleted on a suggestion of the American delegate. Ibid., 125th Meeting, pp. 689–690.

7 For a thorough account of the admitted and disputed facts, see H. Munro, 'The Case of the Corfu Minefield', *The Modern Law Review* 10, 1947, pp. 363–376.

8 See e.g., the nuanced appraisal by the Australian representation in L. W. Maher, 'Half Light Between War and Peace: Herbert Vere Evatt, The Rule of International Law, and The Corfu Channel Case', *Australian Journal of Legal History* 9, 2005, p. 81. Online. Available HTTP: http://www.law.mq.edu.au/html/AJLH/vol9/vol9-1_3.pdf (accessed 22 April 2010): '[In] the international context of early 1947, it is very difficult to grasp how the Australian delegation's contact with the UK delegation could in any meaningful sense give rise to an appearance of lack of objectivity or lack of impartiality or, worse still, a suspicion of actual bias on the part of Australia'. On Australia's attitude toward the SC's task of dispute settlement during the first years of the UN, also see Dennett, op. cit., pp. 425–427, who concludes that '[unfortunately], as time wore on, it became more and more evident that the Security Council was being used for political purposes and that the 'facts' were therefore of less importance to the solution of a problem than the impact of political and strategic considerations'.

9 Maher, op. cit., p. 56.

defendants, and, lastly, not to speak about the standards of evidence (*infra* D)[10] raise serious doubts as to the impartiality of the entire process... In this perspective, the veto power happened to become the only guarantee against an arbitrary decision of the SC. As a matter of fact, the first item that had to be addressed by the delegates, – the apparently innocuous and purely organisational question of the fixation of a date for a further meeting on the topic –, sparked a bitter dispute. Beyond mirroring the growing political tensions of the Cold War, the Soviet reluctance to convene another meeting on the topic before knowing if Albania would or could be represented[11] (according to Article 32 of the UN Charter), offers an illustration of the procedural differences between the SC and the ICJ.

Indeed, the interests at a stake in a proceeding before the SC are not the same as those before the World Court: there existed the perception that the SC had to 'build up [its] authority and prestige [...] in the interest of the discharge of its primary responsibility for the maintenance of peace and security in the world'[12] and that this function might collide with the right of a third State as established by Article 32[13]. On the contrary, the non-appearance of a State doesn't affect the prestige and authority[14] of the World Court in a case where its jurisdiction

[10] Australian representative (Col. Hodgson), after having strenuously supported the quasi-judicial character of SC's functions in dispute settlement, candidly affirmed that 'in this respect the ICJ can do very fully the very things we are not able to do here. It can collect additional evidence, and particularly in the oral hearings [...], it can call in witnesses, experts, counsels and advocates. It can obtain material witnesses for examination and cross-examination so that justice shall be done' (*Official Records* …, op. cit., 125th Meeting, p. 722). It is hard not to subscribe to such declaration while at the same time it is hard to understand why the SC, in so especially encouraged by this same Australian representative, has persisted (stubbornly) to adjudicate the dispute, let's say *more Curia*?

[11] Ibid., 95th Meeting, p. 127: 'Mr President, I attach very great importance to the question whether the Council should consider this matter in the presence of the representatives of both the countries concerned or of one only'.

[12] Those were the words of Mr Quo Tai-chi. Ibid., 96th Meeting, p. 139.

[13] Ibid., p. 141.

[14] As the ICJ has stated in its landmark Judgment in the Nicaragua Case (Merits): 'Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that

is established[15] and when she is satisfied that 'the claim is well founded in fact and law'[16], since its jurisdiction lies upon the consent of both parties.

Moreover, the fact that one of the parties to the dispute (i.e. the UK), acted in fact as a member of the adjudicating organ, cannot but thicken the doubt on the impartiality of the SC's proceeding. The UK, although it restrained from voting on its submitted resolution had, as a permanent member and a Big Power, considerably more institutional and political weight than Albania. As is well known, the SC finally confined itself, 'en désespoir de cause'[17], to

> '[*recommend*] that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court'[18].

The uncertainty as to the need – the obligation? – to defer the case to the Court paved the way to an interesting exchange of views on the nature and functions of the SC. As the US representative aptly affirmed before the SC, the question of the articulation of competences between the latter and the ICJ is a

> 'fundamental [one]. If we do not define it accurately now, and if we do not set the limits for our attributions, *this council will become a lower court for all disputes* [the higher Court being, consequently, the ICJ]'[19]

These discussions didn't gave yield to definitive answers but stirred up a lot of questions that would prove – and are still – crucial for the future of the SC's mandate: can the SC – faced to

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judgment by one party', *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment. I.C.J. Reports 1986,* p. 22, § 27.

[15] By virtue of Article 36 (6) of its Statute, the Court enjoys the exclusive power as to determine whether it has jurisdiction if the latter has been challenged by one of the Parties.

[16] Article 53 ICJ Statute. See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980,* p. 24, § 45.

[17] L. Delbez, 'L'évolution des idées en matière de règlement pacifique des conflits', *Revue générale de droit international public* 55, 1951, p. 16.

[18] SC Resolution 22 of 9 April 1947, adopted with the abstention of Poland and the Soviet Union.

[19] Ibid., 125th Meeting, p. 687 [emphasis added].

this kind of disputes (i.e. featuring questions of international responsibility) – put aside international law and justice on discharging its duty in order to settle the dispute? Does the Council have the institutional capacity – e. g. in terms of procedural guarantees for the parties to the disputes under scrutiny – or even the jurisdiction to settle legal disputes that involve disputed factual aspects or complex legal issues? On the contrary, is it bound to shy away from such cases? Which rules and guarantees shield a party to a dispute submitted to the SC against the latter partial findings? It can be maintained that, on the political level, the referral was merely an elegant way (from an institutional standpoint) for the SC to get out of trouble with this tricky issue[20]. The ICJ certainly offered a possibility to obtain a definitive and balanced finding while circumventing the veto rule[21]. Furthermore, that the SC in so doing, and in expressing the (official) grounds for its decision, made a hardly rebuttable interpretation of the rule contained in Article 36 (3) UN Charter. The verbatim records of the SC's meetings provide us with interesting elements in regard to certain questions. It is not without interest to put them in perspective with some subsequent developments of the practice of the SC in order to get the whole picture.

Under Article 24 of the UN Charter, the member States of the UN conferred on the SC the 'primary responsibility for the maintenance of international peace and security'. As a consequence of the wording of its function, the SC has been generally considered as the 'executive branch' of the UN system. This label is likewise reinforced by the political nature of its composition. This was already the case for the Council of the League of Nations as it had been asserted by the Permanent Court of International Justice:

> 'It appears, in fact, that according to the arguments put forward on both sides before the Council, the settlement of the dispute in question depends, at all events for the

[20] In this sense, Jiménez de Aréchaga notes that 'to limit the action of the SC, as a general rule, to the deferral of the parties to some methods or procedures of settlement, offers the advantage of making much easier the functioning of the Council. The agreement between the five permanent members is made easier in a resolution which defer the question to the Court […] than in a detailed decision dealing with all the aspects of fact and of law contained in a recommendation of terms of settlement' [our translation]. E. Jiménez de Aréchaga, 'Le traitement des différends internationaux par le Conseil de Sécurité', *Recueil des Cours* 85, 1954, p. 73.

[21] 'All questions [before the ICJ] shall be decided by a majority of the judges present' (Article 55 (1) of the ICJ Statute).

> most part, on considerations not of a legal character; moreover, it is impossible, properly speaking, to regard the Council, acting in its capacity of an organ of the Leagues of Nations, as will be hereinafter described, as a tribunal of arbitrators'[22].

In the framework of the newly adopted Charter, the question was again put on the table – maybe in stronger terms than within the League because of the relatively minor role attributed to international law in the Charter[23]– by the Brazilian Delegate, Mr Oswaldo Aranha, who '[even believed] that, within the framework of the United Nations, it was this Council that was invested with the power of executive action'[24]. The US delegate later asserted in a similar fashion that

> '[the] Security Council is not and cannot be tribunal. It is *par excellence* the political organ of the United Nations. Ours is not a judicial function, nor do we meet here as international judges. It would be hard otherwise to explain why the International Court of Justice has been maintained and why its functions have been amplified.'[25]

In the same spirit, Mr Hasluck, the Australian representative, affirmed that the SC had to draw a clear-cut *distinction between the facts and the law*. The fact-finding function was a necessary aspect of the political action of the SC, but it was to be carried out without any political bias or legal *a priori*. Mr Hasluck stressed in many of his declarations that the proposal to establish a Sub-Committee and to empower it with the mandate to elucidate the factual circumstances of the incident was not tantamount to proceed 'to a judgment of the dispute'[26]. There was a need to determine the facts 'in order that it [the SC] can determine what is the appropriate method of resolving the dispute'[27].

