

Article 38

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

(1) La Cour, dont la mission est de régler conformément au droit international les différends qui lui sont soumis, applique:

- (a) les conventions internationales, soit générales, soit spéciales, établissant des règles expressément reconnues par les Etats en litige;
- (b) la coutume internationale comme preuve d'une pratique générale, acceptée comme étant le droit;
- (c) les principes généraux de droit reconnus par les nations civilisées;
- (d) sous réserve de la disposition de l'Article 59, les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit.

(2) La présente disposition ne porte pas atteinte à la faculté pour la Cour, si les parties sont d'accord, de statuer *ex aequo et bono*.

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*Select Bibliography*¹

- Boyle, A./Chinkin, C., *The Making of International Law*, (2007), pp. 338 *et seq.*
- Charney, J.I., 'International Lawmaking—Article 38 of the ICJ Statute Reconsidered', in *New Trends in International Lawmaking—International 'Legislation' in the Public Interest* (Delbrück, J., ed. 1997), pp. 171–91
- Dupuy, P.-M., 'La pratique de l'article 38 du Statut de la Cour internationale de Justice dans le cadre des plaidoiries écrites et orales', in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations, ed., 1999), pp. 377–94
- Fitzmaurice, Sir G., 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl* (van Asbeck, F.M./et al., eds., 1958), pp. 153–76
- Jennings, Sir Robert, 'The Proper Work and Purposes of the International Court of Justice', in Muller/et al., *ICJ*, pp. 33–45
- Kearney, R.D., 'Sources of Law and the International Court of Justice', in Gross, *Future of the ICJ*, vol. II, 1976, pp. 610–723
- McWhinney, E., '“Classical” Sources, and the International Law-Making Process of Contemporary International Law', in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, vol. I (1987), pp. 341–53
- Mendelson, M., 'The International Court of Justice and the Sources of International Law', in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Lowe, V./Fitzmaurice, M., eds., 1996), pp. 63–89
- Monaco, R., 'Réflexions sur la théorie des sources du droit international', in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Makarczyk, J., ed., 1996), pp. 517–29
- Onuma, Y., 'The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law', in *Liber Amicorum Judge Shigeru Oda* (Ando, N./McWhinney, E./Wolfrum, R., eds., 2002), pp. 191–212
- Pellet, A., 'Le glaive et la balance—Remarques sur le rôle de la Cour internationale de Justice en matière de maintien de la paix et de la sécurité internationales', in *International Law at a Time of Perplexity—Essays in Honour of Shabtai Rosenne*, (Dinstein Y., ed., 1989), pp. 539–66
- , 'Judicial Settlement of Disputes', *Max Planck EPIL*
- Rosenne, S., 'International Court of Justice (ICJ)', *Max Planck EPIL*
- Shahabuddeen, M., *Precedent in the World Court* (1996), pp. XX–245
- Sørensen, M., *Les sources du droit international: étude sur la jurisprudence de la Cour Permanente de Justice Internationale* (1946), pp. 274 *et seq.*
- Thirlway, H., 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning', *Rec. des Cours* 294 (2002), pp. 264–405
- Wittich, S., 'The Judicial Functions of the International Court of Justice', in *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Buffard, J./et al., eds., 2008), pp. 981–1000.

A. Introduction—The Function of the Court and Applicable Law

Few provisions of treaty law, if any, have called for as many comments, debates, criticisms, praises, warnings, passions, as Art. 38 of the Statute. There are many ways to consider this famous—or infamous—provision. It can be seen as a superfluous and useless clause, at best a clumsy and outmoded attempt to define international law, at

¹ Only general studies on Art. 38 have been included in this Select Bibliography. Books and articles on specific sources or particular issues are mentioned in the footnotes.

worst a corset paralysing the world's highest judicial body. It can also be analysed as a most successful and concise description of, both, the Court's mission and the law it must apply and as providing helpful guidance for avoiding *non liquet* as well as fantasy and arbitrariness in the interpretation and implementation of the rules of law.

- 2 It is the view of the present writer that Art. 38 deserves neither over-praise nor harsh indignity.² It would be disingenuous to make it a kind of revealed truth rigidly defining the frontiers of international law and even the Court's function. But, if interpreted from a dynamic perspective, it probably points to a rather fortunate middle way between a mechanical application of the rules of law (a difficult task indeed in the international sphere) and the dangers of the 'gouvernement des juges'.
- 3 Given the specificities of international law and, beyond, of international society itself, both traditionally—and still today in large part—governed by the sacrosanct principle of State sovereignty, and in view of the then extraneous character of an international court in the international legal system, it was certainly not a bad idea, in 1920, to define and link together, in a general provision, the function of the Court, its means and its limits. Article 38 performs this triple duty with elegance, flexibility and conciseness. It can indeed be said that it does no more than state the obvious and, most probably, had Art. 38 not existed, the Court itself would probably have in any event complied with its requirements. However, besides the fact that what goes without saying is even better if said, it is likely that Art. 38 has prevented a trial and error approach by the World Court when it started, that it continues to provide a useful—if totally 'interiorized'—guide to fulfilling its duties and, certainly, has not prevented it from deciding international disputes submitted to it or from giving advisory opinions and adopting, when need be, innovative or creative solutions.

B. Historical Development

I. Genesis

1. *The Prehistory of Art. 38*

a) International Arbitrations and Applicable Law

- 4 During the end of the 18th century³ and throughout the 19th century, international dispute settlement through arbitration expanded rapidly. The voluntary character of arbitration and the discretion of the parties in establishing the rules of law applicable to the dispute constituted an important element in making this modern mode of international dispute settlement popular.
- 5 Even when the special agreement was silent, arbitrators were fully aware of the international character of their function and that international law applied, as shown, *e.g.*, by the 1903 decision in the *Aroa Mines (Ltd)* case:

Since this is an international tribunal established by the agreement of nations there can be no other law, in the opinion of the umpire, for its government than the law of nations; and it is, indeed scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other.⁴

² 'Ni cet excès d'honneur, ni cette indignité' (Jean Racine, *Britannicus*, Act II, Scene 3).

³ The various Jay Treaty Commissions, created by the 1794 Jay Treaty, are held to be the first instances of modern international arbitration (*cf.* Lillich, R.B., 'The Jay Treaty Commissions', *St. John's L. Rev.* 37 [1962–1963], pp. 261 *et seq.*).

However, arbitrators did not systematically apply the rule of law and often decided on the basis of equity principles. As Root pointed out in 1907:

It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all considerations and influences which affect diplomatic agents. The two methods are radically different.⁵

b) Pre-Existing International Courts

aa) *The Permanent Court of Arbitration*

For sure, the Permanent Court of Arbitration is no more than a list of potential arbitrators and an administrative structure facilitating the establishment of arbitral tribunals. Nevertheless the Parties to the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, adopted at the Hague Peace Conference and establishing the Permanent Court of Arbitration, deemed it necessary precisely to define the function of international arbitration and to circumscribe it as the application of legal rules. Thus, Art. 15 of the 1899 Convention, and Art. 37, para. 1, of the 1907 Convention provide:

International arbitration has for its object the settlement of differences between States by judges of their own choice, and *on the basis of respect for law*.⁶

While this provision does not require the application of international law,⁷ it does nevertheless clearly provide for a decision in law, putting an end to the uncertain practice of previous arbitral tribunals.⁸ Thus, it constituted the first step in establishing international adjudication as opposed to arbitration as it had been known.

However, the absence of a clear reference to international law did not preclude the tribunal established under the Permanent Court in the *Norwegian Shipowners* case between Norway and the United States of America from considering that:

If no special principles are prescribed to the arbitrator, he must doubtless decide in the first place in accordance with international law to be applied from both sources of this science, not only from treaties, but also from customary law, and the practice of judges in other international courts.⁹

Later, this statement was reconfirmed by Art. 33 of the Optional Rules for Arbitrating Disputes between two States which clearly referred to international law as the applicable law in the cases where the parties did not choose otherwise.¹⁰

⁴ RIAA, vol. IX, pp. 408, 444.

⁵ Root's Instructions to the American Delegation to the Hague Conference, 31 May 1907, quoted in Hackworth, G., 'Foreign Relations of the United States', *Digest of International Law* 61 (1984), pp. 1128, 1135–6.

⁶ Emphasis added.

⁷ However, under Art. 48 of the 1899 Convention, a tribunal established under the auspices of the Permanent Court of Arbitration 'is authorized to declare its competence in interpreting the "Compromis" as well as the other Treaties which may be invoked in the case, and in applying the principles of international law'. The text of the 1907 Convention is less clear in this regard and replaces the reference to 'principles of international law' by 'principles of law' *tout court*.

⁸ Cf. *supra*, MN 4–5.

⁹ RIAA, vol. I, pp. 309, 331.

¹⁰ Cf. *infra*, fn. 77.

- 8 It should nevertheless be noted that the very summary fashion in which the 1899 and the 1907 Conventions referred to the applicable law—‘on the basis of respect for law’—allowed the PCA to reorient its activities and to open its doors to so-called mixed disputes, involving not only States but also private persons. These mixed disputes are not necessarily to be solved under international law alone, but may also call for an application of the relevant rules of municipal law.¹¹ Therefore, 85 years after the establishment of the Permanent Court of Arbitration, the formula used in its statute is not at all outmoded; indeed, the same wording has been chosen by Iran and the United States to govern the Iran-United States Claims Tribunal.¹²

bb) The Central American Court of Justice

- 9 The Convention for the Establishment of the Central American Court of Justice of 20 December 1907 provided more clearly for the application of international law. According to Art. 21:

In deciding points of fact that may be raised before it, the Central American Court of Justice shall be governed by its free judgment, and with respect to points of law, by the principles of international law. The final judgment shall cover each one of the points in litigation.¹³

In its second decision, the Court underlined its obligation to decide under international law:

it must subject its judgment in each case to the rules established by compacts, and in default thereof, to the precepts of the law of nations, for to do otherwise would be to suppose the Central American Court of Justice invested with an authority superior to its own organic law.¹⁴

- 10 The Central American Court was not as a success and, following the notice of discontinuation issued by Nicaragua in 1917, was not prolonged beyond the initial ten-year period. However, it is a striking—indeed the first—example of an international court of justice constituted at an international—even though regional—level and vested with the function of applying the rules and principles of international law.

cc) The International Prize Court

- 11 The indication of the law to be applied by the proposed International Prize Court—which was never actually established failing ratification by the signatory powers—was much more explicit and precise. Article 7 of the 1907 Hague Convention (XII) relating to the Creation of an International Prize Court provided in this regard:

¹¹ Cf. Art. 33 of the CPA Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment; Art. 33, para. 1 of the CPA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State.

¹² Art. V of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) of 19 January 1981 provides: ‘The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.’

¹³ Convention for the Establishment of a Central American Court of Justice, 20 December 1907, reproduced in *AJIL* 2 (1908, Suppl.), pp. 239–40. Cf. also Art. 22 which conferred upon the Court the power to determine its jurisdiction ‘by interpreting the treaties and conventions relating to the subject in controversy and by applying the principles of the law of nations’.

¹⁴ Decision of 6 March 1909, *Dr Pedro Andres Fornos Diaz v. The Government of the Republic of Guatemala*, *AJIL* 3 (1909), pp. 737, 742.

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

This enumeration of the sources of rules to be applied by the Court had been adopted in order to establish a clear guideline to the judges and to the States concerned about the consistency of the international law of prizes and maritime war. The report of the Conference stated: 12

Si le droit de la guerre maritime était codifié, il serait facile de dire que la Cour internationale des prises, comme les tribunaux nationaux, devrait appliquer le droit international.¹⁵

It thus appears that the specification of the sources of the law to be applied by the Court was a kind of substitute for a missing code of the international law of war. The problem was nothing less than to determine the content of the material rules relating to maritime war and prizes,¹⁶ an objective which could not easily be achieved. In order to resolve this ‘sérieuse difficulté’¹⁷ the drafters of the 1907 Convention decided to list the sources where the relevant rules should be looked for, *i.e.*, in this order, treaties binding the parties, and, in the absence of such treaties, international custom as the ‘expression tacite de la volonté des Etats’.¹⁸ If no such rule existed, the Conference decided to refer to the ‘general principles of justice and equity’ thus recognizing that the Court would be ‘ainsi appelée à faire le droit et à tenir compte de principes autres que ceux auxquels était soumise la juridiction nationale des prises, dont la décision est attaquée devant la Cour internationale’.¹⁹ It is essentially for the reason of the imprecise determination of the applicable rules that the Convention did not receive sufficient ratification, notably with regard to the United Kingdom.²⁰ This being said, Art. 7 of Convention XII of The Hague made clear that the contemplated court was to apply international law. 13

2. The Codification Endeavour

The outcome of the 1907 Conference with respect to the International Prize Court demonstrated the reluctance of States to be bound by compulsory jurisdiction without a precise framework of legal norms to be applied by such an international tribunal. However, to adopt beforehand a code of the substantive legal rules and principles of international law the application of which would have been the task of the international court turned out to be a fruitless prerequisite and clearly an impossible endeavour.²¹ 14

¹⁵ 1907 Conference, Report, vol. I, p. 190; quoted in von Stauffenberg, p. 273.

¹⁶ Cf. Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 317 (Mr Hagerup), and, similarly, p. 307 (Mr Root).

¹⁷ 1907 Conference, Report, vol. I, p. 190; quoted in von Stauffenberg, p. 273.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Cf. the arguments of Mr Root, Procès-Verbaux, *supra*, fn. 16, p. 317 (Mr Hagerup), and, similarly, p. 307; and further Spiermann, *International Legal Argument*, p. 5.

²¹ The 1920 Advisory Committee of Jurists nevertheless started its work concerning the law applicable by the Court in attempting to define ‘the rules [in the French version: *les règles matérielles*] to be applied by the Court’ (Lord Phillimore, Procès-Verbaux, *supra*, fn. 16, p. 293; cf. also Loder, *ibid.*, pp. 311–12). Concerning the final draft, Ricci-Busatti pointed out that ‘it dealt rather with “sources” than with “rules” of law’ (*ibid.*, p. 338). Kopelmanas noted later that ‘Les Juristes [of the 1920 Advisory Committee] ont abordé l’étude des sources du droit sous l’angle du droit matériel. Cette position aurait dû les mener à la codification du droit

- 15 On the one hand, international law and international relations had not reached a sufficient degree of maturity to be codified. On the other hand, codification of the entirety of international law which encompassed a huge variety of fields and questions would have been a monumental undertaking. The fiasco of the 1930 Hague Codification Conference held under the auspices of the League of Nations confirmed the impossibility of an overall codification of international law at the universal level.
- 16 While the task of codifying international law has fortunately never been abandoned,²² the precedent of the Prize Court made clear that the establishment of an international tribunal could only be envisaged independently of the codification of international law. Instead, Art. 38 limited itself to enumerating the sources of the law to be applied by the Court, and did not describe its content.

II. The PCIJ Statute

1. The Paris Peace Conference and the Covenant

- 17 Notwithstanding the failure of former attempts to establish an international judiciary, the project aiming at the creation of an international court was taken up again. Some of the earliest propositions for a Covenant of a League of Nations suggested the establishment of an international court of justice as ‘a necessary part of the machinery’.²³ Ultimately, Art. 14 of the Covenant empowered the Council to propose to the Member States the creation of a permanent court of international justice. It provided:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

- 18 Article 14 constitutes only a rudimentary guide as to what the Permanent Court should be. It is, however, a matter of perplexity that:

the question of the exact legal character of the new Court of International Justice was never settled in an authoritative way by those who framed the Covenant.²⁴

However, the precedent of the International Prize Court suggests that it was not an easy task to reach a compromise on the exact nature and scope of the new international court and the rules to be applied by it. Thus, the better solution was to reach an understanding about the mere principle of the establishment of the court, leaving the drafting of the details to a later stage.

- 19 It quickly became evident that the new court would relate to adjudication properly so called, as opposed to the classical concept of arbitration²⁵ which:

international: entreprise impossible qui aurait pu faire échouer tout l’édifice de la juridiction internationale que le Comité était chargé d’élever’ (Kopelmanas, L., ‘Quelques réflexions au sujet de l’Art. 38, 3° du Statut de la Cour permanente de Justice internationale’, *RGDIP* 43 (1936), pp. 285–308, p. 292).

²² And the Court quite commonly leans on the ILC drafts as ‘subsidiary means for the determination of rules of law’—*cf.* further *infra*, para. 230. On the relationship between the ICJ and the ILC, *cf.* articles mentioned *supra*, fn. 641.

²³ Miller, D.H., *The Drafting of the Covenant* (1928), vol. 1, p. 13.

²⁴ *Cf.* League of Nations, *The Permanent Court of International Justice* (1921), p. 6.

²⁵ *Cf. supra*, MN 4–5.

is distinguished from the judicial procedure in the strict sense of the word by three features: the nomination of the arbitrators by the parties concerned, *the selection by these parties of the principles on which the tribunal should base its findings*, and finally its character of voluntary jurisdiction.²⁶

The mission of the new Court had been underlined by Léon Bourgeois in his report to the Council of the League of early 1920: 20

In addition to national Courts of Law, whose duty is to administer the laws of each State within its territorial limits, there is room for an international tribunal *entrusted with the important task of administering international law and enforcing among the nations the cuique suum which is the law which governs human intercourse*.²⁷

In discharging its strictly judicial function, the new court would consequently be in charge of applying the law, in this case international law, in the same way as a court of law at the national level is called to apply the law.²⁸

2. The Advisory Committee of Jurists

It was on the basis of this understanding that the Advisory Committee of Jurists established by the Council in early 1920 had to address the salient question of the applicable law. It had been presented with several drafts which included provisions on this question. The President of the Committee, Baron Descamps, compiled a single proposal containing the various suggestions on applicable law: 21

The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:

1. conventional international law, whether general or special, being rules expressly adopted by the States;
2. international custom, being practice between nations accepted by them as law;
3. the rules of international law as recognized by the legal conscience of civilised nations;
4. international jurisprudence as a means for the application and development of law.²⁹

From this point of departure, the members of the Committee entered into a difficult discussion about the rules to be applied by the Court and the provisions to be (or not to be) introduced in the draft. Somewhat surprisingly, the Committee very quickly reached agreement on the question notwithstanding the divergences of opinions and arguments in presence. 22

a) Positions in Presence

It seems to have been common ground that 'to establish the actual rules [*les règles matérielles*] to be followed by the judges, ... would exceed [the] mandate [of the Committee], which was to organise the Court and not to make laws for it'.³⁰ Nevertheless, the majority of the Jurists considered that: 23

The Covenant intended to establish the Permanent Court of International Justice to apply international law; it was the duty of the Committee to point out to the Court how it should carry out its task.³¹

²⁶ Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice (1920), p. 113 (emphasis added).

²⁷ Cf. Procès-verbal of the Session of the Council, 1920–1925, p. 5 (emphasis added).

²⁸ Sørensen (1946), p. 31.

²⁹ Procès-Verbaux, *supra*, fn. 16, Annexe No. 3, p. 306.

³⁰ Cf. the argument of Mr Root, *ibid.*, p. 293.

³¹ Loder, *ibid.*, p. 294.

- 24 Essentially, three positions crystallized during the discussion of the Committee on this question. The jurists were divided between those who found an enumeration unnecessary and wanted to leave the question of applicable law to the discretion of the judges, those who accepted the enumeration proposed by Baron Descamps except paras. 3 and 4, and finally those who generally supported his proposal.
- 25 The first group considered it useless to discuss the issue. Lapradelle argued that ‘a judge must, of course, judge according to law. It only remained therefore to define law. But this duty must be left to the judges’.³² He preferred a much shorter, and more vague, wording: ‘the Court shall judge in accordance with law, justice, and equity’,³³ which is indeed very close to the formula used in the 1899 and 1907 Hague Conventions concerning the Permanent Court of Arbitration.³⁴
- 26 However, a majority supported the enumeration formula, as it had been proposed by the President and vigorously defended by him. The view that the new Court was to apply international law was not challenged. Similarly, paras. 1 and 2 of the President’s proposal were accepted without discussion. The only remaining crucial issue was what law, if any, the judges should apply when neither treaty law nor international custom provided for a rule.
- 27 Root and several other members took the position that the Court should only apply what it considered to be positive international law, *i.e.* international treaty and customary law. Taking into account the experience of the International Prize Court, he believed that only if the Court was limited to apply these well defined rules, would the project be accepted by the States. In his view: ‘Nations will submit to positive law, but will not submit to such principles as have not been developed into positive rules supported by an accord between all States.’³⁵ Consequently, Root was opposed to giving the Court the power to apply the sources enumerated under paras. 3 and 4 of the President’s proposal. Rather, he would have preferred the Court, when facing such a *lacuna*, to declare *non liquet*, for the ‘Court must not have the power to legislate’.³⁶
- 28 Even if other Members of the Committee did not really disagree with Root’s conception of positive rules, they considered that international law was not solely made of such rules. Loder expressed the view that concerning ‘rules which were not ... yet positive law ... it was precisely the Court’s duty to develop law, to “ripen” customs and principles universally recognised, and to crystallise them into positive rules’.³⁷ Descamps, who clearly drafted paras. 3 and 4 of his proposal in order to meet the case of *lacunae* in positive international law, defended his position against Root’s criticism:

it is absolutely impossible and supremely odious to say to the judge that, although in a given case a perfectly just solution is possible: ‘You must take a course amounting to refusal of justice’ merely because no definite convention or custom appeared. What, therefore, is the difference between my distinguished opponent and myself? He leaves the judge in a state of compulsory blindness

³² *Ibid.*, p. 295. In the same sense, *cf.* the argument of Lord Phillimore, *ibid.*, p. 315.

³³ *Ibid.*, p. 295. Lord Phillimore did not make any proposal but recalled that in the English system ‘the judge takes an oath “to do justice according to law”’ (*ibid.*, pp. 315 and 320).

³⁴ *Cf. supra*, para. 7.

³⁵ *Ibid.*, p. 287.

³⁶ *Ibid.*, p. 309. *Accord Ricci-Busatti, ibid.*, p. 314. Lord Phillimore expressed this view, too, and criticized in this regard the Five-Powers Plan according to which the Court could apply what it considered should be the rules of international law (*ibid.*, p. 295).

³⁷ *Ibid.*, p. 294. Hagerup came to the same conclusion, *ibid.*, pp. 296 and 307–8.

forced to reply on subjective opinions only; I allow him to consider the cases that come before him with both eyes open.³⁸

Most of the members of the Committee shared the view that a declaration of *non liquet* would amount to a denial of justice and was consequently inconceivable.³⁹ A solution needed to be found in order to avoid the incompetence of the Court because of the absence of rules to be applied. According to Descamps, ‘if the competence of the Court were confined within the limits of positive recognised rules, too often it would have to non-suit the parties.’⁴⁰ Various propositions were made during the meeting of 2 July 1920, including having cases referred to another body in the event of a lack of positive rules.⁴¹ Ricci-Busatti, however, considered that even in the absence of a positive rule of international law a legal situation was established and that the Court shall have to apply what he called ‘general principles of law’ in order to decide the case. In his view, ‘it is not a question of creating rules which do not exist, but of applying the general rules which permit the solution of any question.’⁴²

Ricci-Busatti also considered that ‘a formula must be found uniting the various elements which should guide the Court, without making any distinction between them’,⁴³ thus suggesting that the ‘successive order of examination’ in the President’s initial proposal was not the most accurate solution.⁴⁴ This view was shared by several members of the Committee,⁴⁵ while others attached only little importance to the question.⁴⁶ However, Baron Descamps again defended his position in this regard,⁴⁷ considering the successive order as an ‘order of natural *précellence*’⁴⁸ and the formula was kept in the final compromise.

b) The Final Compromise

At the 15th meeting of the Committee, Root introduced a new draft which he had prepared in collaboration with Lord Phillimore. According to this new draft, the Court should apply, as well as treaties and custom, ‘the general principles of law recognised by civilised nations’⁴⁹ and ‘the authority of judicial decisions and the opinions of writers as a means for the application and development of law’.⁵⁰ Ricci-Busatti also introduced a

³⁸ *Ibid.*, p. 323.

