

THE CORFU CHANNEL CASE, H V EVATT:

The Scourge of War

L W MAHER *

“... determined to save succeeding generations from the scourge of war ...”

At San Francisco in 1945,¹ the Australia delegation led by Dr Herbert Vere Evatt, KC (of whom more later), played a decisive role in the process which led to the adoption of the Charter of the United Nations Organization (UN).²

The Charter's preamble provides as follows:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

- *to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and*
- *to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and*
- *to promote social progress and better standards of life in larger freedom,*

AND FOR THESE ENDS

- *to practice tolerance and live together in peace with one another as good neighbours, and*
- *to unite our strength to maintain international peace and security, and*
- *to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and*
- *to employ international machinery for the promotion of the economic and social advancement of all peoples,*

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE
AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Article 1 of the Charter provided that the first purpose of the UN was:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

Chapter XIV of the Charter established the International Court of Justice (ICJ) as the principal judicial organ of the UN. The first case presented to the new court resulted from a long-forgotten episode in the transition from the cessation of hostilities in a war that had claimed the lives of more than 50 million people to a looming period of prolonged international tension and strife – which soon acquired the name, the Cold War.

The immediate aftermath of war

One of the most urgent tasks confronting the victorious powers following the end of the War in Europe on 7 May 1945 was the clearance of the hundreds of thousands of mines which had been laid in the Mediterranean and the seas of north west Europe.

The barbaric occupation of Greece had ended by 4 November 1944 when Nazi Germany withdrew its forces which were desperately needed elsewhere in Europe to resist the advancing Russian armies. In the case of the Straits of Corfu (also called the Corfu Channel), the existence of a safe route through the Straits had been announced by the Allied Command in November 1944, and in January and February 1945 the channel had been check-swept by the Royal Navy with negative results.

Then, by an agreement made in November 1945 between the four major powers, the USSR, the USA, the UK, and France, the formidable task of removing the remaining mines in a co-ordinated way was committed to the International Central Mine Clearance Board. A Mediterranean Zone Board with representatives from the region as well as the four powers' representatives was assigned the task of clearing the Mediterranean Zone.

In keeping with its stated objectives, the main Board promulgated detailed information about mines and mine clearance to world shipping interests and all the Mediterranean Zone countries including Albania. The information included maps showing the areas of Albanian territorial waters which had already been swept by British mine-sweepers.

At this point it is necessary to say something about Albania. The principality of Albania had been carved out of the remnant Ottoman Empire at the instigation of Austria and Italy at the London Conference of Ambassadors in December 1912 following the First Balkan War. Albania was not then ready for nationhood and by the late 1920s it had become a kind of protectorate under the regime of the Italian dictator, Benito Mussolini. On 7 April 1939, Italy invaded and occupied Albania. The supremely egotistical and opportunistic Mussolini plunged Italy into the Second World War on the AXIS side on 10 June 1940. On 26 October 1940, an Italian invasion force crossed the frontier between Albania and Greece. To Mussolini's surprise and Hitler's dismay, a much smaller and much less well-equipped Greek army drove the Italian invaders back into Albania. On 6 April 1941, a huge German army invaded Greece from Bulgaria and Yugoslavia. By the end of May 1941, Germany and its AXIS allies, Italy and Bulgaria, had conquered and occupied Greece including Crete. Italy sued for peace in 1943. In November 1944, a communist regime seized power in Albania and it soon became one of the most rigid members of the Soviet bloc (and, following the Sino-Soviet split in the 1960s, the Beijing camp).

Britain had recognised the new Albanian regime in November 1945, but diplomatic relations between the two nations were fraught. Greco-Albanian relations had been strained since the creation of Albania in part because of Greek complaints about the treatment of Greeks in, and Greece's territorial claim to, that part of southern Albania which to the Greeks was Northern Epirus. The installation of a communist government in Albania was to make matters worse when, after the end of the AXIS occupation of Greece in November 1944, Greece took a sharp swing to the repressive right and descended into the so-called "third round" of civil war in 1946. Moreover, Greece had renewed its territorial claim over Northern Epirus (unsuccessfully, as matters turned out) in the negotiations leading to the treaties that dealt with the consequences of the Second World War.

Cold War

The end of the Second World War had led seamlessly to the emergence of the Cold War. In late 1945 and early 1946, the allied combatants and their associates began to divide along an east-west axis. The Cold War was to be the dominating geopolitical condition of the post-war era until the collapse of the Soviet Union and the Soviet bloc in 1989-1991.