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22 *Article 3, paragraph 2, of the Treaty of Lausanne, (Frontier between Turkey and Iraq), Advisory opinion of November 21st 1925*, Series B, No. 12, p. 26.

23 Delbez, op. cit., p. 12 ; M. Forteau, 'Le droit international dans la Charte des Nations Unies' in J.-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies : Commentaire article par article*, vol. I, Paris, 2005, p. 114.

24 *Official Records* …, op. cit., 114th Meeting, p. 423.

25 Ibid., 125th Meeting, p. 686.

26 Ibid., 111th Meeting, p. 363. See also ibid., p. 365: '[the text of the proposed resolution] does not prejudge the case'; ibid., 114th Meeting, p. 420: 'It seems to us that in a matter of this kind, the Security Council

These views nevertheless collided with those defended by his successor at the SC, Col Hodgson, who advocated for a *quasi-judicial vision of the Security Council's mission*[28]. At the 127th meeting, he quoted an earlier declaration made by one of its predecessors at the 26th meeting according to which '[the Council] should administer impartial justice according to equity and good conscience and the proven merits of the particular case'[29]. Col Hodgson was confident, rather belatedly since the SC was on the verge of deferring the dispute to the ICJ, about the capability of the Security Council to adopt a fair decision on the merits: '[the members of the Security Council] have to act on the evidence as reasonable men and come to a reasonable conclusion'[30]. Although these views are debatable and probably carried some interest on a theoretical level, in view of the Australian context (as described in Maher's Article), the incoherence, if not the duplicity, of Australia – on one side arguing for an ideally a-politicized Security Council basing its decisions on the 'principles of justice and international law' while on the other side blindly supporting the UK – seems blatant[31].

But this opinion of a quasi-judicial function of the SC didn't gather support among the other members of the Security Council: Mr Johnson, the US Ambassador to the UN declared that the 'least the Council [could do then was] to give the impartial forum, which the International Court of Justice constitutes an opportunity to repair, if possible, some of the damage which

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has an obligation, an inescapable obligation, which is to bring about the peaceful settlement of the dispute as promptly as possible, in conformity with the principles of justice and international law. […] There is a dispute between two nations involving questions both of fact and of law. […] We submit that it is not our business to try to impose our individual views on either of the parties. It is only a matter for us to try to do what is just and what is in conformity with international law, and to adopt such measures as will bring about a prompt settlement of the dispute'.

27 Ibid., 111th Meeting, p. 363.

28 Those were the views of Herbet Vere Evatt(Australia's Foreign Minister at that time). Maher, op. cit. p. 57.

29 Ibid., 127th Meeting, p. 721.

30 Ibid.

31 C. Bridge, 'Diplomat', in: R. Nile, K. Saunders, T. Stannage (eds.), *Paul Hasluck in Australian History: Civic Personality and Public Life*, St. Lucia, 1999, pp. 138-140 Maher reports that Evatt had ordered his delegation 'to fall in behind whatever approach the UK took in the Security Council'. Maher, op. cit., p. 60.

has been done by the action of the Security Council'[32] and further asserted, in a since then forgotten mood, that 'we all have confidence in the impartiality of the Court'[33], implying that he doubted that the SC could act impartially. The Soviet Union was opposed to a finding of the SC on the merits for two different grounds: 1) the Council should decline its competence because of the lack of previous negotiations[34] and 2) because there was no threat to the peace[35]. The first argument was out rightly dismissed by the British delegate[36]. As to the second point, although it is hard to find a clear determination on the legal basis for the seizure of the Council in the verbatim records, it cannot be light-hearted sustained that an incident such as the Corfu's, resulting in the death of more than 40 soldiers, could fall outside the notion of a dispute 'which is likely to endanger the maintenance of international peace and security'[37]. It is significant that Mr Gromyko didn't rebut the arguments related to the quasi-judicial function of the SC, albeit he insisted on the fact that the resolution establishing the

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[32] *Official Records* …, op. cit., 125th Meeting, p. 686.

[33] Ibid., p. 686. United States' unshackled faith in this respect is strangely at odds with its later struggle during the *Nicaragua Case* proceedings aiming at rebutting the ICJ's jurisdiction. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, § 99: 'The United States emphasizes, however, that to conclude that the Court cannot adjudicate the merits of the complaints alleged does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes, but merely that in this respect the application of international legal principles is the responsibility of other organs set up under the Charter'.

[34] *Official Records* …, op. cit., 111th Meeting, pp. 365–366.

[35] See Ibid., p. 371: 'Article 35 is inapplicable, as there are no facts which would come within the provisions of this Article. Any statement to the effect that the behaviour of Albania in connexion with the damage done by mines to the British destroyers in the Corfu Channel constitutes or may constitute a threat to the peace is devoid of all foundation'.

[36] Ibid., pp. 384–385.

[37] Jully sustained that '[the] Anglo-Albanian dispute presents, *par excellence*, all the characteristics of a dispute of a nature to threat the maintenance of peace' [our translation]. L. Jully, 'Le premier arrêt de la Cour internationale de Justice', *Die Friedens-Warte* 48, 1948, p. 148.

Sub-Committee couldn't 'prejudge the case'[38]; neither did he refute the views, shared by the majority of the members, advocating a limited role of the SC when it has to deal with complex legal issues. Contrariwise, Mr. Michalowski, the Polish delegate, after having asserted that no proofs 'at all' existed and that 'the charges contradict one another', observed that some questions of law […] [were] in doubt, such as the question of innocent passage through territorial waters'. He further affirmed that

> '[in] the opinion of our delegation, we cannot decide upon all these legal problems in this Council. We cannot discuss here all these facts which, *as in a detective story*, first prove and then disprove various theories. Such deliberations are not required of this Council. Its task is to decide upon essential questions connected with the maintenance of international peace and security'[39].

Yet, it is not crystal-clear whether the Polish delegate pointed to the functional limits of the SC's powers in matter of law-adjudication process or whether he merely pointed, in support of the thesis of the Soviet delegate Mr Gromyko, to the SC lack of jurisdiction over the case. Just after having mentioned, for the first time in this context, the possibility of deferring the dispute to the ICJ in accordance with Article 36 (3) of the UN Charter[40], Mr Michalowski, clearly aiming to show the falseness of the quasi-judicial thesis, further added that '[we] are not a court of justice nor a jury, and we cannot pass a verdict one way or the other on the basis of our convictions alone'[41].

As to the establishment of the Sub-Committee in order to scrutinize the facts, the Chinese as well as the Colombian and the American delegates supported the proposal of the Australian representative[42]. Mr Johnson, although expressing unequivocal support to the British views on

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38 *Official Records* …, op. cit., 111th Meeting, p. 365: 'this Sub-Committee should work on the evidence at present available, namely, the documents which have been brought to this Council and the statements which have been made before this Council, and that it should supplement that evidence by reference to the two parties to the dispute, but not *by undertaking an investigation beyond those limits*' [emphasis added].

39 Ibid., pp. 375–376 [emphasis added].

40 Ibid.

41 Ibid.

42 Ibid., 114th Meeting, p. 418; p. 424.

substantial issues, insisted that 'sound practices [required] very careful examination of all the evidence pertinent to disputes before the Security Council'[43]. Mr Johnson and Mr Cadogan, though in favour of the establishment of the Sub-Committee, since they considered it a useful tool for the SC – mainly for considerations of efficiency –, expressed scepticism about its necessity[44]. Mr Aranha supported the idea of quasi-judicial procedure and favoured the establishment of the Sub-Committee[45]. Mr El-Khouri expressed serious doubts as to the need to set up a special Sub-Committee in order to clarify the facts and was opposed to it[46]. Lastly, Poland didn't feel the need to set up the Sub-Committee since 'on the basis of documents available at the present moment here in New York, it is impossible to find *any convincing evidence*'[47].