³⁹ Hagerup, *ibid.*, pp. 296 and 317; Loder, *ibid.*, pp. 311–12; Lapradelle, *ibid.*, p. 312.

⁴⁰ *Ibid.*, p. 320. Cf. also Fernandes, *ibid.*, p. 345.

⁴¹ Lapradelle suggested referring these kinds of cases to the Permanent Court of Arbitration because ‘the mandate of the Court of Arbitration would include, amongst other things, the elements upon which the Court should base its sentences’ (*ibid.*, p. 314). Lord Phillimore considered that: ‘Disputes which could not be settled by the application of rules of law should be taken before the Council of the League of Nations’ (*ibid.*, pp. 295 and 320). This position was also upheld by Root (*ibid.*, p. 318). Lord Phillimore deemed it even possible to ask the Assembly of the League ‘to fill the gap by way of legislation’ (*ibid.*, p. 320). Baron Descamps considered, however, that ‘it would only unnecessarily complicate the question ... The power to administer justice must not be taken away from the judges, but a formula defining and guiding this power can and must be looked for. If they succeeded, they would merit the gratitude of humanity’ (*ibid.*, p. 318).

⁴² *Ibid.*, pp. 314–345.

⁴³ *Ibid.*

⁴⁴ Cf. especially, *ibid.*, pp. 332 and 337.

⁴⁵ Cf. Lord Phillimore, *ibid.*, p. 338; Hagerup, *ibid.*

⁴⁶ Cf. especially Altamira, who pointed out that ‘legal language always uses pleonasm. By keeping this expression, therefore, they would only be following an age-old tradition’ (*ibid.*, p. 338).

⁴⁷ *Ibid.*, pp. 318 and 336.

⁴⁸ *Ibid.*, p. 337.

⁴⁹ Cf. *ibid.*, Annex 1, p. 344.

⁵⁰ *Ibid.*

draft provision the main effect of which was to emphasize that judicial decisions and doctrine were not sources of law, a view which was not accepted by the Committee.

32 After some comments, notably by Lord Phillimore, on the meaning of ‘general principles of law’,⁵¹ the Committee very quickly reached general agreement on Root’s proposal which was adopted with a few formal modifications. In particular, the fourth paragraph concerning jurisprudence and doctrine was rephrased into ‘The authority of judicial decisions and the doctrines of the best qualified writers of the various nations.’⁵²

33 Only some other minor changes were adopted after the consideration of the provision by the Drafting Committee.⁵³ The text of Art. 35 of the Committee’s Draft provided consequently:

The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

1. international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
2. international custom, as evidence of a general practice, which is accepted as law;
3. the general principles of law recognised by civilised nations;
4. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

3. *The Discussions in the League of Nations and the Adoption of the Statute*

34 The Council of the League did not substantially modify Draft Art. 35 (which eventually became Art. 38) proposed by the Committee of Jurists. It only added, at the beginning of para. 4, the words: ‘Subject to the provisions of Article 57bis ...’. This merely formal modification had been deemed necessary after the introduction, by the Council, of said Art. 57bis concerning the *res judicata* principle, which stated: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’

35 For its part, the Assembly, despite a rather cursory discussion, adopted non-negligible changes to Draft Art. 35.

36 The most important proposal for amendment was made by Argentina, which wished to include in the Committee’s draft a new subparagraph providing for the application of ‘the rules drawn up by the Assembly of the League of Nations in the performing of its duty of codifying international law’:

Furthermore, Argentina proposed to rephrase paras. 2 and 4 of the Committee’s text as follows:

international custom as evidence of a practice founded on principles of humanity and justice, and accepted as law; ...

judicial decisions, as against the state in which they have been delivered, if it is a party to the dispute; and the teachings. ...⁵⁴

⁵¹ Lord Phillimore explained that ‘general principles of law’ should be understood to be principles ‘accepted by all nations *in foro domestico*’ or ‘maxims of law’ (*ibid.*, p. 335, and *cf.* also Hagerup, *ibid.*, p. 317. Lapradelle also accepted this meaning of the ‘general principles’ formula, but suggested the deletion of the reference to ‘civilised nations’ which he considered superfluous ‘because law implies civilisation’ (*ibid.*, p. 335).

⁵² *Ibid.*, p. 337.

⁵³ For a more detailed analysis see Kearney, pp. 610, 612; *cf.* also, more specifically centered on the role of the general principles of law: Raimondo, F.O., *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008), pp. 17–20.

⁵⁴ League of Nations, *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court* (1921), p. 50.

The Sub-Committee of the Third Committee of the First Assembly's meeting in charge of the question of the Court's Statute considered that the proposed new draft would confer upon the Assembly of the League a power to legislate and would exclude 'every possibility of considering the judgments as precedents building up law'.⁵⁵ The amendments were then rejected without any further discussion. 37

Similarly, the Subcommittee deleted the references in the opening phrase of Art. 35 to 'the limits of the Court's jurisdiction as defined in Article 34'⁵⁶—a rather minor and immaterial modification—and the phrase 'in the order following'⁵⁶—which had already given rise to some criticism in the Committee of Jurists.⁵⁷ 38

Finally, the Assembly introduced a new and separate paragraph enabling the Court to decide *ex aequo et bono*: 'These provisions shall not prejudge the power of the Court to decide a case *ex aequo et bono* if the parties so agree thereto.'⁵⁸ 39

In an earlier stage of the discussion, the Assembly had adopted an amendment to para. 3 of the Committee's proposal referring to 'general principles of law and justice'. However, it ultimately endorsed Politis' view according to which the Court should have 'a right to apply the general principles of justice only by agreement of the parties'.⁵⁹ 40

Draft Art. 35 thus modified became Art. 38 in the Statute as finally adopted by the Assembly on 13 December 1920. 41

III. The ICJ Statute

During the elaboration of the ICJ Statute, Art. 38 did not give rise to much controversy, neither in the Washington Committee of Jurists, nor at the San Francisco Conference. It was reproduced in the Statute of the new Court with only minor modifications. 42

1. Positions in Presence

The general position regarding Art. 38 was quite well exposed in the communication of the Informal Inter-Allied Committee: 43

The law to be applied by the Court is set out in Article 38 of the Statute, and, although the wording of this provision is open to certain criticisms, it has worked well in practice and its retention is recommended.⁶⁰

The Washington Committee of Jurists took the same view and only very briefly discussed the question of the law to be applied by the Court.⁶¹ Basdevant, the French delegate to the Committee pointed out: 44

that while Article 38 was not well drafted, it would be difficult to make a better draft in the time at the disposal of the Committee. He also called attention to the fact that the Court had operated very well under Article 38. He felt, therefore, that time should not be spent in redrafting it.⁶²

⁵⁵ *Ibid.*, p. 68.

⁵⁶ *Ibid.*, p. 145.

⁵⁷ *Cf. supra*, para. 30.

⁵⁸ League of Nations, *Documents, supra*, fn. 54, p. 157.

⁵⁹ *Ibid.*; and *cf.* also Kearney, p. 614.

⁶⁰ UNCIO, vol. XIV, p. 435. *Cf.* also the proposals by Venezuela (*ibid.*, p. 436 and p. 373) and the United States (*ibid.*, p. 357). The proposal of Cuba (*ibid.*, p. 435) contained some further-reaching modifications to para. 2 and para. 4 of the 1920 version of Art. 38 and was based on a series of proposals made at the Inter-American Conference. On this point *cf.* Kearney, pp. 610, 653–4.

⁶¹ A proposition of the delegate of Costa Rica suggesting the deletion of the word 'general' in para. 3 of the 1920 version of Art. 38 (UNCIO, vol. XIV, p. 170) was not discussed any further.

⁶² *Ibid.*, p. 170.

- 45 Consequently, the Committee did not propose any substantial modification to Art. 38 despite some minor proposals to modify the last paragraph concerning the power of the Court to decide *ex aequo et bono*.⁶³ It only reconsidered the numbering of the provision, a purely formal modification. The Rapporteur of the Committee, Basdevant, recalled in its report that Art. 38:

has given rise to more controversies in doctrine than in practice. The Committee thought that it was not the opportune time to undertake the revision of this article. It has trusted to the Court to put it into operation, and has left it without change other than that which appears in the numbering of the provisions of this article.⁶⁴

- 46 At the San Francisco Conference, the proposed amendments concerning Art. 38, especially those of Cuba⁶⁵ and Ecuador,⁶⁶ were not really discussed either. During the very brief discussion in Committee 1 of Commission IV, the Colombian representative asked whether the sources enumerated under Art. 38 would be applied by the Court in the order indicated. The two observers of the PCIJ, President Guerrero and Judge Hudson, recognized that this would not be the case.⁶⁷ In a declaration annexed to the *procès-verbal* of the meeting, the Colombian delegation explained that it withdrew its amendment aiming at introducing a compulsory order of application of the sources listed because it was convinced that the new Court would give the utmost importance to the contractual engagements of States, as had been the case with the PCIJ.⁶⁸ At the fifth meeting of Committee 1 of Commission IV, Chile proposed to insert a clear reference to international law into para. 1 (c). This proposal was considered unnecessary given the fact that Art. 38 had always been understood to imply a clear mandate to apply international law.⁶⁹ This initial proposal having been rejected, Chile submitted a new amendment which led to the only noticeable modification of Art. 38.

2. *Minor Touching Up*

- 47 The new amendment proposed by Chile aimed at introducing a clear reference of the mission of the Court into the opening paragraph of Art. 38. The new text provided:

The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ...⁷⁰

In the view of the Chilean delegation, the addition to Art. 38, combined with Art. 36, was intended to give a clearer definition of the Court's mission as an international judicial organ than had resulted from the previous jurisprudence of the Court and the history of its creation. It was further intended to draw the attention of the governments and of the international organizations concerned to 'the obligation of carrying out as soon as possible the reconstruction and codification of international law as one of the most effective means of ensuring peace and facilitating good relations among states'.⁷¹

⁶³ Cf. *ibid.*, p. 436.

⁶⁴ *Ibid.*, p. 843.

⁶⁵ Cuba again proposed a modified formal presentation of Art. 38, as already submitted to the Washington Committee of Jurists (cf. *supra*, fn. 60).

⁶⁶ Ecuador wanted to add a new paragraph relating to regional international law after para. 3 of Art. 38; cf. UNCIO, vol. III, p. 412.

⁶⁷ UNCIO, vol. XIII, p. 164.

⁶⁸ *Ibid.*, p. 287.

⁶⁹ *Ibid.*, p. 164. Cf. *infra*, para. 65 *et seq.*

⁷⁰ UNCIO, vol. XIII, p. 284.

⁷¹ *Ibid.*

This Chilean amendment was the only one adopted, unanimously, concerning Art. 38.⁷² The Rapporteur of Committee 1 of Commission IV explained: 48

The First Committee has adopted an addition to be inserted in the introductory phrase of this article referring to the function of the Court to decide disputes submitted to it in accordance with international law. The lacuna in the old Statute with reference to this point did not prevent the Permanent Court of International Justice from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court.⁷³

IV. An Impressive Posterity

Since its adoption in the 1920 PCIJ Statute, Art. 38 has had an unquestionable influence on the development of international law and the law of international adjudication.⁷⁴ 49
Sørensen considers that 'la concordance prétendue entre cet article et le droit international commun s'est consolidée en vertu de l'existence même de l'article 38 et de son autorité inhérente'.⁷⁵

Besides the influence of Art. 38 on the codification of the substantive rules of international law,⁷⁶ numerous arbitration agreements reproduce or refer expressly to this provision.⁷⁷ Thus, Art. 28 of the 1928 General Act on Pacific Settlement of International Disputes provided: 50

If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice. ...⁷⁸

⁷² *Ibid.*

⁷³ *Ibid.*, p. 392. Cf. also Hudson, *PCIJ*, p. 604, and *infra*, paras. 65 *et seq.*

⁷⁴ Rousseau, C., *Droit international public* (1970), tome 1, p. 59; Sørensen (1946), p. 40.

⁷⁵ Sørensen (1946), p. 40.

⁷⁶ As for the 1930 Codification Conference under the auspices of the League of Nations, *ibid.*, p. 41. With regard to Art. 24 of its Statute, which confers upon it the responsibility to make 'the evidence of customary international law more readily available', the ILC considered in its second report to the General Assembly that 'Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court' (*ILC Yearbook* (1950), vol. II, p. 368, para. 30). Cf. also Shahabuddeen, p. 71.

⁷⁷ Cf. e.g. Art. 5 of the 1921 German-Swiss Treaty on Arbitration and Conciliation; Art. 5 of the German-Swedish Treaty of 29 August 1924; Art. 5 of the German-Finish treaty of 14 March 1925; Art. 19 of the Poland-Czechoslovakian Treaty of 23 April 1925; Art. 2 of the Danish-Swedish Treaty of 14 January 1926; Art. 2 of the Danish-Norwegian Treaty of 15 January 1926; Art. 2 of the Elsenore Treaty between Finland and Norway of 3 February 1926; Art. 4 of the Dutch-German Treaty of 20 May 1926; Art. 4 of the German-Danish Treaty of 2 June 1926; Art. 19 of the Polish-Yugoslav Treaty of 18 September 1926; Art. 6 of the Polish-Norwegian Treaty of 9 December 1929; or, more recently: Art. 33 of the Optional Rules for Arbitrating Disputes Between Two States of the Permanent Court of Arbitration:

1. The arbitral tribunal shall apply the law chosen by the parties, or in the absence of an agreement, shall decide such disputes in accordance with international law by applying:
 - (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 - (b) International custom, as evidence of a general practice accepted as law;
 - (c) The general principles of law recognized by civilized nations;
 - (d) Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

States may refer to this provision, and thus indirectly to Art. 38 of the Statute, in arbitration agreements (cf. Case concerning the *Loan Agreement between Italy and Costa Rica (dispute arising under a financing agreement)*, RIAA, vol. XXV, pp. 21, 55–6 [paras. 14–16], Art. 3 of the agreement).

⁷⁸ LNTS, vol. 93, p. 355.

The reference to Art. 38 was kept in the Revised General Act of Arbitration, adopted by the General Assembly in 1948.⁷⁹ A comparable provision was introduced by the International Law Commission in its 1953 Draft Convention on Arbitral Procedure.⁸⁰ After the rejection of this Draft Convention by the General Assembly, the International Law Commission adopted a new Draft which did not simply refer to Art. 38, but which reproduced it with only one slight modification in order to give the parties some choice with respect to the applicable law.⁸¹

51 Furthermore, quite often, arbitral tribunals that are not expressly instructed to do so, refer to the principles of Art. 38 in order to accomplish their task. This has been the case with the German-American Claims Commission which decided, in its Administrative Decision No. 2, to apply the rules indicated in Art. 38 and the legal rules of the United States and Germany.⁸² The same solution has been adopted by the arbitrator in the *David Goldenberg & Sons* case between Germany and Romania⁸³ and by the Special Arbitral Tribunal created in order to determine the *Responsibility of Germany Arising from Damage Caused in the Portuguese Colonies in South Africa (Naulilaa)*.⁸⁴

52 Arbitral tribunals settling investment disputes under the auspices of the International Centre for Settlement of Investment Disputes created under the 1965 Washington Convention are equally empowered to apply, *inter alia*, international law. Concerning the reference to ‘international law’ in Art. 42, para. 1⁸⁵ of the 1965 Convention, the Report of the Executive Directors of the International Bank for Reconstruction and Development states:

The term ‘international law’ as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.⁸⁶

⁷⁹ UNTS, vol. 71, p. 116 (Art. 28).

⁸⁰ Draft Art. 12 provided:

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Art. 38, para. 1, of the Statute of the International Court of Justice.

The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis* (*ILC Yearbook* [1953], vol. II, p. 210).

⁸¹ New Draft Art. 10 stated:

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono* (*ILC Yearbook* [1958], vol. II, p. 84).

⁸² RIAA, vol. VII, pp. 1, 25–6.

⁸³ RIAA, vol. II, pp. 901, 909.

⁸⁴ RIAA, vol. II, pp. 1011, 1016. For an identical solution, see the award in the *Air Service Agreement of 27 March 1946 between the United States of America and France case*, RIAA, vol. XVIII, pp. 417, 430 (para. 26).

⁸⁵ ‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and *such rules of international law as may be applicable*’ (emphasis added).

⁸⁶ *Cf.* para. 40 of the report; available on the website of ICSID <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>.

This view has furthermore been reconfirmed by recent decisions of ICSID Tribunals which expressly cite Art. 38 with a view to determining what international law is.⁸⁷

Being a branch of international law, international criminal law ‘draws upon the same sources, namely conventions, custom, and general principles of law’.⁸⁸ Therefore, the sources listed in Art. 38 can assist in law-making in criminal international law ‘and have the potential to develop the law when used creatively.’⁸⁹ On some occasions, criminal international tribunals have formally turned to Art. 38,⁹⁰ or based themselves on the sources listed in that provision without expressly mentioning it⁹¹ in order to define their international judicial function and the applicable rules.

Furthermore, in the absence of any dispute, Art. 38 may constitute a guidance for diplomatic negotiations between States. Thus, the 1982 United Nations Convention on the Law of the Sea defines the rules governing the delimitation of the continental shelf or the exclusive economic zone by referring to Art. 38:

The delimitation of [the exclusive economic zone] [the continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as

⁸⁷ Cf. e.g. the annulment decision of 5 February 2002 in *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID, Case No. ARB/98/4, *ILM* 41 (2002), 933, 941–2 (paras. 37–46); the decision on jurisdiction 5 January 2001 in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID, Case No. ARB(AF)/98/3, para. 57, available at <<http://www.state.gov/documents/organization/3921.pdf>>; the award on damages of 31 May 2002 in *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), ICSID Reports VII (2005), p. 159 (para. 46); the decision on jurisdiction of 11 May 2005 in *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, para. 135, available at <<http://italaw.com/documents/camuzzi-en.pdf>>; the award of 2 August 2006 in *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID, Case No. ARB/03/26, para. 225, available at <http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf>; the award of 22 May 2007 in *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, para. 257, available at <<http://italaw.com/documents/Enron-Award.pdf>>. On the use by investment arbitration tribunals of the general principles of international law on treaties and other sources, see Fauchald, O.K., ‘The Legal Reasoning of ICSID Tribunals—An Empirical Analysis’, *EJIL* 19 (2) (2008), pp. 301–64.

⁸⁸ Raimondo, *supra*, fn. 53, p. 73. Cf. also Simma, B./Paulus, A., ‘Le rôle relatif des différentes sources du droit international public’, in *Droit international pénal* (Ascensio, H./Decaux, E./Pellet, A., eds., 2000), p. 55.

⁸⁹ Swart, M., ‘Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’, *ZaōRV* 70 (2010), p. 462. Cf. also Pellet, A. ‘Applicable Law’, in *The Rome Statute of the International Criminal Court: A Commentary* (Cassese, A./Gaeta, A./Jones, J.R.W.D., eds., 2002), pp. 1051–84; or Bitti, G., ‘Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the JP of the ICC’, in *Emerging Practice of the International Criminal Court* (Stahn, C./Sluiter, G., ed., 2009), pp. 285–304.

⁹⁰ Cf. e.g. ICTY, *Prosecutor v. Kupreskić et al.*, Trial Chamber, 14 January 2000, Case No. IT-95-16-T, para. 540: ‘Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a “subsidiary means for the determination of rules of law” (to use the expression in Art. 38(1) (d) of the Statute of the International Court of Justice), which must be regarded as declaratory of customary international law.’

⁹¹ Cf. e.g. ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, 20 February 2001, Case No. IT-96-21-A, para. 583: ‘Notwithstanding a claim by Landžo to the contrary, there is no reference to any defence of diminished mental responsibility in the Tribunal’s Statute.... If there is a ‘special defence’ of diminished responsibility known to international law, it must be found in the usual sources of international law—in this case, in the absence of reference to such a defence in established customary or conventional law, in the general principles of law recognised by all nations.’ (footnotes omitted); cf. also *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Appeals Chamber, 31 January 2000, Case No. IT-94-1-A-AR77, para. 13; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 30 September 2008, Case No. ICC-01/04-01/07, para. 508; ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, 16 December 2011, ICC-01/04-01/10, para. 148.

referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.⁹²

C. The Function of the Court

- 55 As explained above, the scope of Art. 38, in its 1945 wording, is twofold: in addition to setting out different sources of law, it summarizes the function of the Court in relation to the law it must apply. As a judicial body, the Court's main function 'is to decide ... disputes which are submitted to it'. As an international tribunal, it must make its decision 'in accordance with international law'. However, both formulas give an incomplete picture of the Court's function.

I. The Function of the Court 'is to decide ...'

1. A Partial Definition of the Court's Function—Art. 38 and the Advisory Function of the Court

- 56 Indeed, the function of the Court 'is to decide ... such disputes that are submitted to it', a formula which serves as a discreet reminder that it has no general competence but can only decide if the parties so agree.⁹³ However, this formula fails to indicate the other main function of the Court: giving advisory opinions in accordance with Art. 96 of the Charter and Art. 65 of its Statute. Moreover, it ignores important implied or derivative functions such as the Court's contribution to the development of international law through its law-making or, certainly, its 'law-ascertaining' role.⁹⁴
- 57 As 'the principal judicial organ of the United Nations',⁹⁵ the Court is vested with two main functions: a contentious one—it has to decide disputes between States—and an advisory one—it gives advisory opinions upon request of the General Assembly,

⁹² Cf. Art. 74, para. 1 and Art. 83, para. 1 UNCLOS respectively. The ICJ and various arbitral tribunals have recalled these provisions in several judgments: cf. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 294 (para. 95); *Continental Shelf* (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), pp. 13, 30 (para. 27); *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark/Norway), ICJ Reports (1993), pp. 38, 59 (para. 48) and 61 (para. 52); *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon/Nigeria: Equatorial Guinea intervening), Merits, ICJ Reports (2002), pp. 303, 424 (para. 244); *Maritime Delimitation in the Black Sea* (Romania/Ukraine), ICJ Reports (2009), pp. 61, 74–5 (para. 31); cf. also *Delimitation of maritime boundary between Guinea-Bissau and Senegal*, RIAA, vol. XX, pp. 119, 191 (paras. 95–96); *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, RIAA, vol. XXVII, pp. 147, 210 (para. 221); *Guyana/Suriname Maritime Boundary Delimitation*, 17 September 2007, paras. 330–331, available at <<http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>>. Cf. also the reference to these provisions in *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 49 (para. 49), made at a time when the Convention had not yet been definitively adopted.