A dramatic turning point occurred in the US Congress on 12 March 1947 when President Harry S Truman announced his administration's legislative proposal for provision of \$400 million for urgent US military and economic assistance to Greece and Turkey. The President said that a "fateful hour" had arrived. Nations "must choose between alternate ways of life". One way of life was based upon the will of the majority and was distinguished by free institutions. The second was based on the will of the minority forcibly imposed on the majority, and "If we falter in our leadership, we may endanger the peace of the world". Under what immediately became known as the "Truman Doctrine", the President told the assembled legislators that it would be the policy of the US "to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures". Although the President did not refer to it by name, it was clear that the Soviet Union was the source of the danger – the other way of life. On 5 June 1947, in an address at Harvard University, the US Secretary of State, (General) George C Marshall, announced his eponymous plan for the

reconstruction of western Europe in which enormous undertaking the Soviet Union was destined to play no part.³

Until May 1946, shipping of all kinds regularly used the North Corfu Channel without hindrance from either of the two territorial powers concerned - Albania and Greece. No objection had been raised by Albania or any other country to the active presence of British mine-sweepers in late 1944 and early 1945 in the North Corfu Channel, Valona Bay, and the Durazzo Approaches. It was true that Albania had not been invited to send observers to the Zone Board, but this was only because she possessed no mine-sweeping forces.

The mariners who had been using the reopened Corfu Channel after the end of the Second World War in May 1945 relied generally on the rule of international law (or, if not an accepted rule of law, then at least a rule of usage of long standing) which recognised that in peace and war there is for both warships and merchant vessels a right of innocent passage through straits forming highways of international maritime traffic. However, the British Government entertained a doubt as to whether the right of innocent passage carried with it a right to carry out mine sweeping operations within territorial waters without the agreement of the territorial power.

The Corfu Channel Incidents

The Corfu Channel case arose from three events.

The first occurred on 15 May 1946 when Albanian shore batteries fired without warning on two British cruisers, *HMS Orion* and *HMS Superb*, as they passed southward through Albanian territorial waters in the North Corfu Strait. The two British warships, which were in a channel swept through a former German minefield in October 1944, were not damaged and had held their fire during the Albanian attack.

The second occurred five months later. On 22 October 1946, a Royal Navy squadron comprising the cruisers, *HMS Mauritius* and *HMS Leander*, and two destroyers, *HMS Saumarez* and *HMS Volage*, was sent northward through the strait from Corfu expressly in order to test the Albanian attitude, that is to say, to see whether the ships would be allowed to pass without interference. The crews were at action stations with express instructions to return fire if attacked, but the ships' guns were in their normal position trained fore and aft and were not loaded.

During the trial passage, the British ships were proceeding slowly within the swept portion of the strait close to the Albanian coast. *Mauritius* was leading, closely followed by *Saumarez*. About two miles astern on the same course was *Leander*, closely followed by *Volage*. In a position outside the Bay of Saranda, *Saumarez* struck a mine and was heavily damaged.



Volage was ordered to give her assistance and take her in tow. Whilst towing the damaged ship, *Volage* struck a mine and she was also heavily damaged. Despite the fact that his vessel's bows were blown off and high cross winds meant that there was a danger that both vessels would be wrecked, the commander of the *Volage* was able to make Corfu with the crippled *Saumarez* still in tow after twelve hours of hard endeavour.

The explosions killed 44 officers and men. Another 42 sailors were injured. On this occasion, the Albanian shore batteries did not open fire, but an Albanian Navy vessel appeared in the vicinity flying the Albanian ensign and a white flag.

Diplomacy

In earlier times, the unprovoked attack on the *Orion* and the *Superb* would have been met, predictably and legitimately, by proportionate retaliatory force. However, the British Government decided not to resort to force. Instead, it immediately protested to the Albanian Government denouncing the attack as a deliberate and outrageous breach of international law and maritime custom, and demanded an immediate and public apology and an assurance that the persons responsible would be punished.

The Albanian Government rejected the British assertions and demands and the diplomatic exchanges went on for three months. Albania asserted that foreign warships had no right of passage through her territorial waters without her authorization.

In a note delivered on 2 August 1946, the British Government stated that it did not recognise any right on the part of a territorial power to demand the fulfilment of conditions before entry was permitted into a recognised international channel. Britain could not therefore agree to give prior notification of passage through the Corfu Channel and warned that if in the future British ships were fired on in the channel, fire would be returned.

Although following the incident involving the *Saumarez* and the *Volage*, the British Government stuck to its policy of seeking a peaceful resolution of the worsening dispute with Albania and the exchange of very strongly worded protest notes between the two governments continued, the patience of His Majesty's Government was nearing exhaustion.

The third and decisive intervention occurred on 12 and 13 November 1946 when the Royal Navy swept the Corfu Channel. Twenty-two moored contact mines were detected and cut. The mines were found to be in a position which left no doubt that they had been deliberately laid as a minefield and were not isolated floating mines. The minefield extended for three miles along the channel. Two of the mines were taken to Malta for expert examination. This revealed that the mines (each containing 600 pounds of explosive) were of German manufacture, that they were free from rust and marine growth, that they had been recently painted, and that they still had grease on their mooring cables. The expert conclusions were that there was no doubt whatever that the mines were laid only a very short time before the date on which the *Saumarez* and *Volage* suffered damage and casualties. Mine fragments recovered from the *Volage* confirmed the origin of the mines.