To sum up, the members, on one side, expressed the view 1) that the SC's task was not to deal with a 'legal dispute', thus giving substance to the rule enshrined in Article 36 (3). Mr Aranha went so far as to assert that the SC had no competence to settle the dispute in its legal aspects[48]. He was also preoccupied by the way the SC had entered in discussion on the material aspects of the litigation and concluded that the SC should rather immediately refer the matter to the ICJ[49]. But at the same time, 2) they underlined the need for adopting legal procedures, and in this context the term quasi-judicial was deemed appropriate, as to allow the SC to carry on its fact-finding function. Even though, it must be reminded, it was almost unanimously admitted that the SC 'is not and cannot be a tribunal … It would be otherwise hard to explain why the International Court of Justice has been maintained and why its functions have been amplified at San Francisco'[50].

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43 Ibid., 111th Meeting, pp. 372–373.

44 Ibid., p. 383. But see further, ibid., 114th Meeting, p. 432: 'I think it would facilitate our business'.

45 See Ibid., p. 423, arguing that the SC '[possessed] a certain judiciary competence'.

46 Ibid., 111th Meeting, p. 378.

47 Ibid., p. 377.

48 Ibid., 125th Meeting, p. 686.

49 Ibid., 125th Meeting, p. 688. See Delbez's acid comment: 'it's only after various months of unfruitful discussions that he decided to refer the litigants before the Court. He should have begun with this. One couldn't imagine a worst method' [our translation]. Delbez, op. cit., p. 10.

50 US representative; ibid., 125th Meeting, p. 686.

The Security Council's Practice of Referral to the International Court of Justice

The case of the *Corfu Channel* is the first, and till now, only dispute for which the SC recommended the referral to the ICJ under Article 36 (3) of the UN Charter[51]. It seems however that the possibility has sometimes been discussed as, for instance, in 1947 during the Egyptian dispute, on a proposal of Belgium (supported by the UK), but which didn't gather the required majority[52]. SC Resolution 395 (1976) of 25 August 1976 is also worth mentioning, which was adopted in the context of the crisis between Turkey and Greece and whereby the SC

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[51] G. Guillaume, 'L'Organisation des Nations unies et ses juges', *Pouvoirs* 2004/2, n° 109, p. 92. It ought nevertheless to be remembered that the GA evoked at least once the possibility for the parties to a dispute to defer it to the ICJ; it happened in conjunction with the South-West African (Namibia) decennial controversy. The (only) UN plenary organ recalled to the UN Member States 'the failure of the Union of South Africa to render annual reports to the United Nations, *and to the legal action provided for in article 7 of the Mandate read with Article 37 of the Statute of the International Court of Justice*' (Res. 1142 (XII); see likewise GA Res. 1361 (XIV)). Pursuant to this persuasive call, Ethiopia and Liberia seized the Court on the basis precisely of Article 7 of the Mandate and Article 37 of the ICJ Statute; the story is well-known and thus we won't dwell upon it. Instead, it ought to be stressed that what has been said in regard to the SC power to defer a dispute to the Court is a fortiori applicable with respect to the GA. Indeed, the latter cannot but (re-)commend to the Parties a specific means of dispute settlement.

[52] S. Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume II: Jurisdiction*, Leiden/Boston, 2006, p. 670. Rosenne also mentions an attempt by the General Assembly to make a recommendation under Articles 10 and 11 of the Charter and 'based upon the principle of Article 36, in the special circumstances of South West Africa' (See Resolution AG 1361 (XIV) of 17 November 1959); M. S. M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, The Hague, 2003, p. 222. Amr also points out that 'the US proposal that the Soviet Union's complaint concerning violation of Soviet air space be referred to the ICJ was vetoed by the Soviet Union'; Stein also relates of a proposal by Colombia in the framework of the Indo-Pakistan dispute. T. Stein, 'Article 36' in B. Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 2nd ed., 2002, p. 627.

> '[*invited*] the Governments of Greece and Turkey […] to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connection with their present dispute.'[53]

However, this wording sounds more like a mere suggestion than a recommendation in the meaning of 36 (3)[54]. In fact, the SC makes no explicit reference to Article 36 (3) of the Charter. This assessment is not extremely encouraging for the advocates of 'peace through law'.

A brief analysis of the reach of Article 36 (3) UN Charter could prove useful in order to shed some light on the reasons for the scarce practice of referral of legal disputes to the ICJ by the SC[55]. The rule contained therein, although of limited effects, requires the SC to take into account the fact that 'legal disputes should as a general rule be referred by the parties to the International Court of Justice' (Article 36 (3) UN Charter)[56]. Undeniably, the ICJ, in the *United States Diplomatic and Consular Staff in Tehran* case, confirmed that the rule bears some meaning, thus confirming the *Corfu Channel* precedent:

> 'It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor

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53 SC Resolution 395 (1976) of 25 August 1976.

54 S. D. Bailey, S. Daws, *The Procedure of the Security Council*, Oxford, 1998, p. 315.

55 For an account of the question of the binding effect of SC recommendations with references to the legislative history of the UN Charter, see H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, London, 1951, pp. 444–450.

56 H. Lauterpacht, *International Law Being the Collected Papers of Hersch Lauterpacht, Volume 5: Disputes, War and Neutrality*, Cambridge, 2004, pp. 224–226. For a rather critical appraisal of this provision, see: Delbez, op. cit., pp. 9–10: 'The use of both of these conditional moods verb forms is eloquent, the formula is lenitive to the maximum extent possible and it is clear that the Council stay free in law to conform himself or not to this too modest directive. Nothing bars him to set aside a dispute of a juridical nature and to try to settle it through its own methods, i.e. based on political considerations' [Our translation].

in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 […]'[57].

Would one go too far to paraphrase the Court landmark sentence in the *Nicaragua Case*[58], and, reverting the roles (of the organs), thereby assert that 'the Security Council should shy away from a case brought before it merely because it has legal implications'? Nothing in the Charter literally bars the SC to take cognizance of a case for such reasons. Unlike the SC in relation with the General Assembly, pursuant to Article 24 of the Charter, the ICJ does not benefit from any privilege of primacy in the exercise of its law-adjudicating function. In fact, whereas Article 12 of the Charter prevents the GA to make any recommendation concerning a situation or a dispute as long as the SC is seized (and provided it 'has [not] failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members'[59]) Article 96 of the Charter expressly allows State parties to submit their disputes to other tribunals. Admittedly, if the SC were to decide not to exercise its functions with regard to a dispute on the ground that it features legal aspects, this could constitute a default in the exercise of its duties under Chapter VI of the Charter. In such a situation where no other procedure would have been instituted under Article 33 and where the dispute would continue, the SC could be charged of not discharging its primary responsibility for the maintenance of peace under Article 24. Thus, nothing in the Charter requires the SC to refer a dispute to the ICJ, for the sole reason that it has legal implications, as most international disputes have. The formulation –'as a general rule'– leaves room for exceptions. But the rule embodied in Article 36 (3) UN Charter clearly suggests that the SC should at least provide compelling explanations when it refuses to refer a 'legal dispute' to the Court.

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[57] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 22, § 40.

[58] 'It must also be remembered that, as the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, § 96.

[59] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, § 30, pp. 150–151.

A recommendation under Article 36 (3) UN Charter, as regards the states involved in a proceeding, bears a strong political and moral injunction to give their consent in order to set up the ICJ's jurisdiction. But the lack of legal binding force of such recommendation doesn't necessarily entail the conclusion that their effects are limited to the political and moral sphere. Sir Hersch Lauterpacht suggests that 'the failure to act on them [the recommendations of the SC under Article 36 (3)] may bring about the enforcement provisions of Chapter VII wherever such failure is held to amount to a breach of the peace'[60].

Lauterpacht wondered whether the reasons behind the meagre resort to Article 36 (3) of the UN Charter could not be found in the replacement of the term 'justiciable' by the term 'legal' upon the drafting of Article 36 (3), arguing that the latter is part of an 'unhelpful traditional terminology'[61]. It appears then that this topic is closely intertwined with the so-called argument (or theory) of the justiciability of disputes. As Judge Lachs rightly affirmed in his separate opinion in the *Nicaragua case*, the criterion must be sought elsewhere than in the 'complex legal issues':

> 'Thus it becomes clear that the dividing line between justiciable and non-justiciable disputes is one that can be drawn only with great difficulty. It is not the purely formal aspects that should in my view be decisive, but the legal framework, the efficacy of the solution that can be offered, the contribution the judgment may make to removing one more dispute from the overcrowded agenda of contention the world has to deal with today'[62]

Furthermore, another Judge asserted in his Dissenting opinion appended to the same judgment that, contrariwise to what the US had argued before the Court, it was 'not the design of the drafters of the Charter and the Statute to exclude the Court from adjudicating disputes falling within the scope of Chapter VII of the United Nations Charter'; Schwebel was thus 'unable to agree that the practice of States in interpreting the Charter and the Statute confirms such a

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60 Lauterpacht, *International Law Being…* op. cit., p. 226; also see Kelsen, *The Law of the United Nations*, op. cit., p. 450.