⁹³ For a detailed treatment of the means of establishing the Court's jurisdiction cf. Tomuschat on Art. 36 MN 35 *et seq.* In the (*Bosnian*) *Genocide case*, the Court referred in these terms to its adjudicatory function: 'The Court's function, according to Art. 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it"' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [Bosnia and Herzegovina/Serbia and Montenegro], Merits, ICJ Reports [2007] pp. 43, 90 [para. 116]).

⁹⁴ Cf. *infra*, MN 338 *et seq.*

⁹⁵ Art. 92 UN Charter; Art. 1 of the Statute. For an assessment of this role cf. Oellers-Frahm on Art. 92 UN Charter MN 29–35; Gowlland-Debbas on Art. 1, especially MN 19–20; and further Oellers-Frahm, K., in Simma, *UN Charter*, Art. 92 UN Charter MN 31–40; Tomka, P., 'Art. 92', in *La Charte des Nations*

the Security Council and other organs of the United Nations and specialized agencies authorized to this effect by the General Assembly.⁹⁶ And so too was the PCIJ, even though it was not an organ of the League of Nations.⁹⁷

Article 38, which is part of Chapter II of the Statute ('Competence of the Court'), does not mention the Court's advisory jurisdiction, nor does Chapter IV on 'Advisory Opinions' contain a provision equivalent to Art. 38. During the preparation of its new Rules of 1936,⁹⁸ the PCIJ contemplated the formal inclusion of a reference to Art. 38, para. 1.⁹⁹ It finally gave up the idea of mentioning any precise article and contented itself with reproducing the new Art. 68 of its Statute¹⁰⁰ in its Rules, since 'il est presque impossible de prévoir tous les cas'.¹⁰¹ However, there can be no doubt that, when giving advisory opinions, the Court must be guided by the directives embodied in Art. 38.¹⁰²

According to Art. 68: 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.' Quite rightly, the Court has consistently recognized—even if only implicitly—that Art. 38, para. 1 is fully applicable when it exercises its advisory function.¹⁰³

On several occasions, the Court has recalled that: 'The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.'¹⁰⁴ Thus, in its Advisory Opinion on the *Competence of the*

Unies (Cot, J.-P./Pellet, A./Forteau, M., eds., 3rd edn., 2005), pp. 1945–6; Pellet, A., 'Strengthening the Role of the International Court of Justice as the Principal Judicial Organ of United Nations', *LP ICT 3* (2004), pp. 159–80 (which is a translated and updated version of: 'Le renforcement du rôle de la Cour en tant qu'organe judiciaire principal des Nations Unies', in *Increasing the Effectiveness of the International Court of Justice—Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* [Peck, C./Lee, R.S., eds., 1997], pp. 235–53).

⁹⁶ Cf. Art. 96 UN Charter and Art. 65, para. 1 of the Statute. For comment on the historical development of the Court's advisory function cf. Oellers-Frahm on Art. 96 UN Charter MN 6–13.

⁹⁷ In its original drafting, the PCIJ Statute had included no provision on advisory opinions; however, Art. 14 of the Covenant of the League of Nations provided that: '...The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly'. Cf. also Arts. 71–74 of the 1922 Rules of the PCIJ. The 1929 Revision Protocol added a Chapter IV to the PCIJ Statute, and the (then) new Art. 68 was drafted in the same terms as Art. 68 of the present Court's Statute. For further treatment cf. *infra*, MN 59–60; as well as Frowein/Oellers-Frahm on Art. 65 MN 3–5; Cot on Art. 68 MN 2–9.

⁹⁸ The Rules were adopted on 11 March 1936; the 1929 Protocol entered into force on 1 February 1936.

⁹⁹ Cf. Rapport présenté par M. Negulesco, PCIJ, Series D, No. 2, 3rd Add., p. 801. On this episode cf. Sørensen (1946), pp. 37–8; and Guyomar, pp. 647–8.

¹⁰⁰ Cf. *infra*, MN 59.

¹⁰¹ Rapport du Comité de coordination, PCIJ, Series D, No. 2, 3rd Add., p. 880. The judges certainly were sensitive to the dangers of embarrassing inferences *a contrario*, underlined by the Registrar, in case of the adoption of an incomplete enumeration of the transposable articles.

¹⁰² No argument to the contrary can be inferred from the singular ('function') used in Art. 38; the Statute is not a model of consistency in this respect: Art. 68, for example, resorts to the plural when mentioning the Court's 'advisory functions'.

¹⁰³ For a similar view cf. Mendelson (1996), pp. 63, 64, fn. 4.

¹⁰⁴ *Status of Eastern Carelia*, PCIJ, Series B, No. 5, p. 29; and further ICJ, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, ICJ Reports (1960), pp. 150, 153; *Northern Cameroons* (Cameroons/United Kingdom), ICJ Reports (1963), pp. 15, 30. In several advisory opinions, the Court reaffirmed that 'reasons of judicial propriety' could oblige it to refuse to give an opinion (cf. e.g. *Western Sahara*, ICJ Reports (1975), pp. 12, 25 (para. 32) and 28 (para. 46); or *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 158 (para. 47) and 161 (para. 56).

ILO to Regulate, Incidentally, the Personal Work of the Employer, the PCIJ recalled that, in interpreting Part XIII of the Peace Treaty of Versailles in the framework of its advisory function, it:

is called upon to perform a judicial function, and, taking the question actually before it in connection with the terms of the Treaty, there appeared to be no room for the discussion and application of political principles or social theories, of which, it may be observed, no mention is made in the Treaty.¹⁰⁵

This clearly shows that only international law as defined in Art. 38 applies.¹⁰⁶

61 As has been noted:

toute la *raison d'être* des avis consultatifs se trouverait compromise si l'on admettait que la réponse à une question de droit international pût différer en principe suivant que les experts consultés prennent place sur les sièges de la Cour ou qu'ils se constituent en simple comité d'experts.¹⁰⁷

When the Court gives an advisory opinion, it exercises its judicial function¹⁰⁸ and, being an organ of international law,¹⁰⁹ that body of law is the only one applicable. Art. 38 fully applies in such a circumstance. The concept of judicial function (and limitation) so important in contentious matters¹¹⁰ is as relevant when the Court acts in its advisory capacity¹¹¹ and it probably is in its advisory opinions that the Court has given the more detailed reasons for its rejection of the 'political motives' as a bar to the exercise of its jurisdiction, precisely as a consequence of the exclusively judicial character of its functions.¹¹²

¹⁰⁵ PCIJ, Series B, No. 13, p. 23. Cf. also *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ Reports (1947–1948), pp. 57, 61, where the Court described its 'interpretative function' (of the Charter) as falling 'within the normal exercise of its judicial powers'.

¹⁰⁶ Cf. also Anzilotti's individual opinion appended to the PCIJ's advisory opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, PCIJ, Series A/B No. 65, p. 61: in the judge's view, the Court would deviate from the essential rules which govern its function as a Court and which it must follow even when giving an advisory opinion if it were to pronounce on a purely domestic law matter.

¹⁰⁷ Sørensen (1946), p. 38. According to the present writer, the Court could leave a question open when giving an advisory opinion (cf. e.g. *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports [1996], pp. 226, 263 and 266 [paras. 97 and 105E]), but could not do so in the framework of its contentious function. For a similar view cf. Judge Vereschetin's declaration, *ibid.*, pp. 279–81; Salmon, J., 'Le problème des lacunes à la lumière de l'avis 'Licéité de la menace ou de l'emploi d'armes nucléaires' rendu le 8 juillet 1996 par la Cour internationale de Justice', in *Mélanges en l'honneur de Nicolas Valticos—Droit et Justice* (Dupuy, R.-J., ed., 1999), pp. 197–214, pp. 202–3; and Weil, P., "'The Court Cannot Conclude Definitely ...'—*Non Liquet* Revisited' in *Politics, Values and Functions—International Law in the 21st Century: Essays in Honor of Professor Louis Henkin* (Charney, J./Anton, D./O'Connell, M.E., eds., 1997), pp. 105–14, p. 111.

¹⁰⁸ Cf. e.g. Rapport présenté par M. Negulesco, PCIJ, Series D, No. 2, 3rd Add., *passim*, in particular, pp. 782–3. For similar views cf. Rosenne, *Law and Procedure*, vol. I, pp. 168–9. However: 'The purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, ICJ Reports [1950], pp. 65, 71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested' (*Nuclear Weapons*, *supra*, fn. 107, ICJ Reports [1996], pp. 226, 236 [para. 15]).

¹⁰⁹ Cf. *infra*, MN 67.

¹¹⁰ Cf. *infra*, MN 65–68.

¹¹¹ Cf. generally Runavot, M.-C., *La compétence consultative des juridictions internationales, reflet des vicissitudes de la fonction judiciaire internationale* (2010), 460 p. Cf. also Wittich, p. 983.

¹¹² Cf. in particular *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 136, 155 (para. 41), where the Court recapitulates its 'long-standing jurisprudence' according to which it 'cannot accept that it has no jurisdiction because of the "political" character of the question posed'.

2. A Useful Guide to the Court's Mission

Turning to the Court's contentious function, the present Court and its predecessor have been guided by Art. 38 not only for rendering their judgments properly speaking but also when they take other forms of decisions in the course of proceedings. 62

a) Judgments

Explicit references in the World Court's case law to Art. 38 of the Statute are rare.¹¹³ 63 However, they are not non-existent. Errors or omissions excepted, the Permanent Court expressly mentioned it in only two judgments.¹¹⁴ The present Court did cite this provision more often but nevertheless parsimoniously.¹¹⁵ The Court expressly relied on Art. 38 for two main purposes.

First, the Court referred to Art. 38 in order to stress that it was bound to resort to the sources enumerated in para. 1 of said provision. This aspect will be dealt with in more detail later.¹¹⁶ 64

Second, the Court made it clear that its function is of an exclusively judicial nature, and that, consequently: 65

- 'From a general point of view, it must be admitted that the true function of the Court is to decide disputes between States ... on the basis of international law: Art. 38 of the Statute contains a clear indication to this effect';¹¹⁷
- 'the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties',¹¹⁸ thus echoing its celebrated *dictum* in the case concerning the *Northern Cameroons*, according to which, 'There are inherent

¹¹³ Rosenne, *Law and Procedure*, vol. III, p. 1539; cf. also Sørensen (1946), p. 38.

¹¹⁴ Cf. the judgments of 22 July 1929 in *Payment of Various Serbian Loans Issued in France* (France/Kingdom of the Serbs, Croats and Slovenes), PCIJ, Series A, No. 20, pp. 19–20, and *Payment in Gold of the Brazilian Federal Loans Issued in France* (France/Brazil), PCIJ, Series A, No. 21, pp. 19–20. However, references to Art. 38 in the personal opinions of judges are less uncommon.

¹¹⁵ Cf. *Right of Passage over Indian Territory* (Portugal/India), Merits, ICJ Reports (1960), pp. 6, 37; *South West Africa Cases* (Ethiopia/South Africa; Liberia/South Africa), Second Phase, ICJ Reports (1966), pp. 6, 47 (para. 88) and p. 48 (para. 89); *Nuclear Tests* (Australia/France) (New Zealand/France), ICJ Reports (1974), pp. 253, 271 (para. 57), and pp. 457, 477 (para. 60); *Continental Shelf* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 37 (para. 23); *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 290–1 (para. 83); *Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 38 (para. 56), p. 92 (para. 172), p. 97 (para. 184); *Frontier Dispute* (Burkina Faso/Republic of Mali), ICJ Reports (1986), pp. 554, 575 (para. 42); *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Reports (1992), pp. 351, 390–1 (para. 47), 601 (para. 403); *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 61 (para. 52); *Kasikili/Sedudu Island*, ICJ Reports (1999), pp. 1045, 1059 (para. 19), p. 1102 (para. 93); *LaGrand*, ICJ Reports (2001), pp. 466, 486 (para. 52); *Avena and other Mexican Nationals* (Mexico/United States of America), Judgment, ICJ Reports (2004), pp. 12, 61 (para. 127); *(Bosnian) Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 90 (para. 116); *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)* (Mexico/United States of America), Provisional Measures, ICJ Reports (2008), pp. 311, 325 (para. 53); *Jurisdictional Immunities of the State* (Germany/Italy), Judgment of 3 February 2012, available at <<http://www.icj-cij.org>>, para. 55. In the *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), the Court referred to the contentions of Germany referring to Art. 38, para. 1 (c) (and not to para. 2), ICJ Reports (1969), pp. 3, 21 (para. 17). For other references to Art. 38, para. 2 cf. *infra*, MN 157–175. Just as in the case of the PCIJ, references to Art. 38 in the personal opinions of judges are much more frequent.

¹¹⁶ Cf. *infra*, MN 79.

¹¹⁷ *Serbian Loans case*, *supra*, fn. 114, PCIJ, Series A, No. 20, p. 19.

¹¹⁸ *Nuclear Tests cases*, *supra*, fn. 115, ICJ Reports (1974), pp. 253, 271 (para. 57), and pp. 457, 477 (para. 60).

limitations on the exercise of the judicial function, which the Court, as a court of justice can never ignore¹¹⁹

- ‘As implied by the opening phrase of Art. 38, para. 1, of its Statute, the Court is not a legislative body’;¹²⁰ and that
- possible difficulties in the application of a right recognized in its judgments are not a ‘sufficient ground for holding that the right is not susceptible of judicial determination with reference to Art. 38 (I) of the Statute’.¹²¹

66 As Fachiri has observed,

Subject to the single exception laid down in the last paragraph, [Art. 38] ensures that the decisions of the Court shall proceed and be based solely upon rules of law. It is this principle, more perhaps than any other single feature, that establishes the Court’s position as a judicial tribunal.¹²²

This has been made even more apparent since 1945, with the addition of the new phrase explicitly describing the function of the Court.¹²³ However, as noted by the Rapporteur of Committee IV/I at the San Francisco Conference:

The lacuna in the old Statute with reference to this point did not prevent the Permanent Court of International Justice from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court.¹²⁴

67 By defining the function of the Court with respect to the law to be applied by it, Art. 38 thus appears as the—usually undisclosed—basis for sustaining the fundamental view that the World Court is an organ of international law.¹²⁵ Therefore, ‘the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency’.¹²⁶ As such it ‘is deemed itself to know what [international] law is’¹²⁷ and, consequently, ‘in the fulfilment of its task of itself ascertaining

¹¹⁹ *Northern Cameroons case*, *supra*, fn. 104, ICJ Reports (1963), pp. 15, 29. However, in that case, the Court did not expressly refer to Art. 38.

¹²⁰ *South West Africa Cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 48 (para. 89). On this question *cf.* further *infra*, MN 322 *et seq.*

¹²¹ *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 37. *Cf.* also *Haya de la Torre* (Columbian/Peru), ICJ Reports (1951), pp. 71, 78–9; *Northern Cameroons case*, *supra*, fn. 104, ICJ Reports (1963), pp. 15, 30, pp. 33–4 or p. 38. However, the Court did not mention Art. 38 in either of these two judgements.

¹²² Fachiri, A., *The Permanent Court of International Justice* (1932), p. 101.

¹²³ *Cf. supra*, MN 47–48.

¹²⁴ Report of Mr Al-Farsy, UNCIO, vol. XIII, p. 392. *Cf.* also Hudson, *PCIJ*, p. 603; Kearney, pp. 610, 654 and Shahabuddeen, pp. 82–3.

¹²⁵ *Certain German Interests in Polish Upper Silesia* (Germany/Poland), Merits, *PCIJ*, Series A, No. 7, p. 19: ‘From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts ...’. *Cf.* further *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland/Albania), Merits, ICJ Reports (1949), pp. 4, 35: ‘...to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty’; Diss. Op. Novacovitch, appended to the *PCIJ*’s judgment in the *Serbian Loans case*, *supra*, fn. 114, *PCIJ*, Series A, No. 20, p. 79: ‘The Court, whose mission it is to enforce international law and which has been created to apply such law, must apply this law (Art. 38 of the Statute)’. (The French original expressly defines the Court as ‘l’organe du droit international’). *Cf.* also the judgment in *LaGrand*, where the Court explained that, ‘the Court [does] no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. [And the] exercise of this function, expressly mandated by Art. 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings’ (*supra*, fn. 115, ICJ Reports [2001], pp. 466, 486 [para. 52]).

¹²⁶ *Serbian Loans case*, *supra*, fn. 114, *PCIJ*, Series A, No. 20, p. 15.

¹²⁷ *Brazilian Loans case*, *supra*, fn. 114, *PCIJ*, Series A, No. 21, p. 124.

what the international law is, it [must not confine] itself to a consideration of the arguments put forward [by the Parties], but [must include] in its researches all precedents, teachings and facts to which it had access and which might possibly' help to settle the dispute.¹²⁸ As explained in the *Icelandic Fisheries cases*:

The Court ... as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article Art. 53 of the Statute, *as in any other case*, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court.¹²⁹

In spite of these firm caveats, the Court 'has never been sympathetic' to arguments often advanced by Defendant States that it should not 'exercise its jurisdiction because the dispute involved political aspects'.¹³⁰ On the contrary, the Court has firmly recalled that it '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',¹³¹ and it rightly considers that 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them'.¹³² For the same reason, 'the fact that negotiations are being actively pursued during the ... proceedings before the Court is not, legally, any obstacle to the exercise by the Court of its judicial function'.¹³³ And the same holds true when the Security Council and the Court are called to 'perform their separate but complementary functions with respect to the same events'.¹³⁴

However, the Court, while strictly maintaining 'its judicial character',¹³⁵ has not been prevented from including in its judgments¹³⁶ pure recommendations based on its

¹²⁸ *S.S. Lotus* (France/Turkey), PCIJ, Series A, No. 10, p. 31. *Cf.* also Diss. Op. Basdevant, appended to the judgment in the *Certain Norwegian Loans case* (France/Norway), ICJ Reports (1957), pp. 71, 74: 'the Court must, of itself, seek with all the means at its disposal to ascertain what is the law'.

¹²⁹ *Fisheries Jurisdiction* (United Kingdom/Iceland) (Federal Republic of Germany/Iceland), ICJ Reports (1974), pp. 3, 9 (para. 17) and pp. 175, 181 (para. 18) (emphasis added).

¹³⁰ Wittich, pp. 981–2.

¹³¹ *Nicaragua case*, *supra*, fn. 115, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 435 (para. 96).

¹³² *United States Diplomatic and Consular Staff in Tehran* (United States of America/Iran), Judgment, ICJ Reports (1980), pp. 3, 20 (para. 37). *Cf.* also, *Armed Activities case* (Democratic Republic of the Congo/Uganda), ICJ Reports (2005), pp. 168, 190 (para. 26). For examples of cases where the political issue argument was raised, see Kawano, M., 'The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes', *Rec. des Cours* 346 (2009), pp. 263–77.

¹³³ *Aegean Sea Continental Shelf* (Greece/Turkey), ICJ Reports (1978), pp. 3, 12 (para. 29); *cf.* also *Tehran Hostages case*, *supra*, fn. 132, ICJ Reports (1980), pp. 3, 20 (para. 37); *Nicaragua case*, *supra*, fn. 115, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 440 (para. 106); or *Application of the Interim Accord of 13 September 1995* (The Former Yugoslav Republic of Macedonia/Greece), Judgment of 5 December 2011, available at <<http://www.icj-cij.org>>, para. 57.

¹³⁴ *Cf. infra*, MN 73 and fns. 157–158. On all these aspects, see in particular Pellet, A., 'Le glaive et la balance', *passim*.

¹³⁵ *Northern Cameroons case*, *supra*, fn. 104, ICJ Reports (1963), pp. 15, 29; *Nuclear Tests cases*, *supra*, fn. 115, ICJ Reports (1974), pp. 253, 259 (para. 23), and pp. 457, 463 (para. 23). *Cf.* generally Brown, C., 'The Inherent Powers of International Courts and Tribunals', *BYIL* 76 (2005), pp. 195–244 or Wittich, *passim*.

¹³⁶ As well as in its advisory opinions; *cf. e.g.* *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, where the Court did not content itself with responding negatively to the question

perception of the situation and indicating the measures it considered useful to be taken by the parties.¹³⁷ These recommendations are included in the reasoning but do not, in general, appear in the *dispositif*.¹³⁸ For example:

- in the *Free Zones* case, the PCIJ did not ‘not hesitate to express its opinion that if, by the maintenance in force of the old treaties, Switzerland obtains the economic advantages derived from the free zones, she ought in return to grant compensatory economic advantages to the people of the zones’;¹³⁹
- in the case of the *Société commerciale de Belgique*, ‘though the Court [could not] admit the claims of the Greek Government’, it placed ‘on record a declaration which Counsel for the Belgian Government, speaking on behalf of the Agent for that Government who was present in Court, made at the end of the oral proceedings’ and consequently declared ‘that the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece’s capacity to pay. Such a settlement is highly desirable’;¹⁴⁰
- in the case of *Right of US Nationals in Morocco*, the ICJ was ‘of the opinion that it is the duty of the Customs authorities in the French zone’ to have regard ‘reasonably and in good faith’ to a list of nine factors that it specified;¹⁴¹
- in the *Tehran Hostages case*: ‘Before drawing the appropriate conclusions from its findings on the merits in this case’ the Court considered that it ‘could not let pass without comment the incursion into the territory of Iran made by United States military units’ and observed ‘that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations’;¹⁴²

asked by the General Assembly, but deemed it necessary to propose a modification of the UNAT Statutes in order to provide for an appeal mechanism (ICJ Reports [1954], pp. 47, 56); similarly the *Nuclear Weapons case*, *supra*, fn. 107, where it (i) warned that some of the grounds on which it based its findings ‘are not such as to form the object of formal conclusions ...; they nevertheless retain, in the view of the Court, all their importance’ (ICJ Reports [1996], pp. 226, 265 [para. 104]) and (ii) in the *dispositif*, urged the States to comply with the ‘obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control’ (*ibid.*, p. 267 [para. 105 F]; *cf.* also p. 263 [para. 98])—an ‘answer’ that was manifestly not called for by the question. Similarly, in its advisory opinion of 9 July 2004 on the *Wall case*, *supra*, fn. 104: ‘The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter’ urged the United Nations ‘to redouble its efforts to bring the Israeli-Palestinian conflict ...to a speedy conclusion ...’ (ICJ Reports [2004], pp. 136, 200 [para. 161]) and considered ‘that it has the duty to draw the attention of the General Assembly ...to the need for [the recent efforts of the Security Council] to be encouraged’ (*ibid.*, p. 201 [para. 162]); and, in the *dispositif*, concluded that: ‘The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion’ (*ibid.*, p. 202 [para. 163E]).

¹³⁷ These recommendations are often based on the political, social or economical background of the dispute. On these, *cf.* further *infra*, para. 111 *et seq.* For a detailed review of the cases where the Court made recommendations to the Parties and of the outcomes of such recommendations, see Kawano, *supra*, fn. 132, pp. 372–6.

¹³⁸ Contrast, however, the reference in fn. 139 *infra*.

¹³⁹ *Free Zones of Upper Savoy and the District of Gex* (Switzerland/France), PCIJ, Series A/B, No. 46, p. 169; the Court included a decision to that purpose in the operative part of the Judgment (*ibid.*, p. 172).

¹⁴⁰ *Société commerciale de Belgique* (Belgium/Greece), PCIJ, Series A/B, No. 78, p. 178.