From the British standpoint, it was certain that no mine field could have been laid in the channel within a few hundred yards of the Albanian shore batteries without the connivance, or at least the knowledge, of the Albanian authorities.

There was a further exchange of notes in December 1946 and then, on 13 January 1947, the UK Government referred the dispute to the UN Security Council under art 35 of the UN Charter.

Dr Herbert Vere Evatt

Australia had been elected to one of the non-permanent seats on the Security Council in 1946 for a two-year term. The principal Australian representatives in the Australian Mission to the UN were Paul Hasluck (1905-1993) and Lieutenant-Colonel William R Hodgson (1892-1958).

In Dr Herbert Vere Evatt (1894-1965), Australia contributed one of the dominating individuals of the immediate post-war years.⁴ It is unsurprising that more than 40 years after his death, Evatt excites strong feelings. The antagonisms he unleashed continue to be expressed. It is not possible here to do more than offer a summary. Evatt, had been a Justice of the High Court of Australia for ten years when, at the age of 46, he resigned to enter the House of Representatives in the 1940 federal election. He had become Attorney-General and Minister for External Affairs on 7 October 1941 when the leader of the Parliamentary Labor Party, John Curtin, formed his first wartime government



From the beginning of his tenure as Minister for External Affairs, Evatt changed the course and tone of Australian diplomacy. Evatt's tenacious pursuit of Australian foreign policy was manifested in Australia's role in the formulation of the UN Charter at San Francisco.⁵ His most recent biographers have observed that Evatt achieved international fame for his work on the UN and that it can fairly be said that he was one of the new organization's architects. Evatt had gone to the San Francisco conference determined to voice Australia's attitude to the post-war geo-political order.

In the evolving Cold War *realpolitik* of the immediate postwar years, Australia's power and influence in the international community were marginal. Evatt was, however, completely undeterred by what he perceived as the domineering exclusiveness and bullying of big-power politics. He thrust himself forward as a self-appointed leader of the smaller nations in the emerging post-colonial world. He was determined to remind the world of the unmatched extent of Australia's recent "total" war effort.⁶ As pleaded by Evatt, Australia's claim to a decisive role was self-evident. It derived from Australia's status as a successful participant in the victory against the AXIS powers, from Australian pursuit of regional security arrangement

with the United States of America, and from its status as a Pacific power. Evatt told the UN General Assembly on 18 September 1947 that it was meeting "at a period in world history which can be described as the half light between war and peace".⁷

Evatt stressed that the spirit of the San Francisco Charter "*above all, sought to substitute justice and morality for physical power as the determinant in international relationships*".

The "Australian Government [regarded] support for the United Nations as a cardinal principle of its foreign policy". Evatt was also affronted by "the frustration, futility, and positive injustice caused by applying an individual veto in cases where the majority of the [Security] Council is attempting to exercise *conciliatory jurisdiction* in a dispute between nations".⁸ In his brand of statecraft, it was Evatt the lawyer who was usually at the forefront of the action. Evatt had an abiding commitment to the basic constitutive elements of what was called (rather pretentiously) British justice. His unshakeable belief in the invincibility of rational and impartial decision-making as fundamental to the attainment of justice for nations no less than for individuals is to be seen in all his work.

Australia and the UN Security Council

On 18 February 1947, the UK Ambassador to the UN, Sir Alexander Cadogan (1884-1968), presented the UK case against Albania to the Security Council. According to Cadogan, the detailed direct evidence which he laid out showed that the mine field had been deliberately, recently and secretly laid contrary to arts 2-5 of the Hague Convention No 8 of 1907 which forbade the laying of un-notified minefields, and that, in any event, what had occurred was a crime against humanity.

Cadogan indicated that the UK was proposing that the Security Council should resolve that an un-notified mine field had been laid in the Corfu Strait by the Albanian Government or with its connivance resulting in serious injury to British ships and loss of life and injury to the crews, and, secondly, that the UK and Albania should settle the dispute between them on the basis of such a Security Council finding and in the event of failure to settle either party might apply to the Security Council for further consideration of the dispute. The Albanian representative replied at length on 19 February.

On 24 February 1947, Hasluck moved in the Security Council to set up a sub-committee of inquiry.⁹ On 27 February 1947, with the Soviet Union, Poland and Syria abstaining, the Security Council adopted the Australian proposal by eight votes and set 10 March 1947 as the date for the sub-committee to report. Australia, Columbia (whose representative acted as sub-committee chairman), and (at the Soviet Union's insistence) Poland were appointed to the sub-committee on the nomination of Syria. Cadogan did not participate in the vote on the composition of the sub-committee because Albania did not have a vote.