61 Lauterpacht, *International Law Being…* op. cit., p. 226.

62 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Separate opinion, I.C.J. Reports 1986*, p. 168.

design'[63]. This (sound) affirmation is even more persuasive as Judge Schwebel was far from being tender towards the ICJ in his dissenting opinion.

As some authors underline, 'all international conflicts are at the same time political and legal, only the balance between the political and legal aspects varies'[64]. Hence, can it be maintained that a criterion for qualifying a dispute as a legal dispute within the meaning of Article 36 (3) could reside in the fact that the dispute must be predominantly made up of 'complex legal issues', as some delegate suggested during the discussion of the *Corfu Channel* case? What would then be a complex legal issue? Would it be tenable for instance to reword the assumption as following: 'the SC may not shy away from a case brought before it merely because it has legal implications *unless the legal implications are predominant*'? Be that as it may, the question should be answered not in terms of the allegedly legal or political nature of the dispute but rather in terms of the nature and functions vested with the organ that is more suitable to settle the dispute. In other words, the Security Council may decide on which are the 'legal disputes' by taking into account the effectiveness of the different options for the sake of the maintenance of international peace and security. For example, it can be argued that disputes involving complex legal issues and controversial factual elements may require different means than others in terms of time and procedure. Some disputes may feature a character of urgency that the SC would be in a better place to address, whilst others need a balanced and fair assessment of the different responsibilities; the latter being the province of the ICJ. It has also been submitted that in some cases the settlement by the SC would provide more flexibility, which could mean more effectiveness in some contexts[65]. Yet, this seems not to be the practice adopted by the political organs of the UN, which tend to appraise whether States abide by their obligations[66]. Therefore, Dame Higgins' account doesn't seem to be

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63 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting opinion, I.C.J. Reports 1986*, p. 289.

64 D. Nguyen Quoc, P. Daillier, M. Forteau, A. Pellet, *Droit international public*, Paris, 8th ed., 2009, p. 920 [our translation].

65 R. Higgins, 'The Place of International Law in the Settlement of Disputes by the United Nations Security Council', *American Journal of International Law* 64, 1970, p. 16.

66 O. Schachter, 'The Quasi-Judicial Role of the Security Council and the General Assembly', *American Journal of International Law* 64, 1958, p. 961.

decisive as it is influenced by the specific historic and strategic context of the Cold War[67]. The dearth of practice of the last 20 years unfortunately shows that the roots must be more deeply incrusted in the conscience of the diplomats and political decision-makers.

It is nevertheless plausible that the main cause for the meagre practice of the SC is trivially to be found in a fundamental loss of faith in the strength of international justice –the terminological issue, furnishing only a purely formal legal explanation, is thus nothing more than an epiphenomenal manifestation–, as Remiro Brotóns bitterly underlines:

> 'Obviously, the Great Powers took note of how unpleasant could result the independent exercise of the administration of justice and, from then on, not only were they sparing with urging recommendations of the Charter, but went even further, alleging the inadmissibility of requests related with controversies which, by their substance, they considered *political* and, in their opinion, ought to be always reconducted to the SC.'[68]

The legal effects of the Security Council referral in regards to the jurisdiction of the ICJ

During its first meeting which dealt with the Corfu Channel incident, the SC, pursuant to Article 32 of the UN Charter, decided to invite Albania to take a part in the discussion. On 'summoning' Albania, the SC asked her to abide by all 'those obligations which would apply to a Member of the United Nations in such a case'[69]. This point is worth noting as it would become the touchstone of the legal construction advocated by the UK so as to establish the compulsory jurisdiction of the International Court of Justice[70]. The UK affirmed that having accepted these obligations, Albania was, to the effects of this dispute, bound to abide by the alleged compulsory jurisdiction flowing from the conjunction of Article 25 –which provides that 'the Members of the United Nations agree to accept and carry out the decisions of the

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67 Higgins, op. cit., p. 4.

68 A. Remiro Brotóns, *Derecho internacional*, Valencia, 2007, p. 1116 [our translation].

69 *Official Records* …, op. cit., 95th Meeting, pp. 123–124.

70 Gherari notes that the terms used in this context allow for a wider interpretation than the wording of Article 35. H. Gherari, 'Article 32', in Cot, Pellet, Forteau, op. cit., p. 1042.

Security Council in accordance with the present Charter'–, of Article 36 (3) UN Charter as well as of Article 36 (1) of the ICJ Statute[71].

In its Judgment on Preliminary Objection of 25 March 1948, the ICJ considered that it didn't need to 'express an opinion' on the existence of a compulsory jurisdiction arising out of Article 36 (1) of the Statute, 'since, […] the letter of July 2nd, 1947, addressed by the Albanian Government to the Court, [constituted] a voluntary acceptance of its jurisdiction'[72]. Nevertheless seven Judges regretfully observed that the Court had not dealt with the issue and contested that Article 36 '[had] introduced more or less surreptitiously, a new case of compulsory jurisdiction'[73]. In the same vein, Judge *ad hoc* Daxner noted, after a thorough perusal of the *travaux préparatoires*, that 'the obligatory character of a recommendation under Article 36 (3) of the Charter, is inadmissible'[74].

Most commentators – including some of those who had acted as agent or council for the United Kingdom – admit unhesitatingly that the British argument arising out of the alleged binding effect of the SC resolution was devoid of legal soundness – sometimes even by terming it as 'specious' –, since SC recommendations have no mandatory force[75]. Some

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[71] Article 36 (1) ICJ Statute reads as follows: 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.' See *Corfu Channel case, Judgment on Preliminary Objection: I.C.J. Reports 1948*, p. 17.

[72] Ibid., p. 26. On the question of the basis for the jurisdiction, see the contribution of Mr. Henry Burmester.

[73] *Corfu Channel case, Judgment on Preliminary Objection, Joint Separate Opinion: I.C.J. Reports 1948*, p. 32.

[74] *Corfu Channel case, Judgment on Preliminary Objection, Dissenting Opinion by Dr. Igor Daxner: I.C.J. Reports 1948*, p. 33; Also see F. Honig, 'The International Court of Justice 1947-1950', *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 14, 1951/52, p. 500: 'The [British] argument was ingenious but failed to take account of the wording of Article 25 of the Charter which is concerned with 'decisions', and not with 'recommendations' of the Security Council'; Munro, *op.cit.*, p. 375.

[75] H. Waldock, 'Forum Prorogatum or Acceptance of a Unilateral Summons to Appear before the International Court', *International Law Quarterly* 2, 1948, p. 390; J.-F. Lalive, 'La jurisprudence de la Cour internationale de Justice', *Annuaire suisse de droit international* VI, 1949, p. 167; H. Lauterpacht, *The*

authors, like Hans Kelsen, were less stringent in their appraisal[76]. Leo Gross, while agreeing with the dissenting opinion in its technical aspects, found the outcome unsatisfactory and argued that the ICJ 'missed an opportunity both as an organ of international law and as principal judicial organ of the United Nations to accept a new title of compulsory jurisdiction which might have infused some vitality into Article 36 (3) of the Charter and into the whole system of peaceful settlement established in the Charter'[77].

Hence, what can be said of Article 36 (1) ICJ Statute mid-sentence recognizing the Court's jurisdiction for matters 'specially provided for in the Charter of the United Nations'? Is it arguable that a title of jurisdiction would arise out of this provision despite the lack of binding effect of SC recommendations[78]? Following a systemic and literal interpretation, Article 36 (3) of the UN Charter seems to temper the scope of Article 36 (1) ICJ Statute by providing that the recommendations shall be made 'in accordance with the provisions of the Statute of

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Development of International Law by the International Court, London, 1958, p. 47; Honig, op. cit., p. 500; E. Hambro, 'Some Observations on the Compulsory Jurisdiction of the International Court of Justice', *British Yearbook of International Law* 25, 1948, p. 133; L. Goodrich, E. Hambro, *Charter of the United Nations: Commentary and Documents*, p. 258; Jully, op. cit., p. 151.; M. Dubisson, *La Cour internationale de Justice*, Paris, 1964, p. 158; F. Wittman, *Das Problem des Obligatoriums in der internationalen Gerichtsbarkeit unter besonderer Berücksichtigung von Artikel 36 Absatz 2 des Statuts des Internationalen Gerichtshofes*, Dissertation, Munich, 1963, pp. 106–108; K. Herndl, 'Reflections on the role, functions and procedures of the Security Council of the United Nations', *Recueil des cours* 206, 1987, p. 326; . T. Stein, op. cit., p. 626.