¹⁴¹ *Case concerning Rights of Nationals of the United States of America in Morocco* (France/United States of America), ICJ Reports (1952), pp. 176, 211–12; *cf.* also *Nottebohm* (Liechtenstein/Guatemala), ICJ Reports (1953), pp. 111, 123, as interpreted by Sir Gerald Fitzmaurice, *Law and Procedure*, vol. II, p. 561.

¹⁴² *Tehran Hostages case*, *supra*, fn. 132, ICJ Reports (1980), pp. 3, 43, para. 93.

- in its *Gabčíkovo-Nagymaros Project* judgment, the Court not only imposed on the parties an obligation to negotiate in order to find a commonly acceptable solution concerning the application of the 1977 Treaty, but indicated the way in which these negotiations should be carried out. It especially suggested that ‘both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court’;¹⁴³
- in the case concerning the *Aerial Incident of 10 August 1999*, the Court, while finding that it had no jurisdiction to entertain the application filed by Pakistan, reminded ‘the Parties of their obligation to settle their disputes by peaceful means and in particular the dispute arising out of the aerial incident of 10 August 1999, in conformity with the obligations which they have undertaken’;¹⁴⁴ and
- in the *Land and Maritime Boundary case* the Court noted ‘that the implementation of the present Judgment will afford the Parties a beneficial opportunity to co-operate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently enjoys. Such co-operation will be especially helpful, with a view to the maintenance of security, during the withdrawal of the Nigerian administration and military and police forces’;¹⁴⁵
- in the last paragraph of the motives of its judgment in the case concerning the *Interim Accord of 13 September 1995* between the FYROM and Greece, the ICJ emphasized ‘that the 1995 Interim Accord places the Parties under a duty to negotiate in good faith under the auspices of the Secretary-General of the United Nations pursuant to the pertinent Security Council resolutions with a view to reaching agreement on the difference described in those resolutions’.¹⁴⁶

However, the Court has not always refrained from introducing such recommendations in the operative part of the judgment: thus, in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, it found that ‘the Parties must negotiate in good faith with a view to agreeing on the course of the delimitation line of that portion of the territorial sea located between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the single maritime boundary determined by the Court’.¹⁴⁷ Similarly, in the *Avena case (Request for Interpretation)*, the Court, while recognizing that Art. 60 of the Statute does not allow it to pronounce on a State’s lack of compliance with the main judgment,¹⁴⁸ nonetheless introduced, in the *dispositif*, affirmations on the continuing legal obligations arising under the *Avena* judgment and recalled the US undertakings during the proceedings, thus clearly suggesting a path to be followed.¹⁴⁹

¹⁴³ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), ICJ Reports (1997), pp. 7, 79 (para. 143).

¹⁴⁴ *Aerial Incident of 10 August 1999* (Pakistan/India), ICJ Reports (2000), pp. 12, 34 (para. 55); *cf.* also *Fisheries Jurisdiction* (Spain/Canada), ICJ Reports (1998), pp. 432, 456 (para. 56) and case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgian Russian Federation), Judgment of 1 April 2011, available at <<http://www.icj-cij.org>>, para. 186.

¹⁴⁵ *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 452 (para. 316).

¹⁴⁶ *Interim Accord of 13 September 1995 case*, *supra*, fn. 133, para. 166.

¹⁴⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua/Honduras), ICJ Reports (2007), pp. 659, 763 (paras. 321–324).

¹⁴⁸ *Avena case (Request for Interpretation)*, *supra*, fn. 115, Judgment, ICJ Reports (2009), pp. 3, 20 (para. 56).

¹⁴⁹ *Ibid.*, p. 21 (paras. 61–63). *Cf.* also Judge Abraham’s strong criticism of the judgment on this point in his appended declaration (*ibid.*, pp. 27–9).

b) Other Binding Decisions

- 71 Judgments are not the only binding decisions that the Court can adopt. It may also ‘make orders for the conduct of the case’¹⁵⁰ and ‘indicate ... provisional measures’,¹⁵¹ which, as the Court decided in the *LaGrand case*, ‘have a binding effect’.¹⁵² While it is certainly true that those decisions only rarely give an opportunity for pronouncements on legal questions,¹⁵³ there are exceptions. And it is interesting to note that the relevant decisions call for the same remarks as the judgments themselves.
- 72 Thus, in its Order of 6 December 1930 in the *Free Zones case*, the PCIJ took great care not to depart from its judicial function. Repeating its *dictum* in the *Serbian Loans case* decided one month earlier,¹⁵⁴ the Court recalled that, ‘being a Court of justice, [it] cannot disregard rights recognized by it, and base its decision on considerations of pure expediency’.¹⁵⁵ In that same case, Judge Kellogg, basing himself expressly on Art. 38 (in conjunction with Art. 36), came to ‘the conclusion that this Court is competent to decide only such questions as are susceptible of solution by the application of rules and principles of law’.¹⁵⁶
- 73 The present Court has also underlined its ‘judicial function’ in several orders. Thus, quoting its judgment on jurisdiction and admissibility in *Nicaragua*,¹⁵⁷ it reaffirmed its power to indicate provisional measures of protection even if the Security Council was simultaneously seized of the question. It considered that: ‘The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.’¹⁵⁸
- 74 Exactly like judgments,¹⁵⁹ the Court’s binding orders may include exhortatory statements without binding force for the parties to the dispute. This also remains true for orders indicating interim measures. In *LaGrand*, the Court noted that its Order of 3 March 1999¹⁶⁰ ‘was not a mere exhortation’¹⁶¹—*a contrario*, it *could* have been just that.¹⁶² And it is not unusual for interim orders to make recommendations to the parties which, by their own wording, clearly do not bind them.¹⁶³

¹⁵⁰ Art. 48 of the Statute.

¹⁵¹ Art. 41 of the Statute.

¹⁵² *LaGrand case*, *supra*, fn. 115, ICJ Reports (2001), pp. 466, 506 (para. 109).

¹⁵³ Cf. Sørensen (1946), p. 53.

¹⁵⁴ *Serbian Loans case*, *supra*, fn. 114, PCIJ, Series A, No. 20, p. 15.

¹⁵⁵ *Free Zones case*, *supra*, fn. 139, Second Phase, PCIJ, Series A, No. 24, p. 15; cf. also pp. 10–11, 13 and 14, as well as the Court’s Order of 19 August 1929 in the same case: Series A, No. 22, pp. 12–13.

¹⁵⁶ *Ibid.*, Series A, No. 24, p. 38; and cf. also p. 39.

¹⁵⁷ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1984), pp. 392, 435 (para. 95).

¹⁵⁸ (*Bosnian*) *Genocide case*, *supra*, fn. 93, Provisional Measures, Order of 8 April 1993, ICJ Reports (1993), pp. 3, 19 (para. 33); and cf. also *Armed Activities case (DRC/Uganda)*, *supra*, fn. 132, Provisional Measures, ICJ Reports (2000), pp. 111, 126 (para. 36).

¹⁵⁹ Cf. *supra*, MN 68.

¹⁶⁰ *LaGrand case*, *supra*, fn. 115, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq.*

¹⁶¹ *Ibid.*, ICJ Reports (2001), pp. 466, 506 (para. 110).

¹⁶² Interestingly, while, in the past, when it included ‘indications’ in view of the non-aggravation of the dispute, the Court used a rather soft language (in particular by using the conditional [cf. *Land and Maritime Boundary case*, *supra*, fn. 92, Provisional Measures, ICJ Reports (1996), pp. 13, 24–5 (para. 49); cf. also *infra*, fn. 163]), it has now recourse to a stronger terminology; cf. *Avena case*, *supra*, fn. 115, ICJ Reports (2003), pp. 77, 91–2 (para. 59); ‘Both Parties *shall* refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve’ (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia/Thailand), Provisional Measures, Order of 18 July 2011, available at <<http://www.icj-cij.org>>, paras. 69–74).

¹⁶³ In its orders of 2 June 1999, the Court noted that, in the context described, ‘the parties should take care not to aggravate or extend the dispute’ (*Legality of the Use of Force (Yugoslavia/Belgium)*, ICJ Reports

II. ‘... in accordance with international law’

According to the usual analysis,¹⁶⁴ the two paragraphs of Art. 38 can be seen as setting out a general principle—according to which the Court applies exclusively public international law (para. 1)—and an exception: when the parties so agree, it can decide *ex aequo et bono* (para. 2). This analysis presupposes that, in the framework of para. 2, the Court is authorized to depart from a strict application of the rules and principles of international law. This is indeed the case. 75

1. *The Principle: International Law as the Only Basis for the Court’s Decision*

One of the main criticisms of Art. 38 is its incompleteness.¹⁶⁵ This is certainly well founded if one considers the four sub-paragraphs of para. 1 as a comprehensive list of the sources of international law: this list *is* incomplete and, as time has passed, its *lacunae* have become more and more apparent. However, this is of limited importance. The enumeration in para. 1 is not intended to be exhaustive and the general reference to international law in the opening sentence suffices to enable the Court to have recourse to other sources of international law whenever it deems this necessary; moreover, in practice, Art. 38, while a useful directive, has not prevented the Court from deciding on the basis of other sources of international law, the theory of which it has greatly advanced. At the same time, the Court has taken advantage of Art. 38 to clarify the frontiers of the sources of international law, beyond which it does not venture. 76

a) A Non-Exhaustive Description of What International Law Is

Scholars usually describe Art. 38, para. 1, as listing the ‘sources’ of international law¹⁶⁶ and this is the way this provision has been understood by the Court itself, which has, however, not entered into the nice—but rather vain—distinction, sometimes made in doctrine, between sources of international law and sources of international obligations. 77

aa) *A Guide to the ‘Sources’ of International Law*

The Court has not been mistaken: what para. 1 of Art. 38 does is to list ‘formal’¹⁶⁷ sources of international law, *i.e.* the manifestations¹⁶⁸ of the rights and obligations of 78

(1999), pp. 124, 140, [para. 49] and *cf.* also para. 48). It is interesting to note that such a step was taken in all ten cases submitted to the Court, including the two cases where the Court decided to remove the case from the list (*ibid.* [Yugoslavia/Spain], pp. 761, 773 [paras. 37–38] and *ibid.* [Yugoslavia/United States of America], pp. 916, 925 [paras. 31–32]).

¹⁶⁴ *Cf. e.g.* Jennings, Sir. R.Y./Watts, Sir. A., *Oppenheim’s International Law* (9th edn., 1992), vol. I/1, p. 44; Rousseau, *supra*, fn. 74, p. 59; Shaw, M.N., *Public International Law* (6th edn., 2008), pp. 70–1; Daillier, P./Forteau, M./Pellet, A., *Droit international public (Nguyen Quoc Dinh)* (8th edn., 2009), pp. 1003–4.

¹⁶⁵ *Cf. infra*, MN 81.

¹⁶⁶ As has been noted: ‘When discussing the problem of the “sources” of international law, most [international lawyers] begin their argument by referring to Art. 38 of the ICJ Statute’ (Onuma, pp. 191, 195). Onuma himself strongly (and, in the view of the present writer, excessively) criticizes this classical approach (*ibid.*, pp. 191–212, especially at pp. 195–6 or 200). T. Franck stresses that Art. 38 does not appear as a catalogue of sources of international law, but rather as a ‘choice of laws clause’ (*The Power of Legitimacy among Nations* (1990), p. 190).

¹⁶⁷ On the distinction between formal and material sources *cf. infra*, MN 111 *et seq.*

¹⁶⁸ The manifestations—and certainly not, as has been written, ‘the end-product’ of the creative factors ‘operating through the creative process’ (McWhinney, *The World Court*, p. 6; McWhinney, in *Essays Roberto Ago*, pp. 341, 346): this understanding is based on a serious confusion between the very different notions of ‘sources’ on the one hand, and ‘norms’ on the other. As noted by R. Kolb, ‘actively speaking, a source determines the means of *creating* the law; passively speaking, it indicates the place *where to find* the law’

79 States, on which it can base its decisions to settle the disputes submitted to it. As noted above,¹⁶⁹ on several occasions, both the present Court and its predecessor have referred to Art. 38, para. 1 in order to show that they were bound to resort to the sources enumerated therein:

- In the *Continental Shelf case* (Tunisia/Libya), the ICJ recalled that: ‘While the Court is, of course, bound to have regard to all the legal sources specified in Art. 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation [of the area of continental shelf], it is also bound, in accordance with paragraph 1 (a) of that Art., to apply the provisions of the Special Agreement.’¹⁷⁰
- In the *Gulf of Maine case*, the Chamber indicated that, for ascertaining ‘the principles and rules of international law which in general govern the subject of maritime delimitation’, ‘its reasoning must obviously begin by referring to Art. 38, para. 1, of the Statute of the Court’, in particular ‘to conventions (Art. 38, paragraph 1 (a)) and international custom (para. 1 (b)), to the definition of which the judicial decisions (para. 1 (d)) either of the Court or of arbitration tribunals have already made a substantial contribution’.¹⁷¹
- In *Maritime Delimitation in the Area between Greenland and Jan Mayen*, it again turned to ‘the sources listed in Art. 38 of the Statute of the Court’, which it ‘must consider’, as the basis of ‘the law applicable to the fishery zone’.¹⁷²
- In the *Serbian Loans case*, the PCIJ stated that ‘Art. 38 of the Statute cannot be regarded as excluding the possibility of the Court’s dealing with disputes which do not require the application of international law’,¹⁷³ while
- in the *South-West Africa cases*, the present Court declared itself unable ‘to regard [the notion of *actio popularis*] as imported by the “general principles of law” referred to in Art. 38, paragraph 1 (c), of its Statute’.¹⁷⁴
- In *Nicaragua*, it recalled that it is: ‘Bound ... by Art. 38 of its Statute to apply, *inter alia*, international custom “as evidence of a general practice accepted as law”’.¹⁷⁵
- In the *Land, Island and Maritime Frontier Dispute*, the Court interpreted the ‘reference [in the *compromis*] to the rules of international law and to the “first

(‘Principles as Sources of International Law (with Special Reference to Good Faith)’, *NILR* LIII [2006], pp. 3–4, emphasis in the text). For further discussion *cf. infra*, MN 84–86 and 282.

¹⁶⁹ MN 65.

¹⁷⁰ *Continental Shelf case* (Tunisia/Libya), ICJ Reports (1982), pp. 18, 37 (para. 23). The special agreement required the Court to state ‘the principles and rules of international law [which] may be applied for the delimitation of the area of the continental shelf’. This formula was reproduced in the Chamber’s judgment in the *Frontier Dispute case* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 575 (para. 42). *Cf. also Kasikili/Sedudu Island, supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1102 (para. 93).

¹⁷¹ *Gulf of Maine case, supra*, fn. 92, ICJ Reports (1984), pp. 246, 290–1 (para. 83).

¹⁷² *Jan Mayen case, supra*, fn. 92, ICJ Reports (1993), pp. 38, 61 (para. 52).

¹⁷³ *Serbian Loans case, supra*, fn. 114, PCIJ, Series A, No. 20, p. 20.

¹⁷⁴ *South West Africa cases, supra*, fn. 115, ICJ Reports (1966), pp. 6, 47 (para. 88). In the *North Sea Continental Shelf cases*, the Court referred to the contentions of Germany referring to Art. 38, para. 1 (c) (and not to para. 2), *supra*, fn. 115, ICJ Reports (1969), pp. 3, 21 (para. 17). In *Avena*, the Court did not enter into a detailed examination ‘of the merits of the contention advanced by Mexico that the “exclusionary rule” is “a general principle of law under Art. 38(1) (c) of the ... Statute” of the Court’; *supra*, fn. 115, ICJ Reports (2004), pp. 12, 61 (para. 127). For other references to Art. 38, para. 2 *cf. infra*, MN 157–175.

¹⁷⁵ *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 14, 98 (para. 187).

paragraph” of Art. 38 [as obviously excluding] the possibility of any decision *ex aequo et bono*.¹⁷⁶

- In *Kasikili/Sedudu Island*, the Court based itself on the Special Agreement between the Parties (which expressly referred to Art. 38, para. 1) to conclude ‘that the Parties had no intention of confining the rules and principles of law applicable in this case solely to the rules and principles of international law relating to treaty interpretation’¹⁷⁷; and,
- In the case concerning *Jurisdictional Immunities of the State*, the Court noted that it ‘must determine, in accordance with Art. 38 (1) (b) of its Statute, the existence of “international custom, as evidence of a general practice accepted as law” conferring immunity on States and, if so, what is the scope and extent of that immunity’.¹⁷⁸

There is no doubt that the Court must abide by its Statute, of which Art. 38 forms part.¹⁷⁹ Indeed, ‘Art. 38 cannot itself be creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself’.¹⁸⁰ This provision is nevertheless ‘authoritative generally because it reflects state practice.’¹⁸¹ In this respect, it can be seen as ‘déclaratoire [du droit international général] en matière de sources’.¹⁸²

Such a view has been challenged on several grounds:

- the drafting of Art. 38 is defective;¹⁸³
- the list of sources given in Art. 38 is ‘truncated’¹⁸⁴ and/or outmoded;¹⁸⁵

¹⁷⁶ *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 390–1 (para. 47).

¹⁷⁷ *Kasikili/Sedudu Island case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1102 (para. 93).

¹⁷⁸ *Jurisdictional Immunities case*, *supra*, fn. 115, para. 55.

¹⁷⁹ For a similar view *cf. e.g.* Fitzmaurice (1958), pp. 153, 161–8 and 175; Charney, pp. 171, 174; Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 379; Mendelson (1996), pp. 63, 88; or Shahabuddeen, p. 83.

¹⁸⁰ Jennings/Watts, *supra*, fn. 164, p. 24. *Cf.* also Fitzmaurice (1958), pp. 153, 176: ‘Art. 38 of the Statute of the International Court of Justice is not, technically, an abstract statement of what the sources of international law in fact are, but a standing directive to the Court (analogous to any corresponding provisions of a *compromis* in a particular case) as to what it is to apply in deciding cases brought before it.’ *Cf.* also: d’Aspremont, J., *Formalism and the Sources of International Law—A Theory of the Ascertainment of Legal Rules* (2011), p. 149: ‘Art. 38 has never been more than a provision that modestly aims to define the law applicable by the International Court of Justice’; Murphy, J.F., *The Evolving Dimensions of International Law: Hard Choices for the World Community* (2010), p. 148: ‘Art. 38 of the Statute of the International Court of Justice is intended simply to guide the Court in its proceedings ...’; Verhoeven, J., ‘Considérations sur ce qui est commun: cours général de droit international public’, *Rec. des Cours* 334 (2008-I), p. 109: ‘L’Art. 38 a pour seul objet de donner à un juge des indications sur le droit qu’il est appelé à appliquer’; Pauwelyn, J., *Conflict of Norms in Public International Law—How WTO Law Relates to other Rules of International Law* (2003), p. 90; or Kennedy, who notes however: ‘It [Art. 38] has been taken as a convenient catalog of international legal sources generally, and as such, has been the starting point for most discussion in this area’ (‘The Sources of International Law’, *American University Journal of international Law & Politics* 2 [1987], p. 2).

¹⁸¹ Jennings/Watts, *supra*, fn. 164, p. 24.

¹⁸² Abi-Saab, ‘Les sources du droit international: essai de déconstruction’, in *International Law in an Evolving World—Liber Amicorum Jiménez de Aréchaga* (1994), pp. 29–49, p. 36. *Cf.* also the rather confusing remark by Sir Gerald Fitzmaurice: ‘Art. 38 is the formal source of what the Court has to *apply*, and clearly *reflects* an abstract view of what the sources of international law in general are’ ([1958], pp. 153, 173—emphasis in the original text).

¹⁸³ *Cf.* in particular the harsh criticism by Sir Gerald Fitzmaurice (1958), pp. 153, 173–5; and further Kopelmanas (1936), *supra*, fn. 21, p. 292.

¹⁸⁴ Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 379; *cf.* also *e.g.* Abi-Saab (1994), *supra*, fn. 182, pp. 29–49, pp. 35–6; or Fitzmaurice (1958), pp. 153, 161.

¹⁸⁵ *Cf. e.g.* Onuma, pp. 191–212, especially at pp. 201–3, or Suy, E., ‘Unilateral Acts of States as a Source of International Law: Some New Thoughts and Frustrations’, in *Droit du pouvoir, pouvoir du droit—Mélanges offerts à Jean Salmon* (2008), p. 631.

- it is abusively formalistic;¹⁸⁶ and
- it ignores the gradual formation of the rules of law through a law-making process.¹⁸⁷

- 82 In the abstract, each of these criticisms, and certainly the last one, has its own merit, at least from the perspective of a doctrinal analysis of the sources of international law.¹⁸⁸ However, with all due respect, they are misplaced when Art. 38 is seen in its context and, in any case, in the light of the flexible approach followed by the Court. As has been aptly explained, ‘the pertinent inquiry [with respect to Art. 38] is not its quality as doctrinal exposition but its value as a tool. From this aspect certain of the criticisms are not apropos’.¹⁸⁹ And further: ‘Unsatisfactory as the formulation may be thought, the meaning is reasonably clear.’¹⁹⁰ Indeed, as Professor Jonathan Charney has written, ‘Art. 38 is open to interpretation and evolution’, but, in contrast to what he proceeds to allege, this is not a ‘limitation’.¹⁹¹ On the contrary, its openness shows the malleability and flexibility of this provision,¹⁹² and the Court has met no difficulty in interpreting and applying Art. 38 in the light of the evolution of international relations and of international law. As was noted by Basdevant in his Report to the San Francisco Conference in 1945, Art. 38 ‘has given rise to more controversies in doctrine than in practice’.¹⁹³ And it is certainly true that, as aptly explained by Paulsson, ‘the judicious application of evolving sources of law is at the heart of the process of building an international system where perceptions of legitimacy are often more important than the elusive “proof” of abstract legal propositions’.¹⁹⁴
- 83 In short, ‘Article 38(1) has not caused any serious difficulties in its purpose of providing the Court a basis for decision. A reasonable number of flaws have been detected by commentators in its rational basis, method of organization, and mode of expression—none of which have hampered the Court’.¹⁹⁵

¹⁸⁶ Cf. e.g. McWhinney, *The World Court*, pp. 2–3; McWhinney, in *Essays Roberto Ago*.

¹⁸⁷ Cf. the illuminating remarks by Professeur Georges Abi-Saab, who rightly notes that ‘le droit international, comme tout droit, ... ne surgit pas toujours dans l’univers juridique par un ‘big bang’. Dans la plupart des cas, il s’agit d’une croissance progressive et imperceptible’ ([1994], *supra*, fn. 182, pp. 29–49, pp. 47–8).

¹⁸⁸ For a general defence of the classical theory of sources as reflected in Art. 38 cf. Monaco, pp. 517–29; and also Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 3–5.

¹⁸⁹ Kearney, pp. 610, 697.

¹⁹⁰ Shahabuddeen, p. 80; and cf. also Judge de Castro’s Sep. Op. appended to the Court’s judgment in *Icelandic Fisheries case* (United Kingdom/Iceland), *supra*, fn. 129, ICJ Reports (1974), pp. 72, 100: ‘it does appear possible to overcome the difficulty resulting from the unfortunate drafting of the Statute’.

¹⁹¹ Charney, pp. 171, 174.