Evatt's psychological fragility manifested, for example, in issuing contradictory instructions to Australia's UN delegation, made Hasluck and Hodgson's job difficult. Evatt's unshakeable lawyerly conviction that in investigating the UK notification the Security Council should behave like a quasi-judicial tribunal investigation and his inability or disinclination to make appropriate allowance for the combined effect of the worsening Cold War and the veto

power of the permanent (Big Power) members of the Security Council. Having adhered closely to Evatt's original instructions, Hasluck was subjected to an outburst of Evatt's pique and anger when, predictably, the Security Council sub-committee produced an inconclusive report. Evatt now executed a 180 degree turn. From a position of neutral participation, the delegation was to fall in behind whatever approach the UK took in the Security Council. If the UK wanted the matter referred to the ICJ, the delegation was to support such a proposal strongly. If the UK was firmly against referral to the court, Australia was not to support a reference unless a clear majority was in favour. The delegation was to act in close consultation with Cadogan and to take a suitable opportunity of criticising any unwarranted interference by the secretariat and the introduction by any country of irrelevant propaganda.

The enquiry "had been unsatisfactory and it was regrettable that, even if [the] Australian delegate could not get support from Columbia, he did not take a strong line in a minority report". Hasluck reminded Canberra that the delegation's strongest line during the Committee's work was to maintain complete objectivity and impartiality of the Committee even though that meant limiting the scope of the Committee's report. It was not at all surprising that the exasperated Hasluck resigned from the Department of External Affairs.¹⁰

The Security Council debate continued on 21 and 25 March 1947. On the latter date, after three months of elaborate investigation and extensive debate, the Soviet Union vetoed the proposed Security Council resolution condemning Albania. Poland had been promoting an alternative resolution which was overtaken by the UK's resolution that the dispute be referred to the ICJ. Debate resumed on 3 April 1947 (by which time Hodgson had replaced Hasluck) and continued six days later.

Echoing Evatt's statement in the Parliament five months before and couched very much in the language of lawyers, Australia's position was that the Security Council was acting in a *quasi-judicial role* and had to reach a decision *as reasonable men on the basis of all the available evidence* (author's emphasis). Since, on that basis, the Security Council had actually found against Albania the matter could not be ignored (although nullified by the Soviet veto) because the case was of concern beyond the UK and the USSR as a crime against humanity. The Soviet delegate, Andrei Gromyko, assailed Hodgson for what he labelled his "veto phobia disease".

Then, on 9 April 1947, with the Soviets and Poland abstaining, the Security Council, by eight votes to nil, recommended under art 36(3) that the dispute should be submitted to the ICJ.

First Case for a New Court and an Unsolicited and Unwelcome Offer

The United Kingdom filed its application in the ICJ on 13 May 1947 accusing Albania of having laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities.

The old Permanent Court of International Justice set up under the League of Nations had not been a success. Neither the US nor the USSR had been a party to the PCIJ statute. The new ICJ would be different. So far as Evatt was concerned, the time had arrived when a broad step forward could be taken in the direction of enlarging the new World Court's

effective area of jurisdiction by restricting the power of reservation and by making acceptance of the automatic jurisdiction of the court in legal disputes a condition of membership of the UN. Moreover, an effective judicial authority would act as a break on the vast executive authority of the Security Council.

By late 1947, the UK's case in the ICJ was at an advanced stage. Six months had passed since it had been filed. Albania had raised a preliminary objection to jurisdiction. At the meeting of the UN General Assembly at Lake Success on Long Island, New York in November 1947, Evatt suggested to Hector McNeil, the UK Minister of State for Foreign Affairs, that he would be willing to appear as counsel on behalf of the UK in its pending ICJ case against Albania. McNeil passed Evatt's suggestion on to the UK Attorney-General, Sir Hartley Shawcross, KC.

Evatt was nothing if not an opportunist and even by late 1947 or early 1948 it was not too late for him to become involved in the case in a leading role. His approach to McNeil can be understood as the action of a man supremely confident of his role and capacities. Appearing as counsel would enable the former accomplished trial lawyer to show off his skills in marshalling and presenting the evidence in what, given the Albanian denials of complicity in the laying of mines and of knowledge of the existence of the mines, was shaping up as, in part, the equivalent of a complex and demanding witness action in which it would be necessary for the UK to rely on circumstantial and expert evidence and inference. It would also enable Evatt the former appellate lawyer and appellate judge to demonstrate that grave international disputes could and should be resolved peacefully according to accepted and evolving norms of civilised international behaviour.