[76] He described the interpretation according to which Article 36 (3) in conjunction with Article 36 (1) ICJ Statute entailed compulsory jurisdiction in a case where the SC had issued a recommendation to this effect as nothing less (and nothing more) than 'doubtful'. Kelsen, *The Law of the United Nations*, op. cit., p. 517. Yet, see H. Kelsen, 'The Settlement of Disputes by the Security Council', *International Law Qarterly* 2, 1948, p. 193: 'The wording of these provisions, however, is clear enough to ascertain that the Security Council has no power by itself to refer the dispute to the International Court of Justice. This can be done only 'by the parties''.

[77] L. Gross, 'The International Court of Justice and the United Nations', *Recueil des Cours* 120, 1967, pp. 353–354.

[78] Australian representative (Col. Hodgson) straightforwardly supported this title of jurisdiction, albeit without elaborating on it (*Official Records* …, op. cit., 125th Meeting, pp. 722–723).

the Court'. Therefore, this provision can be hardly construed as substantiating an ipso facto establishment of the ICJ's jurisdiction through a mere SC's resolution. Furthermore, an argument that has been advanced in order to criticize the aforementioned separate opinion is that the interpretation chosen by the minority of the Court left Article 36 (1) ICJ Statute emptied of any legal reach as it establishes the jurisdiction of the Court for 'all matters specially provided for in the Charter of the United Nations'[79]. In this perspective, Hambro considered that the UN Charter 'contains no 'matters specially provided for' in regard to the jurisdiction of the Court' in relation with Article 36 paragraph 1 ICJ Statute'[80].On a purely logical level[81], taking into account the 'ordinary meaning to be given to the terms of'[82] the Charter, it is quite bold to affirm that the SC has been vested with the power to issue recommendations that it is impossible to implement. If the SC can recommend something, this must necessarily entail that the Court shall have jurisdiction, because the SC would not recommend something that is technically impossible. Probably in most of the hypothetic future cases, a recommendation will be issued only when the parties had no previous intention to submit the case to the ICJ. It is possible that the strong political call would influence their

[79] Ibid. See particularly, J. Mervyn Jones, 'Corfu Channel Case: Jurisdiction', *Transactions of the Grotius Society* 35, 1949, p. 95. This author argued that the interpretation of the minority 'merely create a vicious circle or perpetual renvoi between the two provision'.

[80] Hambro, op. cit., p. 133.

[81] As is stressed by Dionisio Anzilotti, the logical presuppositions and consequences that derive from the rules adopted by the states actually matter for the purpose of the determination of the sources of international law. D. Anzilotti, *Corso di diritto intenazionale, Volume Primo, Introduzione – Teorie Generalli*, 3rd ed., Padova, 1955, p. 67. For an example of such a 'logical interpretation', see ICTY, *The Prosecutor v. Duško Tadić*, Appeal Chamber, Judgment of 15 July 1999, Case No. IT-94-1-A, § 284: 'It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: *the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements*' [emphasis added].

[82] As suggested by Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT). United Nations, *Treaty Series*, vol. 1155, p. 331.

will[83]. But that's only a bet on the effects of the recommendation. The plausible alternative is that one of the parties adamantly refuses to submit the dispute. In such a case the SC would recommend something that would prove legally impossible. It is submitted that to accept such a non-sense would seriously undermine the prestige and authority of the SC, not to say of the UN altogether.

Quite strikingly, both the minority judges of the ICJ that had expressed their opinion on the matter and most of the commentators favoured the historical interpretation[84], rejecting the argument arising out of the principle *ut res magis valeat quam pereat*[85]. The less that can be said is that the Separate Opinion is neither satisfying from a purely technical point of view as it doesn't address the problem of the meaning of Article 36 (1) ICJ Statute and actually leaves this provision without any legal reach.

The argument of a title of compulsory jurisdiction arising out autonomously from Article 36 (1) of the UN Charter was likewise used in the *Ambatielos* case, although in a different, and this time undoubtedly specious – there had been no recommendation by the SC –, legal

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83 Jully also terms the British argument of the mandatory effects of the recommendation as 'specious' and rebuts the argument of applying the principle *ut res magis valeat quam pereat* to Article 36 (3) of the UN Charter in order to confer the power to the SC to impose a specific – let alone judicial – means of dispute settlement as he considers that it amounts to denying the persuasive strength and therefore the political and moral effects of recommendation. He then criticizes the argument of applying the rule of interpretation *ut res magis valeat quam pereat* to Article 36 (1) of the ICJ Statute and concludes that without the Albanian letter of 2 July 1947 – which was considered as the basis for the jurisdiction of the Court –, there would likely have been a majority of Judges to declare the inadmissibility of the British request. Jully, op. cit., p. 152.

84 In this context, it ought to be remembered that at that time the historical interpretation, notably based on the analysis of the *travaux préparatoires*, constituted one among the main, if not the principal, methods of treaty interpretation. The VCLT will operate later on a radical change in the hierarchy among these methods as it will relegate it in its Article 32 which enunciates the Supplementary means of interpretation'. The latter have to give in to the 'General rule of interpretation' stated in Article 31 which requires, in its first paragraph, the treaty to be interpreted according to the: 'ordinary meaning to be given to [its] terms […] in their context and in the light of its object and purpose. '

85 With the notable exception of Jully, op. cit.

construction. In its Memorial, Greece asked the Court to establish its jurisdiction on the basis of a systemic interpretative argumentation which deduced a compulsory title of jurisdiction out of the conjunction of Article 1 and 36 (3) UN Charter[86].

In his oral pleading, Sir Eric Beckett replied to the Greek argument, thus attempting to challenge the opinion the UK had in some of its aspects put forward back in 1948 in the *Corfu Channel* case :

> 'I find it difficult to believe that these remarks are presented as a serious argument, but they have been presented to the Court and I think I should say a few words about them. [Sir Eric Beckett then quoted the relevant fragments of Greece's memorial and observations on the preliminary objection] In this passage of the Greek Memorial there are in fact two misquotations of the provisions of the Charter. The first extract from Article 1 (1) should be completed by the words 'which might lead to a breach of the peace', because Article 1 (1) of the Charter refers to disputes which might lead to a breach of the peace and it is difficult to believe that the Ambatielos claim falls into this category, and, secondly, and more important, Article 36 (3) of the Charter, when referring to the reference of disputes to the International Court of Justice, adds 'in accordance with the provisions of the Statute of the Court', words omitted in the Greek Observations but which, of course, entirely destroy the Greek argument. However, if the argument really is that these provisions of the Charter give compulsory jurisdiction to the Court and its jurisdiction is the only question with which the Court is concerned at present, the contention can be answered briefly by the well-known facts that there were many States who desired that the Charter should make the jurisdiction of this Court obligatory, but it is well known and undisputed that this desire was not realized at San Francisco, and none of the Charter provisions quoted says that the Court is given any jurisdiction by them.'[87]

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86 *I.C.J. Pleadings, Ambatielos Case (Greece v. United Kingdom)*, p. 25, also see Greece's observations on the preliminary objection. Ibid., p. 223. It is interesting to notice that Hartley Shawcross acted this time as a councel for Greece, proving coherent in its argument (contrarily to Sir Eric Beckett).

87 Ibid., p. 285. This excerpt highlights apparently the historical interpretation as the most favoured (in that epoch) method of treaty interpretation (see *supra* note 85).

The Court didn't seize the opportunity neither this time to elucidate the issue as it established its jurisdiction on the main title submitted by Greece, namely Article 37 ICJ Statute in relation with a Treaty of Commerce and Navigation of July 16th, 1926.

It took more than fifty years after the *Corfu Channel* for the ICJ, to definitely closes – in an *obiter dictum* – the debate with regard to the interpretation of Article 36 (1) of the Statue in relation with Article 36 (3) of the Charter :

> 'The Court observes that the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court. In particular, there is no such provision in Articles 1, paragraph 1, 2, paragraphs 3 and 4, 33, 36, paragraph 3 and 92 of the Charter, relied on by Pakistan.'[88]

It is curious to observe that after declining twice for reasons of procedural economy, the ICJ eventually decided to take position on Article 36 (1) ICJ Statute in such a wide affirmation whilst it was not necessary for the sake of the case[89], as if the judges felt the need, yet posthumously, to definitely close the door to this surreptitious limited title of compulsory jurisdiction. Still and from the aforesaid, was it tenable tenable to sustain back in 1948 the validity of such autonomous head of jurisdiction? The Court's repeated silences and uncertainties during nearly 50 years prove that it was not absurd to argue in this sense. The fundamental importance[90] of the issue for the rule of law in the international society indicates it still deserves a more in-depth and up to date treatment than that provided for in the reviewed precedents.