¹⁹² Cf. e.g. Paulsson, J., ‘International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law’, in ICCA congress series no. 13, *International Arbitration 2006: Back to Basics?* 879 (2007), p. 883: ‘Art. 38 has never been immutable ...’; or Pauwelyn, *supra*, fn. 180, p. 90. Professor Charney himself accepts that ‘the meaning of Art. 38 is not fixed, but it will continue to evolve as the international community changes its understanding of the doctrine of sources’ (Charney, pp. 175–6). Cf. also Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 379. Ironically, the critics of Art. 38 themselves note the harmless nature of their criticisms.

¹⁹³ Cf. *supra*, MN 45.

¹⁹⁴ Paulsson, *supra*, fn. 192, pp. 885 *et seq.*

¹⁹⁵ Kearney, pp. 610, 707; cf. also Thirlway, ‘Law and Procedure, Parts One and Two’, *BYIL* 76 (2005), p. 77. As also noted by Sir Michael Wood: ‘There may, so it is said, be other and more varied sources of the law. yet while no one would deny the great changes, it is by no means clear that they require any fundamental rethinking of the sources of international law’ (What Is Public International Law? The Need for Clarity about Sources’, *Asian JIL* 1 [2011], p. 210). Even Professor Onuma concedes that Art. 38 ‘is still useful as a clue to the identification of the binding norms of international law’ (p. 202). As noted by Ambassador Shabtai Rosenne: ‘The sparsity of direct jurisprudence on Art. 38 illustrates its satisfactory operation’ (*Law and Practice*, vol. III, p. 1539).

bb) Sources of International Law and Sources of Obligations

In this regard, a further point must nevertheless be briefly discussed. In his celebrated article of 1958 devoted to ‘Some Problems Regarding the Formal Sources of International Law’, Sir Gerald Fitzmaurice argued that Art. 38 could not be seen as listing the ‘sources’ of international law since treaties at least were sources of obligations, not of law. In his view: ‘Even so-called “law making” treaties do not really create law in the proper sense of the term ... , i.e. as meaning rules of general validity for and application to the subjects of the legal system, not arising from particular obligations or undertakings on their part.’¹⁹⁶ 84

In reality, this last point is a pure *petitio principii*: why would ‘law’ necessarily be limited to ‘rules of general validity’? As Art. 38 makes clear, States’ obligations (and their correlative rights)¹⁹⁷ may arise from ‘general’ as well as from ‘particular’ conventions, and the same holds true in respect to custom.¹⁹⁸ Moreover, whether deriving from particular undertakings on the part of the obliged States or international organizations, or having any other origin, legal obligations are part of international law, and certainly of that part of international law to be applied by the Court by virtue of Art. 38.¹⁹⁹ ‘les différends soumis à un tribunal portent par définition sur les droits et obligations (subjectifs) des justiciables: mais ces droits et obligations ne peuvent exister et être revendiqués juridiquement que grâce aux règles générales qui les fondent en droit’.²⁰⁰ 85

For this same reason, *for the purpose of Art. 38*, there is no point in making the nice legal distinction between ‘norms of conduct’ (*Handlungsregel*) and ‘norms of adjudication’ (*Entscheidungsnorm*)²⁰¹: the distinction might be fruitful in ‘general’ international law, but it is meaningless as regards the judicial function. And, indeed, it has not prevented the Court from expressly referring to international conventions as a ‘source’ of international law.²⁰² 86

¹⁹⁶ Fitzmaurice (1958), pp. 153, 157. R. Kolb takes up the distinction and applies it to general principles and concludes that they can operate as a source of law or of obligation, *supra*, fn. 168, pp. 11–13).

¹⁹⁷ Rights and obligations are all that law (at least the law to be applied by the Court) is about.

¹⁹⁸ *Cf. infra*, MN 202 *et seq.* and 242 *et seq.* As noted by Pauwelyn (*supra*, fn. 180), the opposition of positions between two schools of thought in this respect is reminiscent of ‘the divide between, civil law and common law. For lawyers with a civil law background ... , statutes (hence, in international law, treaties) form the core of a legal system. For common lawyers, on the contrary, the common law (hence, in international law, custom) is more important’ (p. 157).

¹⁹⁹ Sir Gerald Fitzmaurice attributes the so-called mistake he denounces to a confusion between treaties and statutes (Fitzmaurice [1958], pp. 153, 157); but it can be wondered whether his own position is not based on too exclusive a fixation on the idea that ‘in the domestic field, [legislation] is the formal source of law par excellence’ (p. 160): indeed, ‘in the international field, there is nothing which quite corresponds’ to legislation (*ibid.*); the most proximate substitute is treaty law.

²⁰⁰ Abi-Saab (1994), *supra*, fn. 182, pp. 29–49, pp. 39–40. For other criticisms of Fitzmaurice’s distinction *cf. e.g.* Thirlway, H., *International Customary Law and Codification* (1972), pp. 25–7; Thirlway, H., *Rec. des Cours* 294 (2002), pp. 261, 321–34—but see this author’s comments of the *Gulf of Maine case*, in *BYIL* 2005, where he elaborates on Fitzmaurice’s distinction ([1958], pp. 82–3); Mendelson, M., ‘Are Treaties Merely a Source of Obligation?’ in *Perestroika and International Law* (Butler, W.E., ed., 1990), pp. 81 *et seq.*

²⁰¹ *Cf. e.g.* Onuma, pp. 191, 195–203.

²⁰² *Cf. supra*, MN 79; and further *infra*, MN 178 *et seq.* Contrast, however, Thirlway’s analysis of the *Gulf of Maine case*, in which he shows that the Chamber’s judgment ‘betrays ... a highly academic approach to judicial law-finding, and an unadmitted, and perhaps unconscious, distinction between treaties as sources of law and treaties as sources of obligations’ (Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 [1990], pp. 1, 22, and more generally, pp. 21–5).

b) Other Sources of International Law—The *Lacunae* of Art. 38

- 87 As has been stressed again and again: “To a certain extent every legal system is “open-textured”. This “fuzziness” of the law, however, is far more pronounced in the international legal system.”²⁰³ Yet, even if it is ‘fuzzy’; this does not mean that international law is incomplete, since the two questions are distinct.
- 88 This commentary is not the proper place to re-examine the endless doctrinal debates about the *lacunae* of international law in general, usually coupled²⁰⁴ with the question of *non liquet*.²⁰⁵ For present purposes, suffice it to note that, while the Court, in the framework of its advisory function, has, very clearly at least on one occasion, observed that ‘in view of the present state of international law viewed as a whole, ... [it could] not reach a definitive conclusion’²⁰⁶ with respect to one aspect of the question asked, it has never done so in a contentious case,²⁰⁷ even though nothing in its Statute expressly precludes it from pronouncing a *non liquet*.²⁰⁸ A contrary attitude would hardly be compatible with the Court’s judicial character.

²⁰³ Weil (1997), *supra*, fn. 107, pp. 105–14, p. 113. Cf. also Anand, R.P., ‘The International Court As a Legislator’, *IJIL* 35 (1995), pp. 119–26, pp. 119–21.

²⁰⁴ While related, both questions are distinct: even if an international tribunal were to find that law does not provide an answer to a given legal question, it is intellectually tenable that it should, nevertheless, decide on another basis such as equity (in the continental meaning of the term) or its sense of natural justice. This possibility will be discussed later (paras. 161–172), inasmuch as it concerns the ICJ.

²⁰⁵ Among a vast legal literature, *cf.* in particular: Stone, J., ‘*Non Liquet* and the Function of Law in the International Community’, *BYIL* 35 (1959), pp. 125–61 (a reply to Sir Hersch Lauterpacht’s ‘Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Legal Order’ in *Symbolae Verzijl* [van Asbeck, F.M.*et al.*, eds., 1958], pp. 196–221); Siorat, L., *Le problème des lacunes en droit international—Contribution à l’étude des sources du droit et de la fonction judiciaire* (1958); Salmon, J., ‘Quelques observations sur les lacunes en droit international public’, *RBDI* 3 (1967), pp. 440–58; or Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 77–84. For more recent discussions, mainly in the light of the ICJ’s 1996 advisory opinion on *Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 226 *et seq.*, *cf. e.g.* Salmon (1999), *supra*, fn. 107, pp. 197–214 or Weil (1997), *supra*, fn. 107, pp. 105–14.

²⁰⁶ *Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 263 (para. 97), 266 (para. 105E), and, on another point, p. 247 (para. 52). Cf. also *Reparation for Injuries in the Service of the United Nations*, ICJ Reports (1949), pp. 174, 185, where the Court affirmed that there was no priority between the State’s right of diplomatic protection and the organization’s right of functional protection: ‘In such a case, *there is no rule of law* which assigns priority to one or to the other, or which compels either the State or the Organization from bringing an international claim’ (emphasis added); *cf. also the dispositif, ibid.*, p. 188.

²⁰⁷ For a similar view *cf.* Diss. Op. Higgins, appended to the Court’s advisory opinion on *Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 583, 591–2 (paras. 36–38). It is true, however, that, in some cases, the Court has bypassed the question on the basis of a sometimes tortuous and debatable reasoning. A striking example is the judgment of 2 December 1963 in the *Northern Cameroons case*, *supra*, fn. 104, ICJ Reports (1963), pp. 15 *et seq.*; *cf. also* the judgment in *Maritime Delimitation and Territorial Questions* in which the Court noted that both international treaty law and customary law were ‘silent on the question whether low tide elevations can be considered to be “territory”’ (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar/Bahrain), Merits, ICJ Reports [2001], pp. 40, 101 [para. 205]); as noted by Thirlway, ‘the Court was enabled to avoid a *non liquet* by (in effect) rejecting the claims of both sides’ (Thirlway, ‘Law and Practice, Part One and Two’, *BYIL* 76 [2005], p. 46). The *Haya de la Torre case* is probably the contentious case in which the Court came nearest to *non liquet*: ‘A choice between [the various courses by which the asylum may be terminated] could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court’s judicial function to make such a choice’ (*supra*, fn. 121, ICJ Reports [1951], pp. 71, 78–9).

²⁰⁸ For the discussions in the Committee of Jurists of 1920 *cf. supra*, MN 27–29. Formal provisions excluding a *non liquet* are extremely rare in international law, but *cf.* Art. 12, para. 2 of the 1953 ILC Draft Convention on Arbitral Procedure, *supra*, fn. 80.

In order to avoid a finding of *non liquet*, the Court has several means at its disposal.²⁰⁹ 89
It can:

- decide *ex aequo et bono*, under the very strict condition imposed by para. 2 of Art. 38;²¹⁰
- shape the required (but missing) rules itself—something the Court does, but never avowedly;²¹¹
- bring to its limits the ‘productivity’ of the sources listed in Art. 38,²¹² in particular by applying the general principles of law mentioned under para. 1 (c);²¹³ or
- have recourse to other sources.

If one accepts the simplest—and the most operational, at least for the purpose of the Court’s function—definition of a source of law,²¹⁴ there can be no doubt that the list of Art. 38 is incomplete. Whether or not Art. 38, para. 1 was, when adopted, a complete list of the sources of international law then existing, there is no doubt that if new sources have appeared, or if new forms of processes of law-making have been recognized as such since then, ‘le fait qu’elles ne figurent pas dans l’article 38 ne saurait constituer en soi un obstacle à ce qu’elles soient traitées comme telles’;²¹⁵ nor would this fact prevent the Court from having recourse to them since they are part of international law that the Court is bound to apply.²¹⁶ In practice, the Court does rely on manifestations of the rights and obligations of the subjects of international law concerned (*i.e.* the parties to the disputes submitted to it or the bodies requesting advisory opinions) other than the sources listed in this provision—at least unilateral acts of States and international organizations. Others have advocated the recognition of other sources to be applied by the Court, but the role of these ‘quasi-sources’ in the Court’s reasoning is at least debatable. 90

aa) Unilateral Acts of States

In its famous (or infamous) judgments of 1974 in the *Nuclear Tests cases*, the Court, in an unambiguous (if not devoid of difficulties) *dictum*, stated: 91

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.²¹⁷

²⁰⁹ For another inventory of these means *cf.* Weil (1997), *supra*, fn. 107, pp. 105–14, pp. 106–9; and also Lauterpacht, in *Symbolae Verzijl*, *supra*, fn. 205, *passim*.

²¹⁰ *Cf. infra*, MN 157–175.

²¹¹ *Cf. infra*, MN 322–334.

²¹² *Cf.* Anzilotti, D., *Cours de droit international* (trad. Gidel [1929], re-edited 1999), p. 117.

²¹³ *Cf. infra*, MN 250–269.

²¹⁴ MN 79.

²¹⁵ *Abi-Saab* (1994), *supra*, fn. 182, pp. 29–49, p. 36.

²¹⁶ *Cf. supra*, MN 79.

²¹⁷ *Nuclear Tests cases*, *supra*, fn. 115, ICJ Reports (1974), pp. 253, 267(para. 43), and pp. 457, 472 (para. 46). For a previous similar statement *cf.* Judge Ammoun’s Sep. Op. appended to the judgment of 20 February 1969 in the *North Sea Continental Shelf cases*, *supra*, fn. 115, which criticized the judgment for not taking ‘into account a well-settled doctrine that a State may be bound by a unilateral act’ (ICJ Reports [1969], pp. 100, 120).

- 92 Thus the Court ended a long controversy that had arisen after the 1933 judgment of its predecessor in the *Legal Status of Eastern Greenland case* where the PCIJ found:

that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.²¹⁸

Although the PCIJ had declared that it was ‘unable to regard the Ihlen declaration of 22nd July, 1919, otherwise than as unconditional and definitive’,²¹⁹ doubts as to the legal nature of that declaration remained since it had been made by the Norwegian Minister of Foreign Affairs in the framework of more general negotiations:

The Court considers it beyond all dispute that *a reply* of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.²²⁰

Moreover, there was in this reply an element of *quid pro quo* since Denmark, for its part, had made a similar declaration in regard to Norway’s claim over Spitzbergen.²²¹ For these reasons, it could be held that the declarations made by both States resulted in an agreement falling within the ambit of Art. 38, para. 1 of the Court’s Statute.²²²

- 93 The *dictum* in the *Nuclear Tests cases*, however, left no room for doubt:

An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.²²³

France thus was held to be bound not by a convention, even purely verbal, with Australia or New Zealand, but solely by its unilateral acts, as the Court again confirmed in its Order of 22 September 1995 on the *Request of New Zealand for an Examination of the Situation*.²²⁴ We clearly have here ‘a *servandum* ... without a *pactum*’,²²⁵ and the Court

²¹⁸ PCIJ, Series A/B, No. 53, p. 73.

²¹⁹ *Ibid.*, p. 71.

²²⁰ *Ibid.* (emphasis added).

²²¹ *Ibid.*, pp. 69–70. Cf. also Murphy, *supra*, fn. 180.

²²² This was the result reached by Judge Anzilotti in his dissenting opinion. While not considering that there existed an element of *do ut des* in the commitments undertaken by both countries in 1919 (*ibid.*, pp. 88–90), he held that ‘The outcome of all this is therefore an agreement, concluded between the Danish Minister at Christiania, on behalf of the Danish Government, and the Norwegian Minister for Foreign Affairs, on behalf of the Norwegian Government, by means of purely verbal declarations’ (*Legal Status of Eastern Greenland case, supra*, fn. 218, PCIJ, Series A/B, No. 53, p. 91). For a similar view cf. Bastid, S., *Les traités dans la vie internationale* (1985), p. 115; Seidl-Hohenveldern, I./Stein, T., *Völkerrecht* (10th edn., 2004), p. 44 (§ 176); Verhoeven, J., *Droit international public* (2000), p. 442. *Contra*: Jacqué, J.-P., *Éléments pour une théorie de l’acte juridique en droit international public* (1972), pp. 253–5; and cf. also Rousseau, *supra*, fn. 74, p. 419.

²²³ *Nuclear Tests cases, supra*, fn. 115, ICJ Reports (1974), pp. 253, 267 (para. 43), and pp. 457, 472 (para. 46) (emphasis added). For a careful comparison between *Eastern Greenland* and *Nuclear Tests* cf. Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 10–13.

²²⁴ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* (New Zealand/France), ICJ Reports (1995), pp. 288, 304–6 (paras. 55–66).

²²⁵ Thirlway, ‘Concepts, Principles, Rules and Analogies’, pp. 261, 340; and also Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 16.

postulates that *acta sunt servanda* in the same way as *pacta sunt servanda*, both general principles being based on the principle of good faith:

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.²²⁶

‘Of course’, as the ICJ made clear in its 1974 judgments:

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not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.²²⁷

On this basis, in various cases, the Court has had some opportunities to distinguish:

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- unilateral acts by which a State is legally bound on the one hand, from
- purely political commitments implying no legal obligations for its author on the other.

Only declarations belonging to the first category can be seen as ‘sources’ of the law to be applied by the Court²²⁸—and as a source distinct from the ‘international conventions’ mentioned in Art. 38, para. 1 (a).

As was noted by the ILC in the preamble to its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, ‘the question whether a unilateral behaviour by the State binds it in a given situation depends on the circumstances of the case’, and, ‘in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law’.²²⁹ Thus, in *Nicaragua*, the Court declared itself ‘unable to find anything in [various documents of the OAS or communications emanating from Nicaragua] from which it can be inferred that any legal undertaking was intended to exist’ and that it ‘cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections’.²³⁰ Likewise, in the case concerning *Armed Activities* between the DRC and Rwanda, the Court rejected the DRC’s contention that Rwanda had withdrawn its reservation to Art. IX of the Genocide Convention after having examined the ‘actual content as well as the circumstances’ in which a statement of

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²²⁶ *Nuclear Tests cases*, *supra*, fn. 115, ICJ Reports (1974), pp. 253, 268 (para. 46), and pp. 457, 473 (para. 49). For strong criticism of this reasoning *cf. e.g.* Rubin, A.-P., ‘The International Legal Effects of Unilateral Declarations’, *AJIL* 71 (1977), pp. 1–30, especially at pp. 9–10; Zoller, E., *La bonne foi en droit international public* (1977), pp. 340 *et seq.*; or Murphy, *supra*, fn. 180, pp. 31–3; but *cf.* also the convincing refutation of these criticisms by Sicaut, J.-D., ‘Du caractère obligatoire des engagements unilatéraux en droit international public’, *RGDIP* 85 (1977), pp. 633–88, especially at pp. 677–86.

²²⁷ *Nuclear Tests cases*, *supra*, fn. 115, ICJ Reports (1974), pp. 253, 267 (para. 44), and pp. 457, 472–3 (para. 47).

²²⁸ For an example *cf. infra*, MN 103. In its advisory opinion of 8 July 1996 on the *Nuclear Weapons case*, the Court mentioned the 1995 declarations of the five nuclear weapons States giving positive or negative assurances against the use of such weapons, but it did not draw any explicit legal consequence from these declarations (*supra*, fn. 107, ICJ Reports [1996], pp. 226, 251 [para. 59]).

²²⁹ ILC, Report on the Work of its 58th session (2006), General Assembly, Official Records, 61st Session, Supplement No. 10 (A/61/10), p. 368.

²³⁰ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 132 (para. 261). In his dissenting opinion, Judge Schwebel, however, treated Nicaragua’s declarations as legally binding instruments (*ibid.*, p. 274 [para. 19]).

the Rwandese Minister of Justice was made.²³¹ Similarly, in the *Frontier Dispute* between Burkina Faso and Mali, the Chamber of the Court, citing both the *Nuclear Tests* and *Nicaragua* cases, concluded that there was no reason to interpret a statement made by Mali's Head of State 'as a unilateral act with legal implications', for the curious reason that 'there was nothing to hinder the Parties' from binding themselves 'by the normal method: a formal agreement on the basis of reciprocity'.²³² It might be added that were this precedent to be followed, the potential impact of unilateral acts as a source to be applied by the Court would fade away.

- 97 However, it must also be noted that besides the rather exceptional situation where the Court applies unilateral acts as an autonomous source of rights and obligations of the parties to decide a dispute submitted to it, it has also drawn legal consequences from a wide range of unilateral acts or forms of behaviour of States which either affect the existence, validity or opposability of rights and obligations deriving from other sources,²³³ or which are themselves taken by virtue of rights or obligations deriving therefrom.²³⁴ A further example of these types of unilateral acts can be found in the declarations accepting the compulsory jurisdiction of the Court pursuant to Art. 36, para. 2.²³⁵ Equally,

²³¹ *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo/Rwanda), Judgment, ICJ Reports (2006), pp. 6, 28 (para. 49). Cf. also ILC, Guiding Principle 3: 'To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.' (*supra*, fn. 229).

²³² *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 554, 574 (para. 40).

²³³ Concerning the ratification of a treaty, which under Art. 2, para. 1 (b) VCLT is 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty', the ICJ considered: 'The ratification of a treaty which provides for ratification ... is an indispensable condition for bringing it into operation' (*Ambatielos* [Greece/United Kingdom], Preliminary Objections, ICJ Reports [1952], pp. 28, 43). Cf. also *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series A, No. 23, pp. 20–1. As for reservations to treaties cf. Pellet, A., 'Third Report on Reservations to Treaties', *ILC Yearbook* (1998-II) (Part One), p. 245 (para. 121); as well as the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Sir Humphrey Waldock attached to the Court's judgments of 20 December 1974 in the *Nuclear Tests cases, supra*, fn. 115, ICJ Reports (1974), pp. 312, 350 (para. 83). For acts relating to the termination or repudiation of a given treaty cf. *Gabčíkovo-Nagymaros case, supra*, fn. 143, ICJ Reports (1997), pp. 7, 62 (para. 98): 'The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty'. Unilateral acts have equally been considered as 'evidence of a general practice' constituting international custom: cf. e.g. *Interhandel* (Switzerland/United States of America), ICJ Reports (1959), pp. 6, 27; *Lotus case, supra*, fn. 128, PCIJ, Series A, No. 10, pp. 28–9.

²³⁴ This would, e.g., apply to delimitations of maritime zones, which, under certain circumstances and conditions, coastal States are entitled to decide unilaterally under international law. In the *Fisheries case*, the Court considered: 'Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law' ([United Kingdom/Norway], ICJ Reports [1951], pp. 116, 132); cf. also the judgment of 16 March 2001 on the *Maritime Delimitation and Territorial Questions case, supra*, fn. 207, ICJ Reports (2001), pp. 40, 103–4 (paras. 212–215). The Court has equally considered various types of State behaviours, e.g. declarations and communications made by State officials (cf. e.g. *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras/Nicaragua), ICJ Reports (1960), pp. 192, 210–13; *Temple of Preah Vihear* (Cambodia/Thailand), Merits, ICJ Reports (1962), pp. 6, 24 and 30–31) or judicial decisions (cf. e.g. the advisory opinion of 9 July 2004 on the *Wall case, supra*, fn. 104, ICJ Reports [2004], pp. 136, 176–7 [para. 100]).

²³⁵ However, as the Court explained in *Nicaragua*: 'In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration' (*supra*, fn. 115, Jurisdiction and Admissibility, ICJ Reports [1984], pp. 392, 418 [para. 60]). It is not the optional declaration in itself which establishes the compulsory jurisdiction of the Court in regard to a given State but Art. 36, para. 2 of the Statute (cf. Rosenne, *Law and Practice*, vol. II, pp. 793–6; Fitzmaurice, M., 'The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent

the consideration of municipal laws²³⁶ also has certain similarities with the question of unilateral acts.