At a critical turning point in world history, Evatt would demonstrate to the new court (and, indeed, to the world) the superiority of the rule of law to the rule of brute force and thus stamp his mark indelibly on a newly evolving and civilising international jurisprudence.

Irritability in Whitehall: What to Do – Accept or Reject?

At first, Shawcross described the Evatt *démarche* as "this remarkable proposal". This was an understandable assessment. Evatt could be pushy and brusque; he was widely regarded as an unabashed publicity-seeker and ego-maniac. In terms of Foreign Office and Dominions Office refinement, he was a rough colonial type who wore ill-fitting clothes and spoke with a flat or monotonous Australian accent. For the Whitehall bureaucrats, it was really none of his business interfering in the conduct of another nation's international affairs.

Shawcross asked the Legal Adviser to the Foreign Office, W E Beckett, to consider Evatt's proposal and a day later, he provided the UK Attorney with following negative response:

I think the problem here is to find the most tactful reasons for refusing this remarkable and, I think, rather embarrassing offer. Of course, the UK, when choosing Counsel to argue an important case before the Hague Court, can employ Counsel from any country in the world. Large countries like the UK have hitherto always felt that they can find the necessary legal talent inside their own countries. People in England, indeed the whole world, would be startled and

puzzled at the inclusion in the team of an Australian lawyer who is also Australia's Foreign Minister. Nobody would suppose that Dr Evatt had been included in the team merely because he was a better lawyer than anyone who could be found in the UK. People would be seeking to find a political significance for his appearance there. If Dr Evatt was not Foreign Minister, and was merely an Australian King's Counsel, it might be a bit different and might be interpreted as a move towards the establishment of a sort of Hague Court Bar of lawyers particularly qualified to conduct cases before that Court. But Dr Evatt is Foreign Minister, and, moreover, Australia played a useful and prominent part in the discussion of this matter in the Security Council. Of course, I do not need to say how embarrassing a member of the team Dr Evatt would in fact be. You would have to lead him, and I do not anticipate that, in the oral hearings, there will be much, if any, need for anybody to follow you. We shall probably find that nearly everything that can be said has been said in the written pleadings. But Dr Evatt is not going to go to the Hague unless he is going to take a leading part and, moreover, he will be a very difficult person for you to control. He might wish to take a line rather different from that we have already taken in the written pleadings, etc etc. I suggest that you should express enormous appreciation of the offer, say that, in principle, we think it quite a good thing that countries, when they go to the Hague, should, when appropriate, include amongst their Counsel lawyers from another country and that, as between members of the Commonwealth, on occasions this might be specially indicated. But you think that it would be a mistake for Dr Evatt to appear in this case just because he is the Foreign Minister of Australia and the world could hardly be got to believe that his appearance amongst our Counsel was merely because he was the best pleader in the world but would be sure to try and draw from it all sorts of unfounded political inferences.¹¹

The British Government was disinclined to reject Evatt's proposal without more detailed consideration and the surviving archival record discloses that McNeil and Shawcross exhibited some muted liking for Evatt's offer. In particular, Shawcross was not convinced that there were serious political implications involved in having a foreign minister of one of the Dominions appearing as counsel in the case. He made it clear that he would have no objection to Evatt appearing and that he would certainly be glad to do anything at all which would strengthen the relationship between Britain and Australia. Shawcross went on to record that he would be very willing that Evatt should play the leading part in the case if that would promote better relations between the two nations. But Shawcross did not think it was practicable to let Evatt do so since it was the UK that was party to the proceeding and it was the first law officer of the UK that must appear.

Shawcross recorded that he had spoken to members of the Australian Delegation to the UN and understood that Evatt had put the proposal forward quite seriously and was still thinking about it. Shawcross went on to record: *"I am afraid, therefore, that we cannot let it drop, and probably the Foreign Secretary will think it desirable himself to write to Dr Evatt, dealing with the matter one way or another"*. Shawcross brought all his considerable diplomatic talents to bear on devising a suitable positive response:

I wish I could be more helpful in suggesting which way he should reply. My inclination is to write to Dr Evatt and to say that we would be delighted to have his assistance as a member of the team at the Hague, but that in all probability there will only be occasion to make one short speech, and that it is felt that this must be made by the Chief Law Officer of the United Kingdom Government as the complainant in the case. In these circumstances, it might be said, possibly Dr Evatt would not wish to be a member of the team, but if, notwithstanding the fact that it is unlikely he could play any very active part in the actual proceedings, he did wish to be present as a member of the team at the Hague, his assistance would be welcomed.¹²

The Dominions Office continued to oppose any accommodation with Evatt. Somewhat in the manner of a hot potato being passed from hand to hand, Evatt's suggestion was still causing anxiety in February 1948 when the ICJ case was at an advanced stage. Shawcross was responsible for a draft letter which had asked to say particularly how much he appreciated Evatt's suggestion that he would consider appearing as a junior to Shawcross: in other words, "thanks - but no thanks". The letter could have ended at that point, but in his draft Shawcross introduced an alternative, a sugaring of the pill, but a generous response nonetheless:

Whilst, however, it seems impracticable to enlist your assistance in the Corfu case, there is another matter which will shortly come before the International Court which we like to commend to you as being worthy of your personal intervention. I refer, of course, to the request for an advisory opinion on the considerations which may properly affect votes on the election of new members to the United Nations. This raises an important issue of principle and I imagine that it is very likely that some and possibly all of the Slav States may wish to appear before the Court and argue the matter. It will therefore be most important, both politically and from the point of view of the Court proceedings, that the case should be adequately argued on the other side. We would very much like you to take the lead in appearing before the Court and arguing the matter, and if you thought fit so to do, we would, I think, support your intervention without appearing ourselves. Perhaps you will consider this possibility.¹³

After McNeil and Beckett made some minor changes to the Shawcross draft letter, it was approved by Gordon-Walker. In mid-January 1948, McNeil signed the letter to Evatt which was sent to him by despatch via the UK High Commission in Canberra reaching Evatt in early February 1948.

The Dominions Office file does not record Beckett's view on the Shawcross suggestion or whether the British officials had any clear idea as to what Evatt's response would or might be. For anyone prepared to wager on the outcome, it was probably a better than even money proposition that, subject to his other commitments, Evatt would accept the suggestion that he appear as leading counsel in the ICJ case concerning UN membership. However, Evatt passed up the opportunity.

On 18 February 1948, McNeil wrote to Shawcross and set out Evatt's reply. Evatt's letter - a model of courtesy and common sense - makes it plain enough that he was alive to the fundamental concern which his original offer to McNeil had raised for the UK Government:

Many thanks for your letter re Corfu. I do not wish, under any circumstances to take any course which could embarrass either Shawcross or the United Kingdom Government.

As I told you, my chief interest in the case is that it is extraordinarily important from the point of view of international good behaviour and the question of circumstantial evidence - arising in a very interesting form.

Thank you for your reference to the Belgian matter, which does raise an important question of principle.

This is a hurried note to thank you for your courtesy in taking the matter so earnestly and seriously.¹⁴

Justice Delayed: The Decisions in the Corfu Channel Case

The hearing by the ICJ of the Albanian preliminary jurisdictional objection in the Corfu Channel case took place at The Hague on 26, 27 and 28 February and 1, 2 and 5 March 1948. On 25 March 1948, the ICJ delivered judgment rejecting Albania's preliminary objection. The Court held that a communication dated 2 July 1947 addressed to the court by the Albanian Government constituted a voluntary acceptance of the court's jurisdiction.¹⁵

Immediately after the dismissal of the preliminary objection, and in an exceptional display of co-operation, the British and Albanian governments announced that they had agreed to submit the following two questions to the Court:

- 1 Is Albania responsible under international law for the explosions which occurred on 22 October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?
- 2 Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on 22 October and on 12 and 13 November 1946 and is there duty to give satisfaction?

Written pleadings on the merits were completed in September 1948. The hearing of oral arguments on the merits commenced on 9 November 1948 and concluded on 17 December 1948. The UK called its seven witnesses between 22 November and 4 December; Albania called its five witnesses between 4 and 14 December. There was further (reply and rejoinder) oral argument between 17 and 22 January 1949.

On 9 April 1949, the ICJ delivered judgment on the merits upholding the UK claim. On the first question, the court determined by eleven votes against five that Albania was responsible for the explosions that occurred and for the ensuing damage to the British warships and the loss of life. The ICJ held that the evidence established that the damage could not have been

caused by floating mines, magnetic ground mines or magnetic moored mines. The Albanian suggestion that the minefield discovered on 13 November 1946 may have been laid *after* 22 October 1946 was unsupported by any evidence and was too improbable to be accepted. The Court held that the charge that Albania *knew of or connived at* the laying of the mines was a charge of such exceptional gravity against a State that it requiring a high degree of certainty that had not been reached.