Be that as it may, one of the legacies of the Court's Judgement in the *Corfu Channel* case lies, as was wisely underlined by Waldock, in the full establishment of the doctrine of *forum prorogatum* in a case where the SC had previously recommended the deferral to the ICJ:

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88 *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgment, I. C. J. Reports 2000*, p. 33, § 48.

89 There is no trace of such a legal interpretation as the one that had been used by the UK in 1947 or by Greece in 1952 in Pakistan's memorial.

90. Thomas Bingham qualifies the consensual basis for the competence of the ICJ as one of the 'most serious deficiencies of the rule of law in the international legal order'. See T. Bingham, *The Rule of Law*, 2010, London, p. 128.

> '[When] the Security Council has recommended that a legal dispute be referred by the Parties to the Court under Article 36 (3) of the Charter, a State may with perfect propriety proceed by unilateral application, whether or not the other State is regarded as liable to compulsory jurisdiction under Article 25 of the Charter or otherwise. This is important, since the disputing States may well be at arms' length and in no mood to discuss a compromis with each other. Or, again, one party may seek to delay or prejudice the hearing by proposing unacceptable conditions for the compromis, but the Court's clear ruling in the Corfu Channel Case enables the other party to short-circuit the equivocation by filing an application unilaterally. The judgment has in this way lent additional strength to the Security Council's power of recommendation under Article 36 (3) of the Charter'[91].

Yet, this is not tantamount to say that the Court has ipso facto jurisdiction over the case; as we have seen, to do so, the Court needs a title established in accordance with its Statute and these heads of jurisdiction are exhaustively enunciated in its Article 36. In spite of para. 1 mid-phrase of this provision, recognizing the Court's jurisdiction for 'all matters specially provided for in the Charter of the United Nations', the latter has been silent in this respect thus making this provision heretofore without effect. Hence, even though the Statute is annexed to the UN Charter, only the former regulates the Court's establishment of jurisdiction. This conclusion remains unaffected even in the still (highly) hypothetical case where the SC, through a binding resolution (ex Article 25) should request two States to defer their dispute to the ICJ. The latter, in order to verify its jurisdiction, couldn't be satisfied with the SC resolution and would definitely need the two States' consent and thus a valid head of jurisdiction under Article 36 (1) or (2) of its Statute[92]. Hence, for the specific need of this consent, the SC cannot obviate to it through its resolution; the two States have given their consent to the binding character of certain SC resolutions and not to the Court's jurisdiction. The SC cannot avail himself of their consent, embodied in Article 25 of the UN Charter, and 'transfer' (transfigure) it under the heading of Article 36 of the Statute, thus establishing the Court's jurisdiction. Therefore, if the two States – or just one of them – do not go to the

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91 Waldock, op. cit., p. 390.

92 See in this respect Judge Daxner's dissenting opinion, op. cit., p. 38.

Court, they will infringe the SC resolution, entailing their responsibility, but the Court won't have accordingly jurisdiction over the dispute[93].

Fact-finding in the Security and its use by the International Court of Justice

Prior to the adoption of SC resolution 22, the long politically tainted clash about the disputed facts – mainly the alleged Albanian origin of the minefield or at least the knowledge and connivance of Albania – led the Council's members to a kind of disillusion and to the conviction that the SC in full session was unable 'to decide on facts'[94]. Therefore the SC decided during its 114th meeting to create a Sub-Committee and conferred to it the task 'to examine all the available evidence concerning the [...] incidents and to make a report to the Security Council'[95] – thus accepting a proposal of Australia – and decided to appoint Australia, Colombia and Poland as its members[96]. SC Resolution 19 was adopted by eight votes with the abstention of Poland, Syria and the USSR[97]. Certain considerations that allow to circumscribe the nature of the fact-finding mission of the Sub-Committee and the main characteristics of the proceeding can be found in the record of the discussion prior to the

93 Quite surprisingly, Albania granted that if the SC had adopted a binding resolution deferring the dispute to the Court, such a resolution would have 'oblige[d] both parties *ipso facto* and without any other step, to appear before the International Court of Justice and […] would [have] authorized them to approach the International Court of Justice without regard to the provisions of the Statute of the Court' (Albanian government's observations reproduced in *Corfu Channel case, Judgment on Preliminary Objection: I.C.J. Reports 1948*, p. 22.

94 In this context, it is not without interest to recall that Albania has seized the GA hoping that 'sa requête sera suivie d'une enquête' (Oral argument of Jean Nordmann (Albania), 20/01 (1949, vol. I, p. 608). It is needless to say that such a hope was ill-founded.

95 SC Resolution 19 of 27 February 1947.

96 *Official Records* …, op. cit., 114th Meeting, p. 438.

97 Ibid., p. 432.

adoption of SC Resolution 19, pursuant to Article 29 UN Charter[98]. In this regard, those who approved the establishment of the Sub-Committee considered that the latter possessed 'a certain judiciary competence'; it still had to be composed by 'a rapporteur and two revisers whose duty is to examine and report upon question for final judgement of their fellow members'[99]. Even though the SC didn't take an official position in this respect, Syria's delegate statement– unchallenged by the other members – according to which the SC's decision to set up the Sub-Committee was not carrying out an 'investigation' by virtue of Article 34[100], seems to describe the generally admitted understanding within the SC. According to the Soviet delegate, the establishment of the Sub-Committee was not necessary because 'the accusations levelled at Albania by the United Kingdom Government [were] not proved, and it is impossible to prove them'[101]. This radical stance, expressed at the very outset of the debates, underlines a total lack of impartiality on behalf of the Soviet delegation. Unlike Australia, USSR didn't even try – or didn't succeed? – to disguise its political agenda behind a juridical rhetoric. Likewise, it can be maintained that such a reproach can also be formulated as to the proceeding before the ICJ, considering the analogous East-West confrontation among the members of the bench[102]. It appears in the judgment on the merits

98 Ibid., pp. 361–440. In this regard, the SC had to cope with the question whether the establishment of the Sub-Committee was a procedural or substantial matter; the SC president affirmed that the decision to this effect 'was not one of the decisions mentioned in Chapter VI of the Charter', thus allowing UK (as one of the party to the dispute) to vote on its adoption, which implied that the question was a substantial one (ibid., p. 428). UK voluntarily restrained nevertheless to vote on the appointment of the Members of the Sub-Committee (ibid., p. 438).

99 Mr. Aranha (Brazil); ibid., 114th Meeting, p. 423.

100 Ibid., p. 430.

101 Ibid., p. 377.

102 Zile describe Judge Krylov as a 'trusted agent of the Soviet State on the international scene' and asserts that 'Krylov's independence and impartiality could be called into question by his membership in the Communist Party of the Soviet Union' given the fact that his admission to the Party and his election to the ICJ were almost simultaneous. The author relates that, in Articles published in the early 1950s, Krylov sometimes called the ICJ an instrument of the 'imperialist' Powers. Z. L. Zile, 'A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy', *American Journal of International Law* 58, 1964, p. 367, 386–387.

that the evidentiary materials arising out of the proceeding before the SC and subsequently submitted to the Court were, at least partially, taken *ipso facto* into account by the Court[103].