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Another kind of unilateral act of States quite commonly taken into account by the Court are the statements made before it by the agents of the parties. In some instances, the Court is content merely to 'take note' of such declarations,²³⁷ which does not amount to much more than an indication of the perception of the factual situation.²³⁸ In other cases, it expressly indicates that it had 'no doubt as to the binding character of all these declarations' and draws express consequences from them.²³⁹ Only in this last situation can it be contended that the Court has perceived the statements in question as creating rights and obligations for the parties in dispute.

bb) Decisions of International Organizations

The decisions of international organizations are certainly less controversial as a source of the law to be applied by the Court than unilateral acts of States. The reason for this doctrinal toleration might lie in the fact that resolutions of organs of international organizations are rooted in the constituent instrument of the organization from which they draw

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Jurisprudence of the International Court of Justice', *Australian YIL* 20 [1999], pp. 127–59); Vicuña, F.O., 'The Legal Nature of the Optional Clause and the Right of a State to Withdraw a Declaration Accepting the Compulsory Jurisdiction of the International Court of Justice', in *Liber Amicorum Judge Shigeru Oda* (Ando, N./McWhinney, E./Wolfrum, R., eds., 2002), pp. 463–79; Kawano, M., 'The Optional Clause and the Administration of Justice by the Court', in *ibid.*, pp. 419–34; Merrills, J.G., 'Does The Optional Clause Still Matter?', in *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), pp. 431–54. For a more detailed treatment of the various issues raised by optional clause declarations cf. Tomuschat on Art. 36 MN 68 *et seq.*

²³⁶ Cf. *infra*, MN 117–139.

²³⁷ Cf. e.g. *East Timor* (Portugal/Australia), ICJ Reports (1995), pp. 90, 105–6 (para. 38); or *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 452 (para. 317), or *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica/Nicaragua), Provisional Measures, Order of 8 March 2011, available at <<http://www.icj-cij.org>>, para. 74.

²³⁸ To be compared with the recommendations to parties included in some judgments or advisory opinions: cf. *supra*, MN 68.

²³⁹ In the the *Mavrommatis case*, the British Agent made a statement according to which His Majesty's Government would not expropriate the concessions. The Court concluded: 'After this statement, the binding character of which is beyond question, the Court considers that henceforward it is quite impossible that the British or Palestine Governments should consent to comply with a request for the expropriation of M. Mavrommatis' Jerusalem concession' (*Mavrommatis Palestine Concessions* [Greece/United Kingdom], PCIJ, Series A, No. 5, p. 27). Cf. also the Judgment of 25 May 1926 on *Certain German Interests*, *supra*, fn. 125, PCIJ, Series A, No. 7, p. 13; as well as *ibid.*, pp. 58, 66, 71 and 72 (*dispositif*), where the Court drew the consequences from the statements in question. In the *Free Zones* case, 'having regard to the circumstances in which [a declaration of the Swiss representative had been] made, the Court' regarded 'it as binding on Switzerland' and expressly placed that declaration on record (*supra*, fn. 139, PCIJ, Series A/B, No. 46, pp. 170 and 172). Cf. also *LaGrand*, *supra*, fn. 115, ICJ Reports (2001), pp. 466, 514 (para. 127) and 516 (para. 128–6), where the Court, in the operative part of the judgment, reiterated that it 'took note' of certain statements made by the United States, and held that 'this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition'. In *Kasikili/Sedudu Island*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1106–8 (paras. 102–103) and p. 1108 (para. 104) too, the Court, on the basis of a joint communiqué of the parties, as explained by Bostwana at oral hearings, found that nationals and vessels of both parties 'shall enjoy equal national treatment'. Similarly, in its Order of 17 June 2003, the Court noted statements by the Agent and counsel from France, which it quoted *expressis verbis*, in support of its decision to dismiss the request for provisional measures in the case concerning *Certain Criminal Proceedings in France* (Republic of the Congo/France), ICJ Reports (2003), pp. 102, 109–10 (para. 33). In the same vein, cf. also *Pulp Mills on the River Uruguay* (Argentina/Uruguay), Provisional Measures, ICJ Reports (2006), pp. 113, 134 (para. 84), ICJ Reports (2010), pp. 14 *et seq.* or *Questions relating to the Obligation to Prosecute or Extradite* (Belgium/Senegal), ICJ Reports (2009), pp. 139, 155 (para. 72).

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their binding force.²⁴⁰ However, such reasoning is in itself unpersuasive: ‘the fact that an act is done under an authority contained in an instrument which is itself a treaty ... does not per se give the resulting act a treaty character’.²⁴¹ Moreover, it is terribly abstract and does not square with reality: certainly, a State against which an action is taken by, e.g., the Security Council under Art. 41 or 42 of the Charter, cannot be deemed to have ‘agreed’ to that measure.

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According to *Oppenheim’s 9th Edition*,

The fact that the International Court of Justice, in its numerous judgments and opinions relating to international organizations, has always been able, without remarking upon the incompleteness of Art. 38, to dispose of the questions arising for decision, is a strong argument for suggesting that their activities are for the moment at least still properly regarded as coming within the scope of the traditional sources of international law.²⁴²

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This is hardly convincing either: the Court also did not mention Art. 38 when defining unilateral acts of States as a distinct source of law to be applied by it, including in its judgment of 1974.²⁴³

The most striking example of an organ having the power to make decisions is the Security Council whose resolutions, when adopted in accordance with Arts. 24 and 25 of the Charter, are ‘binding on all States Members of the United Nations, which are under obligation to accept and carry them out’.²⁴⁴ As the Court observed:

when the Security Council adopts a decision under Art. 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.²⁴⁵

In its Orders of 14 April 1992 on Libya’s requests for the indication of provisional measures in the *Lockerbie cases*, the Court went as far as to consider that:

both Libya and the [United Kingdom] [United States], as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Art. 25

²⁴⁰ For such a view cf. e.g. Suy, E., *Les actes juridiques unilatéraux en droit international public* (1962), pp. 30–2.

²⁴¹ Joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice appended to the judgment of 21 December 1962 in the *South West Africa cases*, *supra*, fn. 115, Preliminary Objections, ICJ Reports (1962), pp. 465, 491. As a convincing example, the learned judges referred to the budget of the United Nations, which is approved by the General Assembly by virtue of Art. 17 of the Charter, but cannot be said to be a treaty. For similar views cf. e.g. Tammes, A.J.P., ‘Decisions of International Organs as a Source of International Law’, *Rec. des Cours* 94 (1958-II), pp. 265–363, p. 269, Skubiszewski, K., ‘A New Source of the Law of Nations: Resolutions of International Organizations’, *Recueil d’études de droit international en hommage à P. Guggenheim* (IUHEI, ed., 1968), pp. 508–20, p. 519; and Jacqué (197), *supra*, fn. 222, pp. 322–5.

²⁴² Jennings/Watts, *supra*, fn. 164, p. 46.

²⁴³ Cf. *supra*, MN 91 and 93–94.

²⁴⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), pp. 16, 53 (para. 115). Cf. also *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ Reports (1962), pp. 151, 163: ‘it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII’ (also quoted in the advisory opinion of 9 July 2004 on the *Wall case*, *supra*, fn. 104, ICJ Reports [2004], pp. 136, 148 [para. 26]). Cf. also *Opinion of 22 July 2010*, available at <<http://www.icj-cij.org>>, paras. 78 and 117.

²⁴⁵ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 54 (para. 116).

of the Charter [... and that,] in accordance with Art. 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.²⁴⁶

Since the case was removed from the list after the parties' agreement to discontinue the proceedings,²⁴⁷ the Court had no occasion to take a final position on the issue. However, in the advisory opinion on Kosovo, the Court firmly declares its right to interpret the decisions of the Security Council:

in the view of the Court, the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions.²⁴⁸

The fight against terrorism has given birth to a form of general law-making²⁴⁹ by the Security Council, which goes far beyond its previous activity, limited to a particular crisis, circumscribed geographically and temporarily.²⁵⁰ This exercise of legislative powers by the

²⁴⁶ *Questions Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya/United Kingdom) (Libyan Arab Jamahiriya/United States of America), ICJ Reports (1992), pp. 3, 15 (para. 39) and pp. 114, 126 (para. 42). However, the Court considered that at that stage it was not 'called upon to determine definitely the legal effect of Security Council resolution 748 (1992)' (which was a decision adopted under Chapter VII of the Charter) (*ibid.*, p. 15 [para. 40] and p. 126 [para. 43]). This commentary is not the place to discuss the power of the Court to control the legality of the resolutions of the Security Council and the General Assembly but it is the present writer's considered view that, had the proceedings continued, the Court ought to have appreciated the validity of Resolution 748 (1992) and, if it had found it valid—which it probably was—it should have considered that it enjoyed the 'super-legality' value deriving from Art. 103. On these questions *cf. e.g.* Franck, T.M., 'The Powers of Appreciation: Who Is The Ultimate Guardian of U.N. Legality?', *AJIL* 86 (1992), pp. 519–23; Bedjaoui, M., *The New World Order and the Security Council: Testing the Legality of Its Acts* (1994); Pellet, A., 'Peut-on et doit-on contrôler les actions du Conseil de sécurité', in *Le chapitre VII de la Charte des Nations Unies. Colloque de Rennes* (Société française pour le droit international ed., 1995), pp. 221–38; Gill, T.D., 'Legal and Some Political Limitations of the U.N. Security Council to Exercise its Enforcement Power under Chapter VII of the Charter', *NYIL* 26 (1995), pp. 33–138. Arangio-Ruiz, G., 'The ICJ Statute, the Charter and Forms of Legality Review of Security Council Decisions', in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), pp. 41–64; Petculescu, I., 'The Review of the United Nations Security Council Decisions by the International Court of Justice', *NYIL* 52 (2005), pp. 167–95; Orakhelashvili, A., 'The Acts of the Security Council: Meaning and Standards of Review', *Max Planck UNYB* 11 (2007), pp. 143–95.

²⁴⁷ Orders of the President of the ICJ of 10 September 2003, ICJ Reports (2003), pp. 149 *et seq.* and pp. 153 *et seq.*

²⁴⁸ *Kosovo Declaration of Independence case*, *supra*, fn. 244, para. 46; *cf.* also the case law cited therein.

²⁴⁹ UN SC Res. 1373 (2001) and 1540 (2005) are considered as the topical examples of such a new form of legislation.

²⁵⁰ *Cf.* Abi-Saab, G., 'The Security Council Legibus Solutus? On the Legislative Forays of the Council' in *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (2011), pp. 23–44; Pellet, A., 'L'adaptation du droit international aux besoins changeants de la société internationale', *Rec. des Cours* 329 (2007), pp. 34–6; Rosand, E., 'The Security Council as Global Legislator: Ultra Vires or Ultra Innovative', *Fordham ILJ* 28 (2005), pp. 545–90; Talmon, S., 'The Security Council as World Legislature', *AJIL* 99 (1) (2005), pp. 175–93; Voefray, F., 'Le Conseil de sécurité de l'ONU: gouvernement mondial, législateur ou juge? Quelques réflexions sur les dangers de dérives', in *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international: Liber amicorum Lucius Caflisch* (2007), pp. 1195–209; Wood, Sir M., 'The Law of Treaties and the UN Security Council: Some Reflections', in *The Law of Treaties beyond the Vienna Convention* (Cannizzaro, E., ed., 2011), pp. 244–55.

Security Council is often described as problematic, since it bypasses the classical method of creation of obligations in international law, regardless of State consent or without the benefit of a normative practice, since, by virtue of Art. 103 of the Charter, it overrides other conventional obligations and since the possibility to challenge these kinds of resolution before a Court remains uncertain.²⁵¹ As for the General Assembly, it has been written that, since it 'formally has no general legislative function in public international law, Art. 38 makes no mention of its various textual outputs'.²⁵² However, there is no doubt that it is vested either explicitly or implicitly²⁵³ with the power to make binding decisions which are indisputably sources of the 'proper law' of the Organization and have been applied as such by the Court.²⁵⁴ Among those decisions, the adoption of the budget is especially important and it can be inferred from the 1962 advisory opinion on *Certain Expenses* that its implementation is compulsory for the member States as well as for the Organization itself.²⁵⁵ However, this is not the end of the question and it may be that, even outside any formal provision of the Charter, General Assembly resolutions have a binding character.

102 In *Namibia*, the Court stated that 'it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design'.²⁵⁶ This finding is not as obscure as it is sometimes said to be, if interpreted in context: it is the inescapable consequence of GA Res. 2145 (XX) which defined the termination of the mandate of South Africa over South West Africa as 'the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship'.²⁵⁷ However, this being so, it is doubtful that such a resolution is the source of the rights and obligations at stake: the General Assembly could put an end to the mandate because that mandate had been grossly violated by South Africa.²⁵⁸ Seen in this perspective, GA Res. 2145 (XX) was no more (nor less) the 'source' of the end of the mandate than a decision of a State terminating a treaty.

103 The same holds true for resolutions which, by themselves, are devoid of binding force, but which are accepted as binding by the addressees. As noted by the PCIJ, with respect to the Council of the League of Nations:

There is nothing to prevent the Parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15, and in particular from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation, the power to give a decision which, by virtue of their previous consent, compulsorily settles the dispute.²⁵⁹

²⁵¹ Cf. Boyle, A./Chinkin, C., *The Making of International Law* (2007), p. 114.

²⁵² Kennedy, *supra*, fn. 180, p. 30; however, the author immediately notes: 'Commentators have nevertheless struggled to think about United Nations resolutions within the rhetoric of sources.'

²⁵³ Cf. the advisory opinion of 13 July 1954 in *Effect of Awards case*, *supra*, fn. 136, ICJ Reports (1954), pp. 47, 56–58.

²⁵⁴ *Ibid.*, pp. 56–62.

²⁵⁵ *Certain Expenses*, *supra*, fn. 244, ICJ Reports (1962), pp. 151 *et seq.*; in particular at pp. 175 and 177.

²⁵⁶ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 50 (para. 105). The French translation might be less confusing, it mentions 'des résolutions ayant le caractère de décisions ou procédant d'une intention d'exécution' (emphasis added); *contra* *Abi-Saab* (1994), *supra*, fn. 182, pp. 29–49, p. 37, fn. 16.

²⁵⁷ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 47 (para. 95).

²⁵⁸ Cf. Art. 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties; and *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 47 (para. 94) for the Court's treatment.

²⁵⁹ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, PCIJ, Series B, No. 12, p. 27.

This may happen with respect to resolutions adopted by the General Assembly as well as to recommendations made by the Security Council of the United Nations. Thus, in the *Corfu Channel* case, the Court noted that: ‘The Albanian Government accepted’ the recommendation of the Security Council to refer the dispute to the ICJ and decided that ‘on the basis of its acceptance [it recognized] its obligation to refer the dispute to the Court.’²⁶⁰ However, it is clear that the source of the obligation assumed by Albania was not the Security Council’s resolution but its own unilateral act accepting that resolution.

cc) Other ‘Quasi-Sources’?

Not all resolutions of international organizations can be defined as ‘decisions’ and the Court has been careful in making the distinction in respect of the resolutions of the Security Council or the General Assembly. Concerning the former, it warned that: ‘The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.’²⁶¹ Even in *Nicaragua*, probably the judgment in which the Court made maximum use of non-binding resolutions of the General Assembly as evidence of the legal rules it had to apply,²⁶² ‘it plainly did not regard them as an independent source of law’.²⁶³ 104

However, in its Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court noted: 105

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.²⁶⁴

This statement is confusing: taken at face value, the words ‘normative value’ give the impression that non-binding resolutions may nevertheless have some kind of legal effect by themselves. On the other hand, the repeated reference to the link between this normative value and the evidence of an *opinio juris* leads to a more classical view pursuant to which the resolutions in question have a role in the customary process.²⁶⁵ 106

However, it is suggested that recommendations made by organs of international organizations vis-à-vis their members can be analysed as ‘quasi-formal sources of law’. This expression was used by Fitzmaurice with respect to the decisions of international tribunals.²⁶⁶ As explained by Professor Kearney, ‘Like “constructive”, “quasi” is a part of the legal legerdemain that justifies treating one thing as something else, usually for laudable reasons’,²⁶⁷ and there is certainly a case for considering recommendations of

²⁶⁰ *Corfu Channel*, *supra*, fn. 125, Preliminary Objections, ICJ Reports (1947–1948), pp. 15, 26 (emphasis added).

²⁶¹ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 53 (para. 114). *Cf.* also *East Timor*, *supra*, fn. 237, ICJ Reports (1995), pp. 90, 103–4 (paras. 31–32).

²⁶² *Cf. infra*, MN 228.

²⁶³ Mendelson (1996), pp. 63, 88.

²⁶⁴ *Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 254–5 (para. 70).

²⁶⁵ *Cf. infra*, MN 211 *et seq.*

²⁶⁶ Fitzmaurice (1958), pp. 153, 172–3.

²⁶⁷ Kearney, pp. 610, 699.

international organizations as ‘quasi-sources’: by definition, they are not binding,²⁶⁸ but as Judge Hersch Lauterpacht lucidly put it in his separate opinion appended to the Court’s 1955 Advisory Opinion on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*:

It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly ... addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other.²⁶⁹

- 107 And, indeed, as part of ‘international *soft law*’,²⁷⁰ recommendations produce legal effects, not only as part of the customary process, but also in and by themselves. First, as Judge Lauterpacht noted, ‘while not bound to accept the recommendation, [the addressee] is bound to give it due consideration in good faith. If ... it decides to disregard it, it is bound to explain the reasons for its decision.’²⁷¹ Second, the learned judge added that, although ‘it is in the nature of recommendations that ... they do not create a legal obligation to comply with them, ... on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively.’²⁷²
- 108 The same can be said of other instruments belonging to what is sometimes called the ‘grey zone’: the gentlemen’s agreements which are usually described ‘as morally and politically binding but which do not create obligations between ... States.’²⁷³ They, too, while not being legally binding, do produce legal effects.²⁷⁴ The ICJ has recognized their existence in some cases, but it has been careful to distinguish them from treaties

²⁶⁸ Cf. the joint separate opinion of Judges Badevant, Alvarez, Winiarski, Zoričić, de Visscher, Badawi Pacha and Krylov appended to Court’s judgment of 25 March 1948 in the *Corfu Channel case*, *supra*, fn. 125, Preliminary Objections, ICJ Reports (1947–1948), pp. 15, 31–2; as well as Fitzmaurice, *Law and Procedure*, vol. I, pp. 100–1. In the *Lockerbie cases*, the Court plainly explained: ‘As to Security Council resolution 731 (1992), ... it could not form an impediment to the admissibility of the [Application] because it was a mere recommendation without binding effect ...’ (ICJ Reports [1998], pp. 9, 26 [para. 44] and pp. 115, 131 [para. 43]).

²⁶⁹ ICJ Reports (1955), pp. 90, 118.

²⁷⁰ Cf. e.g. Abi-Saab, G., ‘Éloge du “droit assourdi”—Quelques réflexions sur le rôle de la *soft law* en droit international contemporain’, in *Nouveaux itinéraires en droit. Mélanges en l’honneur de François Rigaux* (1993), pp. 59–69; Baxter, R.R., ‘International Law in “Her Infinite Variety”’, *ICLQ* 29 (1980), pp. 549–66; Pellet, A., ‘Le bon droit et l’ivraie, plaidoyer pour l’ivraie’, in *Le droit des peuples à disposer d’eux-mêmes; Méthodes d’analyse du droit international—Mélanges offerts à Charles Chaumont* (1984), pp. 465–93; Pellet, ‘The Normative Dilemma: Will and Consent in International Law-Making’, *Australian YIL* 12 (1992), pp. 22–53; Zemanek, K., ‘Is the Term “Soft Law” Convenient?’, in *Liber amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (Hafner, G. et al. eds., 1998), pp. 843–62; Weil, P., ‘Towards Normative Relativity in International Law?’, *AJIL* 77 (1983), pp. 413–42. For further references cf. *infra*, fn. 274.

²⁷¹ *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, *supra*, fn. 269, ICJ Reports (1955), pp. 90, 119. Cf. also *ibid.*, p. 120: ‘Whatever may be the content of the recommendation and whatever maybe the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly’—especially so when a series of recommendations point at the same conclusions.

²⁷² *Ibid.*, p. 115.

²⁷³ McNair, Lord A.D., *The Law of Treaties* (1961), p. 6.

²⁷⁴ Cf. e.g. Schachter, O., ‘The Twilight Existence of Non-Binding Agreements’, *AJIL* 71 (1977), pp. 296–304; Eisemann, P.M., ‘Les *Gentlemen’s Agreements* comme source du droit international’, *JDI* 106 (1979), pp. 326–48; Aust, A., ‘The Theory and Practice of Informal International Instruments’, *ICLQ* 35 (1986), pp. 787–812; Reisman, M., ‘Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions’, *Va. J. Transnat’l L.* 35 (2002), pp. 729–46; Gautier, P., ‘Les accords informels et la CV sur le droit des traités entre Etats’, in *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2008), pp. 425–54; Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 422–31.

properly so called.²⁷⁵ Thus, in the *Aegean Sea case*, the ICJ observed that ‘that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement’²⁷⁶ and it found that:

having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued ... it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court. It follows that, in the opinion of the Court, the Brussels Communiqué does not furnish a valid basis for establishing the Court’s jurisdiction to entertain the Application filed by Greece on 10 August 1976.²⁷⁷

However, the Court did not exclude the possibility that said Joint Communiqué could have:

other implications ... in the context of the present dispute. It is for the two Governments themselves to consider those implications and what effect, if any, is to be given to the Joint Communiqué in their further efforts to arrive at an amicable settlement of their dispute.²⁷⁸

A particular category of resolutions also qualify as quasi-sources in another sense: in effect, it may occur that a resolution is not binding in itself but is a necessary precondition to produce legal effects. The power of recommendation given to the Security Council by Art. 4, para. 2 of the Charter provides a good example of those recommendations which the French doctrine terms *actes-conditions*.²⁷⁹ According to this text, ‘the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is effected’.²⁸⁰ 109

It does not come as a surprise that the ‘quasi-sources’ briefly studied in this subsection have not, as such, been of much use to the Court in its function of settling disputes, nor even in its advisory function: as a matter of definition, recommendations of international organizations, like gentlemen’s agreements, are not binding; consequently, 110

²⁷⁵ See, however, the rather confusing position of the PCIJ in the *Jaworzina case* with respect to a ‘decision’ of the Conference of the Ambassadors instituted by the Principal Allied Powers after World War I (*Question of Jaworzina (Polish-Czechoslovakian Frontier)*, PCIJ, Series B, No. 8, pp. 29–30; and cf. Sørensen [1946], pp. 68–9, for comment).

²⁷⁶ *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 39 (para. 96).

²⁷⁷ *Ibid.*, p. 44 (para. 107). On the basis of a similar reasoning, the Court came to a similar conclusion in the (*Bosnian*) *Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43 *et seq.*; cf. its provisional measures orders of 8 April and 13 September 1993, ICJ Reports (1993), pp. 3, 16–18 (para. 27–32) and pp. 325, 340–1 (para. 32), and the judgment of 11 July 1996 (Preliminary Objections), ICJ Reports (1996), pp. 595, 618–19 (para. 37). In *Maritime Delimitation and Territorial Questions case* (ICJ Reports [2001], pp. 40 *et seq.*), basing itself on the law of treaty interpretation (a position criticized by Thirlway, ‘Law and Procedure, Part Three’, *BYIL* 77 [2006], pp. 5–6), it reached the opposite conclusion with respect to the minutes of a meeting between the parties, which it considered as constituting ‘an international agreement creating rights and obligations for the Parties’ (*supra*, fn. 207, Jurisdiction and Admissibility, ICJ Reports [1994], pp. 112, 122 [para. 30]).