Nevertheless, the Court's answer to the first question attributing legal responsibility to Albania was justified by the evidence of Albania's admitted constant vigilance over the North Corfu Channel after May 1946, of the Albanian order to fire on the *Orion* and *Superb*, of Albania's repeated demands that permission for passage was required, of Albania's failure to protest in its notifications to the UN Secretary General about the laying of a minefield, of its failure to notify the presence of mines in its waters at the latest after the sweep carried out on 13 November 1946, and of its failure to investigate the events of 22 October 1946. In addition, their geographical configuration were such that the Bay of Saranda and the channel used by shipping through the Strait were easily watched, the mine-laying operation required a certain minimum lapse of time, and visibility and sound tests were conducted which had led experts to the conclusion that it was indisputable that if a normal look-out was kept at specified locations the mine-laying operations must have been noticed by coastguards.¹⁶

On the second question, the Court observed that the intention of the UK on 22 October 1946 must have been not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. It held, by fourteen votes against two, that having regard to all the circumstances it was unable to characterise these measures as a violation of Albanian sovereignty because on that day the Royal Navy vessels were exercising the right of innocent passage which the Court declared existed in international straits. However, the court unanimously held that the same justification did not apply to the mine-sweeping operation carried out on 12-13 November 1946 which it held was a violation of Albanian sovereignty. The Court rejected the arguments that the United Kingdom had rights of intervention and self help and went on to hold that its declaration that the UK had violated Albanian sovereignty was "in itself appropriate satisfaction". By a judgment pronounced on 15 December 1949, the ICJ fixed the amount of compensation due from Albania to the UK at £843,947. The fact that Albania defied the court's order was scarcely a surprise given the prevailing deteriorating state of east-west relations. By the end of the decade, things had become a whole lot worse than they were when the Corfu Channel incidents had occurred. The USSR had extended its hegemony in eastern Europe. Admittedly, the Soviets had ignominiously called off the Berlin Airlift in May 1949. But in September, came the announcement that the Soviets had detonated an atomic device. Then, in October the last vestiges of Chiang Kai-Shek's Koumintang regime had been chased from the Chinese mainland and the People's Republic of China had been proclaimed.

Article 94(2) of the Charter provides that if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the ICJ, the other may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The UK did not go back to the Security Council. Instead, it made an unsuccessful collateral attempt to enforce its judgment by resorting to the ICJ. A quantity of monetary gold removed by the Germans from Rome in 1943 was later recovered in Germany and found to belong to Albania. The January 1946 Paris agreement on German reparations provided that looted monetary gold found in Germany or in third countries should be pooled for distribution among countries entitled to receive a share of it. The UK claimed the gold in partial satisfaction of the ICJ judgment in its favour. Italy claimed the gold in partial satisfaction for the damage which it alleged it had suffered as a result of an Albanian law of 13 January 1945 confiscating Italian assets, or under the Italian Peace Treaty.

In a statement issued in Washington, DC on 25 April 1951, the French, UK and US Governments, who were responsible for implementation of the reparations agreement, decided that the gold should be delivered to the UK in partial satisfaction of the ICJ judgment in the Corfu Channel case unless within 90 days of the communication of an arbitrator's opinion to the three nations, Italy or Albania applied to the ICJ requesting it to adjudicate on their respective rights. The arbitrator decided on 20 February 1953 that the gold belonged to Albania. Albania, which had not accepted the jurisdiction of the ICJ, took no action, but Italy filed an application. However, Italy later raised a preliminary jurisdictional question.

On 15 June 1954, the ICJ unanimously decided that, without the consent of Albania, it could not deal with a dispute between Albania and Italy and that it was therefore unable to adjudicate on the submission that the three governments should deliver to Italy any share of the gold that might be due to Albania under the Paris Agreement in partial satisfaction of the damage caused to Italy by the 1945 Albanian law.¹⁷

And there, more or less, the matter of the Corfu Channel incident rested - for four decades. It seemed clear enough that the existence of the Cold War was an insurmountable barrier to Albanian compliance with the ICJ compensation order (and, consequently, to Albania's recovery of its looted gold). As late as March 1990, the policy of Her Majesty's Government remained that it would *"be able to agree to the Tripartite Gold Commission's releasing gold to Albania only when Albania has paid the compensation awarded to Britain by the [ICJ] in the Corfu channel case. This delay will not, however, penalize the survivors and the families of those killed on board HM ships Saumarez and Volage. All concerned were fully compensated at the time under the regulations then in force."*¹⁸

However, the Cold War was ending. Discussions between the UK and Albania took place in December 1990 leading to the resumption of diplomatic relations. The People's Socialist Republic of Albania came to an end in 1991. Then, on 8 May 1992, the parties to the Corfu Channel case announced that they had settled their differences. In a joint announcement, "Both sides expressed their regret at the Corfu Channel Incident of 22 October 1946".¹⁹ It might be suggested that any surviving crew members of *HMS Saumarez* and *HMS Volage* or the families of the dead and injured would have found the expression of undifferentiated diplomatic "regret" puzzling if not annoying. The UK agreed to approve the delivery of 1,574 kgms of gold previously identified for allocation to Albania. In return, Albania agreed to pay the UK \$US2 million in full and final settlement of the UK financial claims. Delivery of the gold was to be conditional on the consent of France and the USA. Upon the settlement of

outstanding claims it had, the US removed its hold over the gold in 1995. France gave its consent in February 1996.