Be that as it may, the Sub-Committee concentrated its attention on the following two questions: a) the existence of the minefield; b) and, if yes, was 'it laid by Albania or with the connivance of the Albanian Government, or was it not?'[104]. The report which was eventually adopted unanimously, yet with an additional report by the representative of Poland answered positively to the first of them. As for the second, and more substantial question, the Chairman of the Sub-Committee, Mr. Angel (Colombia) maintained that 'there is no direct evidence and no positive facts from which it may be concluded beyond doubt that the mines were laid by Albania or with her connivance. Nor we have any conclusive and categorical assertions to this effect by the United Kingdom'. He then went on stressing the core of the problem – which will be later on dealt with by the ICJ –, namely how the mines could be laid 'so close to the coast without Albania's knowledge when that country, especially in view of the incidents which took place in May, had shown such jealousy concern for all matters connected with her sovereignty over territorial waters?'. Therefore, he considered the 'presumption that the minefield could not have been laid in the Corfu Channel without Albania's knowledge so strong, that [he] should have no objection to voting in favour for a finding in that sense if the majority of the members of the Council are of the same opinion'. He then added that if it weren't the case, he 'should be inclined to suggest that […] the Council should recommend that the two parties bring their dispute before the International Court of Justice'[105]. Yet, this interpretation of the Sub-Committee's findings, albeit authoritative (since it was due to its chairman), was far from being unanimously shared by the other SC's members. In addition to Poland and USSR, it is worth mentioning Belgium, whose stance is not presumptively tainted in terms of Cold War, according to which the facts ascertained 'confirm that […] the British

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A commentator of the *Journal de Genève*, 26 December 1949, ironically expressed his scepticism as to the vote of Judge Krylov: 'Les juges de la Cour sont élus sur la base de leurs qualifications personnelles. En principe, donc, c'est M. Krylov, en son âme et conscience de juriste éprouvé, et non point un représentant de l'URSS qui a systématiquement voté pour l'Albanie. Tout de même, il y a des coïncidences qui sollicitent un peu trop la loi des probabilités'.

103 *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports* 1949, p. 17.

104 *Official Records* …, op. cit., 120th Meeting, p. 544.

105 Ibid., p. 549.

charges are entirely unfounded [and] that they should not be taken as the basis for the adoption by the Security Council of an unfair decision. *There is no reason for the Security Council to find Albania guilty*'[106]. Still, the Belgium representative added that he couldn't 'conceive that these mines were laid without that Government's knowledge'[107]; even though this could entail the latter responsibility, as the Court will subsequently determine in her judgement. It is interesting to observe how, bit by bit, Albania's responsibility slipped along from direct responsibility, then connivance and ultimately its mere knowledge, along with the ever-shrinking robustness of the 'compelling' evidences brought by the UK. Needless to remind that the ICJ will eventually come about at the same determination. Albania rejected by all means UK draft resolution arguing that 'to mere assumptions from [arguments devoid of all foundations] is to act contrary to the principles of justice, and is neither a valid nor a serious procedure'[108]. One of the reasons adduced (namely by Poland and Albania) to weaken the probative value of the Sub-Committee's findings laid on the variable standards of evidence applied respectively before the SC and the Sub-Committee. The Australian representative, Mr. Hasluck, retorted that 'the findings which we [i.e. the Sub-Committee] think the Council is justified in making is simply that the mines must have been laid *with the knowledge* of Albania. We think that that finding is a *reasonable* one because of the *accumulation of evidence* leading to that conclusion, and particularly *in the absence of any other reasonable explanation or plausible or practicable theory* as to how the mines got into water at that particular place'[109]. This reply wasn't deemed as satisfactory by the Syrian delegation which correctly assumed that 'according to a general principle of law, no penalty, responsibility, or conviction can be established on possibility or probability. There must be certainty in the matters'[110] and it was thus recommended to further the fact-finding while at

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106 Ibid., 121st Meeting, pp. 586–587.

107 This view will be supported by the USA (ibid., p. 588) which will submit accordingly an amendment to the original UK-sponsored resolution, aiming at deleting any reference at Albania's responsibility for having laid the minefield and replacing it with the words 'with the knowledge of the Albania Government' (ibid., p. 589); as well as by France (ibid., p. 595), which likewise proposed an amendment quite similar to that of the US. China also supported this contention (ibid., pp. 600–601).

108 Ibid., p. 597.

109 Ibid., p. 603 [emphasis added].

110 Ibid., p. 605.

the same time encouraging the mediation between the parties to the dispute. Finally, UK's representative last bid to support its draft resolution made clear that 'although, as I have said several times, I cannot produce eyewitness, *the evidence I have given crates such a clear presumption* that I think nobody need do violence to his conscience in adopting the resolution which I have submitted'[111]. The Sub-Committee's work – Poland submitting a dissenting report[112] – did not allow any advancement towards the dispute settlement but rather revealed the incapacity of the SC, in this polarized context, to reach a balanced pronouncement regarding a controversial factual situation. Yet, on the basis of this report, UK submitted, quite unwisely and untimely, a draft resolution determining that the minefield 'was laid in the Corfu Channel by the Albania Government or with its connivance' (§ 1) and consequently that the dispute had to be settled 'on the basis of the Council's findings in § 1 above', while the SC retained the 'dispute on the agenda'. Such an abrupt request was doomed from the outset; Poland, France and the USA, each of them with their own purposes in mind, put forward their amendments. At the end of the debates preceding the vote on the UK's draft resolution as amended by US proposal stating that 'this minefield could not have been laid without the knowledge of the Albania authorities', thus entailing a 'light' responsibility as compared to a 'direct' one suggested by UK, it wasn't hard to guess that USSR would cast its veto. Indeed, the resolution wasn't adopted and thus SC's fact-finding rejected. This is even more appalling – we rather said paradoxical – since the determination rebutted by the SC will be finally grossly endorsed by the ICJ in its Judgment on the Merits where she will say:

> '*From all the facts and observations mentioned above*, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, *could not have been accomplished without the knowledge of the Albanian Government*'[113]

Since the 'facts and observations' are roughly the same, can we thus conclude, contrariwise to what we have hastily observed before, that the standard of evidence (threshold) is higher for

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111 Ibid., p. 607 [emphasis added].

112 Poland challenged more specifically the 'strong presumption' incumbent upon Albania's connivance or lack of knowledge, qualifying the evidence before the SC as being mere 'conjectures, theories and hypotheses' (ibid., pp. 553–555).

113 *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports* 1949, p. 22 [emphasis added].

the SC than for the ICJ? That, in the light of this case, the SC is 'more Catholic than the Pope'? Or, conversely, that the ICJ (UNO principal 'judicial organ') proved to be bolder – or less demanding – than the SC (a political organ)? Or, more simply and perhaps more down-to-earth, that SC, since it is a political organ can be prevented in discharging its task… for crude political reasons, which have nothing to do with highly sophisticated theories and constructions on evidence and standards of proof. It is nevertheless the case that, in an unexpected – and perhaps unwanted – institutional casting, the SC tried to act as the investigator, better, the Prosecutor – or, even, as a lower court – while the ICJ acted as herself, namely as a judicial organ?

Be that as it may, veto power and the discordance between different interpretations as to the Sub-Committee's findings rendered impossible the adoption of any adjudicating resolution, be it condemning or acquitting Albania[114]. We know the end of the story, the SC faced to an impasse as to the settlement of the dispute, referred, upon suggestion of the UK representative[115], the case to the ICJ (See supra C).

Security Council's attempt to act as the ICJ's Prosecutor

At the outset, it must be remembered that the UK thesis put forward before the SC according to which Albania couldn't but lay itself the mines in the Corfu Channel was decisive in convincing 7 of its members. In this perspective, it is worth noting that – as the Court couldn't fail to remark – 'although the United Kingdom Government never abandoned its contention that Albania herself laid the mines, very little attempt was made by the Government to

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[114] For the sake of completeness, it must be footnoted that, the Corfu dispute, and the USSR's avail of the veto, underlined the need for a general discussion on this power which Permanent members are vested with. The debate took place just before the SC had deferred the dispute to the ICJ.

[115] 'We tried direct negotiations with the Albanian Government but without success. We then hoped that settlement might be possible with the assistance of the Council, which could, we thought, *make a finding of fact*, so that further direct negotiations might have some prospect of success. But that has proved impossible because of the attitude of the Soviet representative. I therefore suggest that the Council *should now recommend that both parties should immediately refer the dispute to the International Court of Justice*' (Official Records …, op. cit., 125th Meeting, p. 685 [emphasis added]).

demonstrate this point'[116]. In the same vein, the Court observed that eventually the UK 'proposed to show that the said warships, with the knowledge and connivance of the Albanian Government, laid mines in the Corfu Channel just before October 22nd, 1946', adding furthermore that the original UK contention (i.e. Albania having laid the mines) 'was in fact hardly put forward at that time [Final submissions] except *pro memoria*, and no evidence in support was furnished'. Hence, UK actually abandoned, if not formally, its pristine contention which was instrumental, as said before, to (almost) convince the SC. Why? Was it due to an unavowed, yet legitimate, fear that this allegation was hard to meet the Court's higher standard of evidence, especially if compared to those of the SC? Be that as it may, Albania's counsels had it easy to dismount UK evidence, previously submitted to the SC, allegedly showing that Albania had laid the mines.