²⁷⁸ *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 44 (para. 108).

²⁷⁹ Rousseau, *supra*, fn. 74, pp. 420–2; Jacqué, J.-P., ‘Acte et norme en droit international public’, *Rec. des Cours* 227 (1991-II), pp. 357–418, p. 382; Alland, D., *Droit international public* (2000), p. 319. Cf. also *Jurisdiction of the Courts of Danzig, Mémoire du Gouvernement dantzikois*, PCIJ, Series C, No. 14-I, p. 342. For his part, Sir Gerald Fitzmaurice called these acts ‘recommendations *that*’ in contrast to ‘recommendations *what*’ (*Law and Procedure*, vol. I, pp. 101–2).

²⁸⁰ Cf. *Competence of Assembly regarding Admission to the United Nations*, ICJ Reports (1950), pp. 4, 8; and cf. also pp. 9–10.

they do not create subjective rights or obligations for States and, in this respect, they will rarely provide a legal basis for solving a dispute or for responding to a request for an advisory opinion—at least if the questions are related to a dispute. However, contrary to the views of positivist doctrine, it appears from a careful study of the case law of the Court that they are not ‘non-legal’. They are taken into consideration by the Court not only in the framework of the crystallization process of customary rules or for the interpretation of treaty law²⁸¹ but, if necessary, they can also have a more direct and autonomous role in the search for legal answers to legal questions. In this respect they certainly are part of international law that the Court is bound to apply.

c) What International Law Is Not

aa) ‘Formal’ and ‘Material’ Sources

- 111 Clearly, the sources listed in Art. 38, para. 1 are ‘formal sources’ of international law, *i.e.* processes through which international law rules become legally relevant.²⁸² In this respect they are usually opposed to ‘material sources’, which can be defined as the political, sociological, economic, moral or religious origins of the legal rules:²⁸³ ‘The former ... is the source from which the legal rule derives its legal validity, while the latter denotes the provenance of the substantive content of that rule.’²⁸⁴
- 112 As Dame Rosalyn Higgins put it, ‘law and politics are not necessarily inimical’.²⁸⁵ More than that: the law-making process is largely, if not exclusively, political.²⁸⁶ But politics as well as other material sources of the rules of international law precede law; they are upstream.
- 113 This has been acknowledged by the World Court with respect to morality.²⁸⁷ As ‘a court of law’, the ICJ:

²⁸¹ *Cf. e.g.* the use of General Assembly Resolutions 56/60 (10 December 2001) and 58/97 (9 December 2003) in order to confirm the interpretation and applicability of the Fourth Geneva Convention in the occupied Palestinian territory (*Wall case, supra*, fn. 104, ICJ Reports [2004], pp. 136, 176 [para. 98]). *Cf.* also *Namibia case, supra*, fn. 244, ICJ Reports (1971), pp. 16, 31 (referring to General Assembly Resolution 1514 [XV] of 14 December 1960 as part of the ‘subsequent development of international law’ concerning self-determination) and *Western Sahara, supra*, fn. 104, ICJ Reports (1975), pp. 12, 68 (para. 162). In *Nicaragua*, the Court attached weight to the United States’ support of several resolutions of the OAS and of the United Nations and to the 1975 Final Act of Helsinki, commonly considered as a (non-binding) gentlemen’s agreement, as a manifestation of an *opinio juris* regarding the principles of the prohibition of the use of force expressed in Art. 2, para. 4 UN Charter and of non-intervention (*supra*, fn. 115, ICJ Reports [1986], pp. 14, 100 [para. 189] and 107 [para. 204]; *cf.* also p. 133 [para. 264]). In its *Nuclear Weapons* advisory opinion, the Court equally relied on the 1975 Final Act of Helsinki and on General Assembly Resolution 2625 (XXV) of 24 October 1970 and therein found support for the basic principle of good faith (*supra*, fn. 107, ICJ Reports [1996], pp. 226, 264 [para. 102]).

²⁸² *Cf. supra*, MN 79.

²⁸³ *Cf. e.g.* Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 124–5; Degan, V.D., *Sources of International Law* (1997), p. 1 (speaking of the ‘causes’ of international law, *i.e.* ‘factors influencing its development’), Rousseau, *supra*, fn. 74, p. 58; Sørensen (1946), pp. 13–14.

²⁸⁴ Jennings/Watts, *supra*, fn. 164, p. 23.

²⁸⁵ Higgins, R., *The Development of International Law through the Political Organs of the United Nations* (1963), p. 9.

²⁸⁶ As has been written, ‘le droit représente une politique qui a réussi’ (Giraud, E., ‘Le droit positif—ses rapports avec la philosophie et la politique’, in *Hommage d’une génération de juristes au Président Basdevant* [1960], p. 234).

²⁸⁷ It is not always easy to make a distinction between morality and equity. Given the special weight and the ambiguity of the term in international law, equity will be dealt with separately (*infra*, MN 140–156). However, morality can be seen as more divorced from law than equity, in that it conveys a more individual, less ‘social’ or collective, connotation.

can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason, it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.

Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, themselves amount to rules of law.²⁸⁸

The same holds true with respect to economic or geographical considerations which 114 play an important role in certain fields of international law and, in particular in the law of maritime delimitation. Thus, the Court considered that ‘certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question’;²⁸⁹ these ‘basic considerations’ can be based on geographical factors,²⁹⁰ but extend beyond them and also include ‘certain economic interests peculiar to a region’.²⁹¹ Thus presented, economic or geographical considerations found and explain the applicable legal rules, but do not constitute the rules in question by themselves.²⁹² This is particularly clear with regard to the institution of the ‘continental shelf’. The Court underlined that this institution ‘has arisen out of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime’.²⁹³

The Court has also referred to ‘new scientific insights and to a growing awareness 115 of the risks for mankind’²⁹⁴ which have brought about the development of new norms and standards concerning the protection of the environment.²⁹⁵ However, it has made

²⁸⁸ *South West Africa cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 34 (para. 49–50). This Judgment has been strongly criticized—and with good reason—but on this precise point it simply illustrates the constant—and, from this writer’s point of view, correct—position of the Court. *Cf.* also *International Status of South West Africa*, ICJ Reports (1950), pp. 128, 140.

²⁸⁹ *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 133.

²⁹⁰ In that case, the Court made reference to ‘the close dependence of the territorial sea upon the land domain’, ‘the more or less close relationship existing between certain sea areas and the land formations which divide or surround them’ (*ibid.*).

²⁹¹ *Ibid.*; *cf.* also p. 138 or p. 142 (where the Court takes into account certain rights ‘founded on the vital needs of the population’). For a much more hesitant position as to the relevance of economic factors in the delimitation process *cf.*, however, the *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 77 (para. 106).

²⁹² *Cf. e.g.* Fitzmaurice, *Law and Procedure*, vol. I, pp. 199–200. For his part, Rosenne analyses these pronouncements as an application of equity *intra legem* (*Law and Practice*, vol. III, p. 1541). However, when the Court assesses ‘the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography’, by taking into consideration other circumstances, namely ‘the data provided for by human and economic geography’ (*Gulf of Maine case*, *supra*, fn. 92, ICJ Reports [1984], pp. 246, 278 [para. 59]), it considers the said data as purely factual circumstances, not as the ‘material sources’ of the law to be applied. *Cf.* also, *ibid.*, p. 342 (para. 236–237); or *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 71 (para. 75).

²⁹³ *North Sea Continental Shelf case*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 51 (para. 95); or *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 36 (para. 86). *Cf.* also the more critical analysis of the link between the legal institution of the continental shelf and the physical data put forward by the Chamber of the Court in the *Gulf of Maine case* (*supra*, fn. 92, ICJ Reports [1984], pp. 246, 293 [para. 91]).

²⁹⁴ *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), p. 7, 78 (para. 140). *Cf.* also the judgment in the *Kasikili/Sedudu Island case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1060 (para. 20).

²⁹⁵ *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 78 (para. 140) and p. 41 (para. 38). *Cf.* also *Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 241–2 (para. 29) and *Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010, available at <<http://www.icj-cij.org>>, paras. 101, 193–4, 204–5.

clear that in the circumstances of the case, such criteria and considerations had not been incorporated into positive rules of international law; therefore, it could only regret the situation and confine itself to the applicable legal rules. Similarly, with respect to the changing framework of international economic relations, the Court noted in the *Barcelona Traction* case:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.²⁹⁶

Thus, the Court made clear that such principles and considerations are not by themselves ‘legal’ rules to be applied by it.

- 116 Similarly, municipal law, which must be seen as ‘mere fact’ from an international law perspective, can be defined in this respect as a possible material source of this law.

bb) International Law versus Municipal Law

- 117 The present commentary is not the proper place to revisit the famous—and still not crossed—*pons asinorum* of the relationship between municipal law on the one hand and international law on the other.²⁹⁷ It will limit itself to clarifying the use made by the Court of domestic law²⁹⁸ in view of its Statute’s clear indication that it must decide in accordance with *international* law.

- 118 Notwithstanding Art. 38, it will be apparent that domestic law is omnipresent in the case law of the World Court. However, contrary to the views exposed by some scholars²⁹⁹ but in line with the Court’s consistent jurisprudence, municipal law does not operate as a ‘formal source’ of the law, even though it can have a ‘decisive’ influence on the Court’s decisions.

- 119 In a *dictum* that has been celebrated or subjected to public obloquy, the PCIJ declared that:

²⁹⁶ *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain), ICJ Reports (1970), pp. 3, 46–7 (para. 89).

²⁹⁷ Cf. Virally, M., ‘Sur un pont aux ânes: les rapports entre le droit international et les droits internes’, in *Mélanges offerts à H. Rolin—Problèmes de droit des gens* (1964), pp. 488–505; also reproduced in *Le droit international en devenir—Essais écrits au fil des ans* (1990), pp. 103–17.

²⁹⁸ In the present article, ‘municipal law’, ‘national law’ and ‘domestic law’ will be treated as synonyms.

²⁹⁹ Among a very impressive literature *cf.* in particular the following works, which are devoted to studying the position of the Court itself: Danilowicz, W., ‘The Relation between International Law and Domestic Law in the Jurisprudence of the International Court of Justice’, *Polish YIL* 59 (1983), pp. 153–64; Jenks, C.W., ‘The Interpretation and Application of Municipal Law by the Permanent Court of International Justice’, *BYIL* 19 (1938), pp. 67–103; Marek, K., ‘Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de Justice internationale’, *RGDIP* 66 (1962), pp. 260–98; Sorel, J.-M., ‘Le droit interne dans la jurisprudence de la Cour internationale de Justice’, in *Droit international et droits internes, Développements récents, Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis, Colloque des 16–18 avril 1998* (Ben Achour, R./Laghmani, S., eds., 1998), pp. 133–62. *Cf.* also the more general study by Santulli, C., *Le statut international de l’ordre juridique étatique: Etude du traitement du droit interne par le droit international* (2001); *cf.* also Abraham R., ‘L’articulation du droit interne et du droit international’, in *La France et le droit international* (2007), pp. 257–78; Nijman J.E./Nollkaemper, A. (eds.), *New Perspectives on the Divide Between National and International Law* (2007), p. 416; Denza, E., ‘The Relationship between International and National Law’, in *International Law* (Evans, M.D., ed., 2010), pp. 411–38.

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.³⁰⁰

As a consequence, a State cannot invoke its own domestic law or that of another State to escape its international obligations whether by virtue of a treaty or of a customary rule. Thus, in the *Treatment of Polish Nationals* case, the PCIJ observed that:

according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... [I]n cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to ... responsibility...³⁰¹

In its commentaries on Art. 3 of its Articles on Responsibility of States for Internationally Wrongful Acts,³⁰² the ILC considered that these *formulae* represent the clearest formulation of the basic principles in this matter.³⁰³

This has led the Court vigorously to affirm the 'superiority' of international law over municipal law. As early as its first judgment, in the *Wimbledon* case, the PCIJ considered that:

In any case a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.³⁰⁴

This principle, which had already been applied in the *Alabama* arbitration,³⁰⁵ has been the constant position of both Courts since then.³⁰⁶ It has also been applied

³⁰⁰ *Certain German Interests case*, *supra*, fn. 125, PCIJ, Series A, No. 7, p. 19.

³⁰¹ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, Series A/B, No. 44, pp. 24–5. *Cf.* also the judgment in the *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 24.

³⁰² Annexed to General Assembly Resolution 56/83, 12 December 2001. The Articles and the corresponding commentaries are reproduced in UN Doc. A/56/10, pp. 59–365; as well as in Crawford, J. (ed.), *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (2002).

³⁰³ Para. 2 of the commentary to Art. 3, reproduced in Crawford, *supra*, fn. 302, p. 86. According to Art. 3: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law'. *Cf.* also Art. 27 VCLT.

³⁰⁴ *S.S. Wimbledon* (United Kingdom, France, Italy, Japan/Germany, Poland intervening), PCIJ, Series A, No. 1, p. 29.

³⁰⁵ Award of 14 September 1872, reproduced in Moore, J.B., *History and Digest of the International Arbitrations to which the United States Have Been a Party*, vol. IV (1898), pp. 1456–7.

³⁰⁶ *Cf. e.g. Exchange of Greek and Turkish Populations*, PCIJ, Series B, No. 10, p. 20; *Jurisdiction of the Courts of Danzig*, *supra*, fn. 279, PCIJ, Series B, No. 15, pp. 26–7; *Greco-Bulgarian 'Communities'*, PCIJ, Series B, No. 17, p. 32; the order and judgment in *Free Zones*, *supra*, fn. 139, PCIJ, Series A, No. 24, p. 12 and PCIJ, Series A/B, No. 46, p. 167 respectively; and further *Treatment of Polish Nationals*, *supra*, fn. 301, PCIJ, Series A/B, No. 44, p. 24. *Cf.* also the observations of Lord Finlay appended to the advisory opinion on the *Questions concerning the Acquisition of Polish Nationality*, PCIJ, Series B, No. 7, p. 26; the ICJ's advisory opinions of 11 April 1949 on *Reparation for Injuries case*, *supra*, fn. 206, ICJ Reports (1949), pp. 174, 180, and of 26 April 1988 on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports (1988), pp. 12, 34–5 (para. 57); the judgments in *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 132; *Nottebohm*, *supra*, fn. 141, ICJ Reports (1953), pp. 111, 123; *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Reports (1958), pp. 55, 67 and *Avena case (Request for Interpretation)*, *supra*, fn. 115, Judgment, ICJ Reports (2009), pp. 3, 18 (para. 47).

where a judgment of a national court was at stake³⁰⁷ as well as in relation to federal States.³⁰⁸

122 In pure logic, this approach is not very consistent with the Court's 'dualist' assertion that municipal laws are 'merely facts' from an international law perspective; as noted by Professor Krystyna Marek: 'Admettre qu'une règle de droit interne peut être conforme—ou non conforme—au droit international, c'est admettre l'unité des deux ordres.'³⁰⁹ However, even though it is most likely that the strong personality of Anzilotti, one of the most powerful proponents of dualism, marked the Permanent Court and that his ghost still haunts the Peace Palace, not too much can be inferred from this theoretical inconsistency: both the view that municipal laws are mere facts vis-à-vis international law and the asserted superiority of international law have the same pragmatic³¹⁰ purpose. The Court reaffirms that, as an 'organ of international law', it decides disputes submitted to it 'in accordance with international law'—of which national law is not part.

123 This is not to say that domestic law is of no relevance to international law (and to the Court). Immediately after asserting that 'municipal laws are merely facts' from the standpoint of international law, the PCIJ made very clear in its 1926 judgment that, nevertheless;

The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.³¹¹

In the *German Settlers* advisory opinion, the Court recognized unequivocally 'that German law is still in force in the territories ceded by Germany to Poland, and that reference to German law is *necessary* in the examination of the nature and extent of the rights and obligations arising under these contracts',³¹² and extensively discussed the relevant German legal rules and their meaning.³¹³

³⁰⁷ *Factory at Chorzów* (Germany/Poland), Merits, PCIJ, Series A, No. 17, p. 33: it is impossible to attribute 'to a judgment of a municipal court power indirectly to invalidate a judgment of an international court'. Cf. also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1999), pp. 62, 87 (para. 62) or *Avena*, *supra*, fn. 115, ICJ Reports (2004), pp. 12, 30 (para. 28): 'The Court would recall that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts.' Cf. also *Jurisdictional Immunities case*, *supra*, fn. 115 (paras. 37–39).

³⁰⁸ Cf. e.g. the order of 9 April 1999 in the *LaGrand case*, *supra*, fn. 115, ICJ Reports (1999), pp. 9, 16 (para. 8); as well as the judgment in the same case, ICJ Reports (2001), pp. 466, 495 (para. 81) and 497–8 (paras. 90–91); similarly the judgment in *Avena*, *supra*, fn. 115, ICJ Reports (2004), pp. 12, 56–7 (paras. 112–113); *Avena (Request for Interpretation)*, *supra*, fn. 115, ICJ Reports (2008), pp. 311, 330–1 (paras. 75–77).

³⁰⁹ Marek, *supra*, fn. 299, pp. 260, 268.

³¹⁰ Sorel, *supra*, fn. 299, p. 133, 160.

³¹¹ *Certain German Interests case*, *supra*, fn. 125, PCIJ, Series A, No. 7, p. 19, and also p. 42. In its judgment of 26 March 1925 in the *Mavrommatis case*, *supra*, fn. 239, the Court had already clarified that: 'The Court has to consider the validity of the concessions only as a preliminary question, and not as a point of law falling by its intrinsic nature properly within its jurisdiction as an International Court' (PCIJ, Series A, No. 5, p. 29). Cf. also, among others, *Panevezys-Saldutiskis Railway* (Estonia/Lithuania), PCIJ, Series A/B, No. 76, p. 18.

³¹² *Certain Questions relating to Settlers of German Origin in the Territory ceded by Germany to Poland*, PCIJ, Series B, No. 6, p. 29.

³¹³ *Ibid.*, pp. 30–4.

Similarly, the present Court has never hesitated to resort to national laws when it deemed this necessary in order to settle a dispute between States or to respond to a request for an Advisory Opinion. Thus, in the *Barcelona Traction* case, the ICJ ‘had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction’.³¹⁴ It added:

If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without serious justifications, invite serious difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has ... not only to take cognizance of municipal law but also to refer to it.³¹⁵

Such a use of domestic law is particularly striking when the Court applies the principle of *uti possidetis juris*. This was made crystal clear by the Chamber constituted in the case of the *Frontier Dispute* between Burkina and Mali:

The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law—especially legislation enacted by France for its colonies and *territoires d’outre-mer*—may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the ‘colonial heritage’, i.e., the ‘photograph of the territory’ at the critical date.³¹⁶

It has been argued that, in doing this, the Court does not act as if national rules were ‘facts’ but applies them as legal norms. In particular, it has been said that the Court does not hesitate to appreciate the validity of a particular national rule in the light of the relevant national law. This is not so. ‘La vérité est que le droit international se borne à reconnaître l’existence du droit interne, dont il a d’ailleurs besoin pour son propre fonctionnement’.³¹⁷ In other words:

la théorie de la fonction factuelle [du droit étatique en droit international] n’implique pas de négation du caractère ‘normatif’ du droit étatique qui est bien envisagé comme un ensemble ordonné de propositions, qualités et concepts; mais ces différents produits légaux [*i.e.* juridiques] ne sont pas les mécanismes de connaissance du droit international.³¹⁸

This having been said, the Court’s approach is sometimes disconcerting. The most astonishing case in this respect is the *Serbian Loans* case in which the Permanent Court accepted that:

when the two States have agreed to have recourse to the Court, the latter’s duty to exercise its jurisdiction cannot be affected, in the absence of a clause in the Statute on the subject, by the circumstance that the dispute relates to *a question of municipal law rather than to a pure matter of fact*.³¹⁹

³¹⁴ *Barcelona Traction*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 33 (para. 38).

³¹⁵ *Ibid.*, p. 37 (para. 50). Cf. also, e.g., the judgment in *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports (1989), pp. 15, 58 (para. 83) (taking into account the position in Italian bankruptcy law).

³¹⁶ *Frontier Dispute case* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 568 (para. 30). Cf. also the Chamber judgment in the *Frontier Dispute* (Benin/Niger), ICJ Reports (2005), pp. 90, 110 (para. 28), and contrast the Chamber judgment in the *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 559 (para. 333).

³¹⁷ Virally, *supra*, fn. 297, pp. 103, 109.

³¹⁸ Santulli, *supra*, fn. 299, pp. 261–2.

³¹⁹ *Serbian Loans case*, *supra*, fn. 114, PCIJ, Series A, No. 20, p. 19 (emphasis added). Cf. also the advisory opinion on the *Danzig Legislative Decrees*, where the Court, without any discussion, agreed to answer a

128 There can be no doubt that this formulation is awkward since, against the formulation of Art. 38 as it now stands, the PCIJ seemed content to play the part of a national court of appeals applying municipal law as such. However, this conclusion must be qualified.

- (1) At the time the *Serbian Loans* case was decided, the *chapeau* of Art. 38 did not include the phrase expressly defining the function of the Court as the application of international law; therefore, it is contended that the present Court would most probably not formulate its reasoning in that same way.
- (2) Moreover, if the argument of the Court is somewhat ambiguous, it can be noted that its jurisdiction in that case derived from a special agreement,³²⁰ which itself is a treaty; the real issue then is whether or not the parties can vest the Court with the duty to settle their disputes by applying rules other than those rooted in international law. The present writer suggests that the answer might be in the affirmative insofar as such a *renvoi* would ‘internationalize’ the rules in question.³²¹
- (3) However, in any event, in the *Serbian Loans* case (as well as in the twin *Brazilian Loans* case), the PCIJ was not requested to *apply* municipal law, but to settle an internal dispute which had arisen in the domestic sphere and it did not disregard its usual means of reasoning and referred both to national laws and legal institutions, which it ‘determined’,³²² as the substantive matter of the solution, and to international law.³²³

129 In fact, in these cases as in any others where domestic law issues were relevant, the PCIJ and the ICJ have confined themselves to appreciating the conformity of national ‘behaviours’ or ‘attitudes’ of the parties with their international obligations. Whether these behaviours or attitudes are legal or wrongful acts in respect of their domestic law does not matter; they must comply with international law; if they do not, they are international wrongful acts entailing the responsibility of the State.³²⁴ As the Chamber of the Court observed in the *ELSI* case:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect

question clearly (and exclusively) relating to domestic law (*supra*, fn. 106, PCIJ, Series A/B, No. 65; for the text of the question *cf.* p. 42). Very logically, in his Sep. Op., Judge Anzilotti objected on the ground that: ‘The question submitted to the Court is one purely of Danzig constitutional law; international law does not come into it at all. It neither is nor can be disputed, however, that the Court has been created to administer international law. Art. 38 of the Statute, which states the sources of law to be applied by the Court, only mentions international treaties or custom and the elements subsidiary to these two sources, to be applied if both of them are lacking. It follows that the Court is reputed to know international law; but it is not reputed to know the domestic law of the different countries’ (*ibid.*, p. 61).