On 29 October 1996, 50 years and one week after the mining of *HMS Saumarez* and *HMS Volage*, the Secretary-General of the Tripartite Gold Commission met in London with representatives of the Albanian Government to conclude the transfer of the Commission gold, to Albania. At the same time, the Albanian Government settled the British claim for compensation for the Corfu Channel incident.²⁰

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¹ The conference was held between 25 April and 26 June 1945.

² *Charter of the United Nations Act* (1945) (Cth).

³ For a range of useful detailed (English language) accounts of the early Cold War years from the extensive literature, see John Lewis Gaddis, *The Long Peace: Inquiries Into the History of the Cold War* (1987); F J Harbutt, *The Iron Curtain: Churchill, America, and the Origins of the Cold War* (1986); R B Woods & H Jones, *Dawning of the Cold War: The United States' Quest for Order* (1991); L B Hinds and T O Windt Jr, *The Cold War as Rhetoric: The Beginnings, 1945-1950* (1991); M P Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (1992); Michael Kort, *The Columbia Guide to the Cold War* (1998); John Lewis Gaddis, *The Cold War: A New History* (2005).

⁴ See A Dalziel, *Evatt the Enigma* (1967); K Tennant, *Evatt: Politics and Justice* (1970); A Renouf, *Let Justice Be Done: The Foreign Policy of Dr H V Evatt* (1983); P Crockett, *Evatt: A Life* (1993); K Buckley, B Dale and W Reynolds, *Doc Evatt* (1994); G J Evans, "H V Evatt: Australia's First Internationalist", 1995 Daniel Mannix Memorial Lecture, The University of Melbourne, 31 August 1995; D Day (Ed), *Brave New World: Dr H V Evatt and Australian Foreign Policy 1941-1949* (1996).

⁵ H V Evatt, *Australia in World Affairs* (1946); T L H MacCormack, "Evatt at San Francisco" (1992) 13 *Aust YB Int L* 89; G Simpson, "The Great Powers, Sovereign Equality and the Making of the United Nations Charter" (2000) 21 *Aust YB Int L* 133.

⁶ H V Evatt, "Risks of Big-Power Peace", *Foreign Affairs*, January 1946, 195. The same piece, under the title "The Framing of the Peace", is to be found in H V Evatt, *Australia in World Affairs* (1946), 123.

⁷ W J Hudson & W Way (Eds), *Australia in the Postwar World: Documents 1947* (Canberra, 1995), 3. Evatt used the same expression in his Holmes Lectures in which he dealt with the formation, operation and future of the UN: Evatt, *The United Nations* (1948), above, n 6, 48.

⁸ Hudson & Way, n 7; Evatt, n 7, 41.

⁹ National Archives of Australia, Department of External Affairs, Series A1838/274, Item 854/10/10.

¹⁰ Hasluck's resignation had followed the controversial appointment of Dr J W Burton as permanent head of the Department of External Affairs: *Hansard (House of Reps)*, 23 April 1947, 1587.

¹¹ Public Records Office (UK), Dominions Office, DO 35/2747 ("PRO"), Memo, Beckett to Shawcross, 19 November 1947.

¹² PRO, Shawcross, Minute, 11 December 1947.

¹³ PRO, Handwritten File Memo, 24 December 1947. This passage in the Shawcross draft was amended by the Foreign Office to read as follows: "Whilst, however, it seems impracticable to enlist your assistance in the Corfu case, there is another matter which will shortly come before the International Court which we like to commend to you as being worthy of your personal intervention. I refer, of course, to the request for an advisory opinion, adopted on the proposal of the Belgian delegation, on the considerations which may properly affect votes on the election of new members to the United Nations, which raises an important issue of principle. It will therefore be most important, both politically and from the point of view of the Court proceedings, that the case should be adequately argued. Perhaps you will consider this possibility." This passage appeared in the final version signed by McNeil.

¹⁴ PRO, Letter, McNeil to Shawcross, 18 February 1948.

¹⁵ ICJ Reports, 1948, 15.

¹⁶ *Corfu Channel case (Merits)* ICJ Reports, 1949, 4, 18-23. The two dissenters on the issue of Albanian responsibility, were Judges Azevedo (Brazil) and Krylov (Soviet Union).

¹⁷ *Case of the Monetary Gold Removed From Rome in 1943 (Italy v France, United Kingdom and United States of America)* ICJ Reports, 1954; D H N Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 *ICLQ* 93.

¹⁸ *Parl Debs (Commons)*, 19 March 1990, col 451.

¹⁹ *Parl Debs (Commons)*, 14 January 1991, col 382; Memorandum of Understanding signed in Rome (1992) 63 *Brit YB Int L* 781.

²⁰ *Parl Debs (Commons)*, 31 October 1996, WA, col 224; Note, (1996) 67 *Brit YB Int L* 814-819.