In respect of the threshold[117] of proof required to adjudicate, the Australian view was that the SC had to decide 'as reasonable men on the basis of all the available evidence'[118], thus yielding a condemnation based on circumstantial evidence[119]. This formulation seems considerably less stringent than the requirement of a 'degree of certainty' in cases concerning grave accusations against States set up by the ICJ in its judgment on the merits[120]. Indeed, the *Corfu Channel* case the Court didn't rely exclusively to the fact-finding of the SC. In fact the only explicit reference to the Official Records of the SC is made with respect of a declaration delivered by Albania according to which the latter admitted that its coasts were kept under close vigilance[121]. With regard to this fundamental discrepancy between the ICJ and the SC in matters of fact-finding, it must be recalled what Judge Schwebel candidly put forward in his aforementioned Dissenting opinion:

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116 *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports* 1949, p. 15.

117 Albania pleaded that 'les Membres du Conseil de Sécurité reconnaissent qu'on ne saurait condamner le Gouvernement albanais sans preuve et sur des simples présomptions', Reply of Albania (20/IX/1948), vol. II, p. 347.

118 See supra note 27.

119 Maher, op. cit., p. 60.

120 *Corfu Channel case, Judgment of April 9th*, 1949: *I.C.J. Reports* 1949, p. 17.

121 Ibid., p. 19.

> 'While the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression – or, as more often is the case, fail to arrive at a determination of aggression – for political rather than legal reasons. However compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.'[122]

The thresholds of evidence, the powers which the two organs are respectively vested with, not to speak of the political composition and the veto right, do distinguish them fundamentally. In this respect, proofs which can be admitted and availed of before the SC can be hardly alleged, let alone adjudicated upon, before the Court; the latter is thus entitled to refuse evidence which do not meet the acknowledged standards of a judicial organ, even if they are 'found' by the SC. In this regard, the Corfu case is emblematic to show that, contrary to the SC first factual determination, Albania was not considered by the Court as having laid the minefield. What if the SC, surrendering to UK compelling insistence, had adopted a resolution condemning Albania on the basis of a 'factual error'? This question appears even more crucial since, as it is widely admitted, the ICJ cannot review SC resolution. Conversely, it is not bound by any factual finding emanating from the SC. By the way, the latter has not always distinguished itself for the accuracy of its investigations; it suffices to recall, for example, its resolution 1530 (11 March 2004), hastily – and wrongly – attributing instantly (the same day) the Atocha (Madrid) bomb attacks to the 'terrorist group ETA', whilst it quickly appeared that it was imputable to one of Al-Qaeda's cells; or its resolution 731 (21st January 1992) straightforwardly endorsing UK, US and France's 'investigations'.

From the aforesaid, the Court's cautious handling of fact-finding made by the SC seems at the same time intelligible and wise both from a logical point of view and from an institutional standpoint.

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[122] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting opinion, I.C.J. Reports 1986*, p. 290.

Hence, this trend – i.e. to keep a relatively distant attitude vis-à-vis the factual findings made by the SC – inaugurated by the ICJ in 1949 will be ultimately confirmed in the *Case Concerning Armed Activities on the Territory of the Congo (Congo Vs. Uganda)*[123] and later in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. In both of these cases the Court yet '[noted] that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention'[124]

More specifically, in the first case, the Court started by stating that she: 'will take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources'[125]. In accordance with the aforementioned line of conduct, the Court considers that 'there is sufficient evidence of a reliable quality to support the DRC's allegation'; in this regard she relied on SC reports as well as on MONUC's. On reading the Court's reasoning, it seems nonetheless quite clear that SC reports or reports established under its aegis do not enjoy a predominant probative value as she treats all the UN-issued documents indistinctly as any factual evidence alleged by the parties, making sure that '[the] above reports are consistent in the presentation of facts, support each other and are corroborated by other credible sources'[126].

In the second case, on the contrary, the Court relied heavily on the judgment delivered, by the ICTY as well as on the latter factual determinations[127].

In condemning the UK for having carried-out the so-called *Operation retail*, the Court not only stressed that it was applying the 'new international law', which flowed from the recently

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123 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment*, § 208–211.

124 Ibid., § 57–61.

125 Ibid., § 205.

126 Ibid., § 209.

127 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, § 217–224.

adopted UN Charter, thus adamantly rejecting the 'alleged right of intervention as a manifestation of a policy of force' – this would have been largely enough for the sake of pronouncing a solemn condemnation – but she also insisted that '[intervention was] perhaps still less admissible in the particular form it would [have taken] here; for, from the nature of things, it would [have been] reserved for the most powerful States, *and might easily [have lead] to perverting the administration of international justice itself*'[128]. This raise the tricky question of the use by a tribunal of evidentiary material obtained through a breach of the law. Indeed, the (forcible) intervention aiming to obtain judiciary evidence had been considered lawful – as alleged by the UK –, this would have not only emptied art. 2 (4) of the UN Charter, but it would also have entailed a blatant inequality of States before the ICJ. For, only those States having the means and the will to use force, could be enabled to collect *corpora delicti*[129], at the expense of weaker States[130], thus striking a flagrant imbalance between them in the administration of proof. Not to speak, as it was argued by Albanian representative before the SC[131], the crucial question of the cleanness of the evidence collected in this way by one of the parties to the dispute. Forcible collected probative materials cannot thus be submitted before an International tribunal in general. In the light of the aforesaid, it can be

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128 *Corfu Channel case, Judgment of April 9th,* 1949*: I.C.J. Reports* 1949, p. 34 [emphasis added].

129 UK tried to justify the Operation retail on the assumption that: 'In view of the secrecy with which these mines had been laid in the Channel there was ample reason to suppose that the *corpora delicti* would be removed, if opportunity to do so was given, before the necessary evidence to enable reparation to be obtained, could be recovered', Reply of the UK (30/VII/1948), vol. II, p. 283.

130 Albania correctly stressed this point when it submitted : 'Ce droit primitif était favorable aux puissants et risquait d'écraser les faibles. Pour revenir au cas soumis à la Cour, il est bien certain que l'Albanie n'aurait jamais pu, sous le prétexte plus ou moins fondé de rassembler des preuves, monter une opération sut les côtes britanniques et imposer, pendant quarante-huit heures, sa volonté aux autorités locales du Royaume-Uni. Pour mériter son nom, le droit doit être accessible à tous et le même pour tous. Dans les relations entre grands et petits États, le droit d'intervention n'est pas un droit', Reply of Albania (20/IX/1948), vol. II, p. 373. See likewise Mr Pierre Cot pleading (Albania), Minutes (18/XI/1948), pp. 405–410.

131 *Official Records of* ..., op. cit., 121st Meeting, p. 574 : 'for ten consecutive days these mines were in the hands, not of impartial authorities, but of authors of the accusations against Albania, that is to say the British authorities'.

sustained that the SC, let alone one of its members being at the same time party to a dispute, is not the judiciary police of the ICJ.

Epilogue

One is tempted to label this conclusive section as "Epitaph", as the Corfu case has quite probably sealed for a long-time such an impromptu casting of roles between the ICJ and the SC. After having determined that such a dispute was not suitable to the SC, the latter decided to refer it to the ICJ, whilst it couldn't at the same time establish *motu proprio* the Court's jurisdiction. Regardless of this highly controversial question, it is regretful to observe that such practice of deferral was not constantly followed in the years to come; this would have enhanced the apparent synergies between the two organs. The SC could have dealt primarily with disputes presenting a character of urgency, while others could have been dealt with by the Court. Or, with regard to a single dispute, one could have also imagined that the SC is bound to address its most urgent aspects by way of Chapter VI and VII without prejudging the Court's role for the assessment of legal responsibilities and other essentially legal topics. In this perspective, the SC could (have) play(ed) as a fact-finder or even as a prosecutor, the two terms must not be read in their narrow legal meaning, though. As for the fact-finder function, the Court relied from time to time to evidence collected, assembled and digested by the SC, yet with a lot of precaution. On the contrary, for the prosecuting task – nowhere envisaged for in the Charter[132] – one could imagine it, notably in certain situations where the use of force is involved and its legal regime is at stake – i.e. rules belonging to *ius cogens*. Well, this could lead the sceptic reader to think that we are talking about "International Crimes of States", but … *Honni soit qui mal y pense!*

[132] As any well-informed international lawyer knows, the Charter has been thoroughly interpreted and modified according to subsequent practice, teleological interpretation and « implied powers » doctrine (and a mix of the three); therefore, the absence of specific powers, tasks and functions cannot be considered *per se* a bar to such an argumentation.