³²⁰ And the fact is that the pre-quoted paragraph is found in the section of the judgment where the Court discussed its ‘Jurisdiction’. For a—questionable—analysis of the judgment based on this aspect *cf.* Marek, *supra*, fn. 299, pp. 260, 295–8. It can be noted that Art. 38 itself is included in Chapter II of the Statute, entitled ‘Competence of the Court’.

³²¹ *Cf. infra*, MN 200–201.

³²² To use the much more satisfactory expression of a Chamber of the present Court in the *ELSI* case, *supra*, fn. 315, ICJ Reports (1989), pp. 15, 47 (para. 62).

³²³ *Serbian and Brazilian Loans cases*, *supra*, fn. 114, PCIJ, Series A, No. 20/21, *e.g.* at pp. 39–40 (discussion of the notion of *force majeure* under international law) or p. 44 (‘It is indeed a generally accepted principle that a State is entitled to regulate its own currency’).

³²⁴ *Cf. e.g.* the Court’s order of 3 March 1999 in *LaGrand*, *supra*, fn. 115, ICJ Reports (1999), pp. 9, 16 (para. 28). More generally, *cf.* also Art. 4 of the ILC Articles on Responsibility of States for Internationally

held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty [between Italy and the United States.

Conversely:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness ... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.³²⁵

And, in the *LaGrand* case the Court, after recalling that, 'If necessary, it can ... hold that a domestic law has been the cause' of a violation of international law, observed that:

In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such.³²⁶

Of course, in determining whether the acts in question comply with the requirements of international law, the Court needs to ascertain their real meaning and scope. To do so, very logically, it will refer to the interpretation that such acts are given within the domestic sphere:

Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.³²⁷

In *Diallo*, the Court recalled:

that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 46 and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124). Exceptionally, where a State puts

Wrongful Acts (*supra*, fn. 302) and the corresponding commentary (reproduced in Crawford, *supra*, fn. 302, at pp. 94–9); as well as *supra*, MN 122.

³²⁵ *ELSI case, supra*, fn. 315, ICJ Reports (1989), pp. 15, 51 (para. 73) and 74 (para. 124). From the abundant case law *cf.* further the ICJ's judgment of 14 February 2002 in the *Arrest Warrant of 11 April 2000*, ICJ Reports (2002), pp. 3, 27–30 (paras. 67–71) and the PCIJ and ICJ decisions quoted in fn. 306.

³²⁶ *LaGrand, supra*, fn. 115, ICJ Reports (2001), pp. 466, 513 (para. 125). *Cf.* also para. 51 of the judgment of 10 February 2005 in *Certain Property* (Liechtenstein/Germany), where the Court decided that decisions of German courts could not be separated from an international convention and could not 'consequently be considered as the source or real cause of the dispute' (ICJ Reports [2005], pp. 6 *et seq.*).

³²⁷ *Brazilian Loans, supra*, fn. 114, PCIJ, Series A, No. 21, p. 124. Once again, this formulation is awkward even though the underlying principle is entirely acceptable (*cf.* already *supra*, MN 130). *Cf.* further, *e.g.*, *Serbian Loans, supra*, fn. 114, PCIJ, Series A, No. 20, p. 46; and the ICJ's judgments in *Guardianship of Infants Convention, supra*, fn. 306, ICJ Reports (1958), pp. 65 or *ELSI case, supra*, fn. 315, ICJ Reports (1989), pp. 15, 47 (para. 62).

forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.³²⁸

- 132 While the Court may have duly to consider municipal law in order to ascertain the lawfulness of the behaviour of the State in regard to international law, it is not for it to judge the application of domestic law in the national sphere, which is to be ensured by national courts. Thus, in the *Panevezys-Saldutiskis Railway case* the PCIJ stated:

The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision.³²⁹

Similarly, in *Breard*, the present Court recalled that its function ‘is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal’.³³⁰

- 133 It can, nevertheless, happen that, without taking a position on the validity of a national act, in regard to international law nor, *a fortiori*, to national law, the Court itself queries ‘whether that act has the international effect ... under consideration’.³³¹ As is well known, in the *Nottebohm* case, the Court did not question the validity *per se* of the naturalization of Nottebohm but concluded that it was not ‘based on any prior connection with Liechtenstein’ and had been ‘granted without regard to the concept of nationality adopted in international law’;³³² therefore, Liechtenstein could not ‘rely upon’ it against Guatemala.³³³

- 134 In the same vein, the Court appreciated that a domestic act purporting to withdraw reservations to treaties cannot have, *per se*, an effect on the international level:

The validity of this *décret-loi* under Rwandan domestic law has been denied by Rwanda. However, in the Court’s view the question of the validity and effect of the *décret-loi* within the domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State’s domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question.³³⁴

- 135 Domestic law has even greater resonance in international law when the latter expressly ‘falls back on’ (‘renvoie au’³³⁵) domestic law.³³⁶ In these cases, the Court is called upon to

³²⁸ *Abmadou Sadio Diallo* (Republic of Guinea/Democratic Republic of the Congo), Judgment of 30 November 2010, available at <<http://www.icj-cij.org>>, para. 70.

³²⁹ *Panevezys-Saldutiskis Railway case*, *supra*, fn. 311, PCIJ, Series A/B, No. 76, p. 19.

³³⁰ *Vienna Convention on Consular Relations* (Paraguay/United States of America), Provisional Measures, ICJ Reports (1998), pp. 248, 257 (para. 38). *Cf.* also the order of 3 March 1999 in *LaGrand*, ICJ Reports (1999), pp. 9, 15 (para. 25) and the judgment in the same case, ICJ Reports (2001), pp. 466, 486 (para. 52); as well as the order of 5 February 2003 in *Avena*, *supra*, fn. 115, ICJ Reports (2003), pp. 12, 34 (para. 37).

³³¹ *Nottebohm*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 21.

³³² *Ibid.*, p. 26.

³³³ *Ibid.*, p. 20. The French original text is more revealing: ‘il s’agit de rechercher si cet acte ...est *opposable* au Guatemala’ (emphasis added).

³³⁴ *Armed Activities case (New Application)*, *supra*, fn. 231, ICJ Reports (2006), pp. 6, 25 (para. 41).

³³⁵ Hugh Thirlway notes that the term ‘renvoi’ does not exist in English (Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 [1989], pp. 124–5). However, in the *Pulp Mills* case, the Court seemed to adopt the term put forward by Argentina: ‘referral clause’ (*supra*, fn. 239, Judgment of 20 April 2010, para. 62).

³³⁶ As happened, according to the present writer, in the *Serbian and Brazilian Loans cases*: *cf. supra*, MN 129.

‘apply’ municipal law, not as such, but as being incorporated into international law. This is so, *e.g.*, when a party raises an objection as to the admissibility of a case of diplomatic protection based on the failure to exhaust local remedies.³³⁷

In *Diallo*, the Court made clear that when provisions of treaties refer to the domestic law applicable (in this case relating to the expulsion of an alien): 136

Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while ‘accordance with law’ as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.³³⁸

For the sake of completeness, it must also be noted that municipal laws have at least two other functions in international law: first, they can be used by way of analogy³³⁹; second, they are the ‘material sources’, the *substratum*, of the general principles of law within the meaning of Art. 38, para. 1 (c). Here again, in neither case are domestic rules as such applied (or applicable) by the Court. However, there are important differences between these hypotheses. 137

Analogy is just that: a ‘[r]essemblance établie par une opération intellectuelle entre deux ou plusieurs actes ou situations juridiques’.³⁴⁰ When the Court or, more frequently, individual judges³⁴¹ resort to municipal law rules or institutions as a source of analogy, they simply implement a *method* of interpretation of the (international) rules it has to apply and can conclude either that the international institution is distinct from the apparently corresponding domestic one—and it will draw the consequences accordingly³⁴²—or they will conclude that the similarities are such that it can be inspired by the private law analogies in applying an international law rule. In so doing, the Court usually refers to ‘rules generally accepted by municipal legal systems’,³⁴³ not to a particular national law. 138

In such a case, the inference could be that domestic law rules, if they coincide, can be transposed, with some caution, into the sphere of international law, and applied as such; this simply refers to the notion of general principles as embodied in sub-para. (1) (c) of Art. 38.³⁴⁴ 139

³³⁷ Cf. *Interhandel*, *supra*, fn. 233, ICJ Reports (1959), pp. 6, 27–8. Cf. also *Certain Questions of Mutual Assistance in Criminal Matters* (Djibuti/France), ICJ Reports (2008), pp. 177, 222–3 (para. 124). Another clear hypothesis of such an express *renvoi* can be found in the case envisaged by Art. 46 VCLT, which accepts that a State can invoke a manifest violation of a rule of its internal law of fundamental importance as a ground invalidating a treaty; the Court has had no occasion yet to apply this principle (*ratification imparfaite*).

³³⁸ *Ahmadou Sadio Diallo case*, *supra*, fn. 328, Judgment of 30 November 2010, para. 65.

³³⁹ Cf. principally Hersch Lauterpacht’s chef d’oeuvre, *Private Law Sources and Analogies in International Law* (1927); and Thirlway, ‘Concepts, Principles, Rules and Analogies’, pp. 264–405.

³⁴⁰ Salmon, J. (ed.), *Dictionnaire de droit international public* (2001), p. 63.

³⁴¹ Hugh Thirlway rightly notes that ‘Individual judges are often in a good position to draw analogies from the specific national systems of law with which they are most familiar’, Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), p. 127.

³⁴² Cf. *International Status of South West Africa*, *supra*, fn. 288, ICJ Reports (1950), pp. 128, 132: ‘The “Mandate” had only the name in common with the several notions of mandate in national law ... It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law’. Cf. also the advisory opinion on *Certain Expenses*, *supra*, fn. 244, ICJ Reports (1962), pp. 151, 168.

³⁴³ *Barcelona Traction case*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 37 (para. 37).

³⁴⁴ Cf. *infra*, MN 253–269.

cc) Equity

- 140 As has been rightly noted, the word ‘equity’ is ambiguous and takes on various meanings in the context of the sources of international law.³⁴⁵ It can either:
- aim at correcting existing legal rules, in which case, it is equivalent to *ex aequo et bono* as envisaged in Art. 38, para. 2, and includes equity *contra legem*;³⁴⁶ or
 - be used as a means for filling the *lacunae* of international law—equity *praeter legem*;
 - be considered as an intrinsic attribute of the rules of law—equity *infra legem*; or
 - constitute the very content of said rules—equity *intra legem*; or
 - adopt the technical meaning it has in domestic common law systems, in particular in England.
- 141 In this last sense, equity is not applicable as such in international law even though some international lawyers of Anglo-Saxon origin seem to have sometimes yielded to the temptation to transpose the common law principle ‘lock, stock and barrel’.³⁴⁷ Indeed, equity in this form is not entirely unfamiliar to international law, but not as a specific source of this body of law, nor as a set of rules applicable as such: it may be taken into consideration when seeking to distil a general principle of law out of domestic laws.³⁴⁸
- 142 In his separate opinion in *Barcelona Traction*, Sir Gerald Fitzmaurice also referred to ‘the English system of Equity’ by way of analogy: he considered that this system could ‘play the same sort of part as [it] does, or at least originally did, in the Common Law countries that have adopted it’,³⁴⁹ explaining that, when general rules ‘produce substantial unfairness’, other rules, or another body of rules, must be applied ‘to mitigate the severity of the rules of law’.³⁵⁰ Although the Court itself has always shown great caution in using equity as a corrective to the rule of law, or as a means to filling in the *lacunae*

³⁴⁵ Cf. e.g. Jennings/Watts, *supra*, fn. 164, pp. 43–4; Sørensen (1946), p. 191; or Weil, P., ‘L’équité dans la jurisprudence de la Cour internationale de Justice—Un mystère en voie de disparition?’, in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Lowe, V./Fitzmaurice, M., eds., 1996), pp. 121–44, p. 123. From the vast literature on equity in international law cf. also Chemillier-Gendreau, M., ‘La signification des principes équitables dans le droit international contemporain’, *RBDI* 16 (1981–1982), pp. 509–35; Degan, D., *L’équité et le droit international* (1970); Degan, D., ‘La justice, l’équité et le droit international’, in Dupuy, *Mélanges Valticos*, *supra*, fn. 107, pp. 89–100; De Visscher, C., *De l’équité dans le règlement arbitral ou judiciaire des litiges en droit international public* (1972); Franck, T., ‘Equity in International Law’, in *Perspectives on International Law* (Jasentuliyana N., ed., 1995), pp. 23–48; Gourgourinis, A., ‘Equity in International Law Revisited (With Special Reference to the Fragmentation of International Law)’, *ASIL, Proceedings of the annual meeting* 103 (2009), pp. 79–82; Jennings, Sir R., ‘Equity and Equitable Principles’, *Schweiz. JB Internat. Recht* 42 (1986), pp. 27–38; Lachs, M., ‘Equity in Arbitration and in Judicial Settlement of Disputes’, *Leiden JIL* 6 (1993), pp. 323–9; Lauterpacht, E., *Aspects of the Administration of International Justice* (1991), pp. 117–52; for further references cf. *infra*, fn. 393.

³⁴⁶ On this aspect cf. *infra*, MN 157–175.

³⁴⁷ The expression is borrowed from Sir Arnold McNair’s Sep. Op. appended to the ICJ advisory opinion on the *International Status of South West Africa*, warning against importing domestic law institutions into international law (*supra*, fn. 288, ICJ Reports (1950), pp. 146, 148). On this aspect cf. further *infra*, MN 268. During the discussions in the Committee of Jurists of 1920 on Art. 38, Lord Phillimore, explained the common law understanding of ‘equity’ (Procès-Verbaux, *supra*, fn. 16, p. 333); but it is not clear whether or not he suggested that equity (in this sense) should be applied by the Court (Sørensen [1946], p. 195).

³⁴⁸ Cf. *infra*, MN 255–266. For an illustration of such a use cf. e.g. Judge Hudson’s Sep. Op. appended to the PCIJ’s judgment of 28 June 1937 on the *Diversion of Water from the Meuse* (Netherlands/Belgium), (Series A/B, No. 70, pp. 76–7).

³⁴⁹ *Barcelona Traction case*, *supra*, fn. 296, ICJ Reports (1970), pp. 64, 85 (para. 36).

³⁵⁰ *Ibid.*, p. 86, quoting Megarry, R.L./Baker, F.W. (eds.), *Snell’s Principles of Equity* (26th edn., 1966), pp. 5–6. Cf. also Hudson, *PCIJ*, p. 617, Jennings (1986), *supra*, fn. 345, pp. 27–38, p. 32; or Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 56. Contrast, however, *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71).

in the international legal system, it can be seen as having used it this way in a disguised manner.

It has been suggested that ‘the ICJ now has considerable experience with the application of equity and has developed a body of jurisprudence that will guide it in future cases’.³⁵¹ This might be a somewhat over-optimistic view and the subjective element inherent in the application of equity is still such as to raise the fear of ‘unfettered law-making by judges, especially at the international level’.³⁵² As Sørensen noted:

Vu la situation peu consolidée de sa juridiction obligatoire et sa préoccupation, de ce chef, de conserver intacte l’illusion que se font les hommes d’Etat sur la possibilité de tenir toute activité législative ou créatrice de droit à l’écart de la fonction judiciaire, la Cour a sans doute fait preuve d’une grande sagesse en ne mettant pas trop en évidence le fait qu’elle s’éloigne du domaine des règles positives.³⁵³

This measure of caution has not prevented the Court from finding grounds for its decisions in considerations based on equity, quite often by just asserting its conclusion without giving detailed explanations:

- (1) Already in its first judgment, in the *Wimbledon* case, the PCIJ took several decisions on the sole basis of social convenience;³⁵⁴
- (2) Even in the *Lotus* case, which is usually seen as the standard bearer of the positivist-voluntarist approach, the PCIJ came to the conclusion ‘that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown’; and it justified this solution by saying: ‘Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy *the requirements of justice* and effectively to protect the interests of the two States. It is only *natural* that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole’.³⁵⁵
- (3) In the *Barcelona Traction* case, the present Court, declared that it was ‘not of the opinion that, *in the particular circumstances* of the present case, *jus standi* [was] conferred on the Belgian Government by considerations of equity’³⁵⁶ which implies *a contrario* that these considerations could have had this result.
- (4) In its Advisory Opinion on the *Agreement between the WHO and Egypt*, the Court, discussing the period of time involved in the observance of the duty to consult and

³⁵¹ McCaffrey, S., *Understanding International Law* (2006), p. 68.

³⁵² Murphy, *supra*, fn. 180, p. 29.

³⁵³ Sørensen (1946), p. 201. This clearly raises the delicate question of law-making by the Court, which is briefly dealt with *infra*, MN 322–334.

³⁵⁴ These decisions concerned the rate of interest, costs and delays of payment (*Wimbledon case, supra*, fn. 304, PCIJ, Series A, No. 1, pp. 31–2). *Cf.* also the judgment of 30 August 1924 in the *Mavrommatis case, supra*, fn. 239, PCIJ, Series A, No. 2, p. 16, where the Court noted that in the absence of rules in the Statute and the Rules, it ‘is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.’ These examples are given by Sørensen (1946), pp. 201–5.

³⁵⁵ *Lotus case, supra*, fn. 128, PCIJ, Series A, No. 10, p. 30 (emphasis added).

³⁵⁶ *Barcelona Traction case, supra*, fn. 296, ICJ Reports (1970), pp. 3, 48 (para. 101) (emphasis added); and *cf.* the explanations for this position, *ibid.*, pp. 48–50 (paras. 92–100). In his Sep. Op., Sir Gerald Fitzmaurice explained that: ‘In the present context, the equitable considerations to which the Court refers in paras. 92–101 of the Judgment, stress the need for a less inelastic treatment of certain of the issues of admissibility involved’ (*ibid.*, p. 85 [para. 35]).

negotiate, and the period of notice of termination of the Agreement to be given, considered that ‘what is reasonable and equitable in any given case must depend on its particular circumstances’;³⁵⁷ without any further determination of what actually would be ‘reasonable and equitable’, the Court expressly referred to these concepts in the response given to the WHO Assembly by underlining that the parties should take all measures in order ‘to effect an orderly and *equitable* transfer of the Office to its new site’.³⁵⁸

- (5) In its advisory opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization*, the Court relied on its inherent powers to conduct the proceedings in order to mitigate the effects of the unequal position the individual and the institution hold before it in an advisory proceedings on review of judgments of administrative tribunals. It concluded that, due to these measures, ‘both the Fund and Ms Saez García have had adequate and in large measure equal opportunities to present their case and to answer that made by the other; and that, in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met’.³⁵⁹
- 145 Yet, it is certainly the recourse by the present Court to ‘elementary considerations of humanity’ which is most illustrative of the use of equity in the reasoning of the Court—even though it can be accepted that it reflects a ‘trial and error’ method³⁶⁰ and that it is neither univocal nor always consistent:³⁶¹

- (1) The expression was first used by the Court in the *Corfu Channel case* where the obligation incumbent upon Albania to notify the existence of a minefield in Albanian waters and to warn the approaching ships of the consequential imminent danger were based ‘not on the Hague Convention of 1907, No VIII, which is applicable in time of war, but on certain general and well-recognized principles’ among them ‘elementary considerations of humanity, even more exacting in peace than in war’.³⁶² These considerations were given the same status as ‘the principle of the freedom of navigation’ and ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’;³⁶³ thus they appear to have been considered general principles of international law of a customary nature.
- (2) In *Nicaragua*, the Court considered that ‘There is no doubt that [the rules laid down in Art. 3 common to all four Geneva Conventions of 1949] constitute a minimum yardstick’ and ‘reflect what the Court in 1949 called “elementary considerations of

³⁵⁷ *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, ICJ Reports (1980), pp. 96 (para. 49).

³⁵⁸ *Ibid.*, p. 97 (para. 51 [2c]) (emphasis added).

³⁵⁹ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, available at <<http://www.icj-cij.org>>, para. 46.

³⁶⁰ Weil (1996), *supra*, fn. 345, pp. 121–44, p. 123.

³⁶¹ *Cf.* generally Dupuy, P.-M., ‘Les “considérations élémentaires d’humanité” dans la jurisprudence de la Cour internationale de Justice’ in Dupuy, P.-M., *Mélanges Valticos*, *supra*, fn. 107, pp. 117–30.

³⁶² *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 22; also quoted in *Nicaragua*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 112 (para. 215).

³⁶³ *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 22. *Cf.* also *Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010, para. 101.

humanity”³⁶⁴ However, the same observation can be made: here again, the latter are assimilated to ‘the general principles of humanitarian law to which the Conventions merely give specific expression’.³⁶⁵

- (3) Finally, in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, commenting upon the ‘cardinal principles contained in the texts constituting the fabric of humanitarian law’,³⁶⁶ the Court observed:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.³⁶⁷

In all these cases, considerations based on equity can either be analysed as the material source of customary (and treaty³⁶⁸) rules,³⁶⁹ or as a description of the content of the rule itself,³⁷⁰ *i.e.* neither as a distinct source of law nor as stemming from such a distinct source.³⁷¹ As has been noted, thus considered, they are ‘un instrument approprié de l’élucidation du droit’³⁷² but, in having recourse to them, the Court clearly does not intend (or does not wish to be seen as intending) to neglect the *lex lata* for the *lex ferenda*.

In the words of Sir Hersch Lauterpacht: ‘The fact that a Tribunal is bound to apply the law does not necessarily mean that it must apply it uncritically.’³⁷³ The Court has on occasion expressed doubts as to the legitimacy of certain rules of law³⁷⁴ or recognized that they were in a process of change,³⁷⁵ but it has always been careful in making a clear

³⁶⁴ *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), p. 14, 114 (para. 218).

³⁶⁵ *Ibid.*, para. 220; but contrast the hesitations of Judges Ago (Sep. Op., *ibid.*, p. 184 [para. 6]) and Jennings (Diss. Op., *ibid.*, p. 537). Cf. also the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, where the Court noted that moral and humanitarian principles are the ‘basis’ of the 1951 Convention (ICJ Reports [1951], pp. 15, 24) or the judgment of 11 July 1996 on the (*Bosnian*) *Genocide case, supra*, fn. 93, ICJ Reports (1996), pp. 595, 612 (para. 22).

³⁶⁶ *Nuclear Weapons case, supra*, fn. 107, ICJ Reports (1996), pp. 226, 257 (para. 78).

³⁶⁷ *Ibid.*, para. 79. Cf. also *Wall case, supra*, fn. 104, ICJ Reports (2004), pp. 136, 199 (para. 157).

³⁶⁸ As rightly noted by P.-M. Dupuy (in *Mélanges Valticos, supra*, fn. 361, pp. 117, 126) ‘l’utilisation des ‘considérations’ par la Cour est destinée à lui permettre de contourner un éventuel obstacle conventionnel, soit que la convention en question ne soit pas applicable en l’espèce ..., soit qu’elle soit écartée par le jeu des réserves à la reconnaissance de juridiction de la Cour par l’une des parties au différend, soit que le ou les Etats concernés n’aient pas ratifié la ou les conventions en cause’.

³⁶⁹ ‘[E]quity may be regarded as a material source of law, but not as a formal source, nor in itself constituting a legal rule. It is perhaps in this sense that equity has its widest significance’ (Jennings/Watts, *supra*, fn. 164, p. 44). Cf. also *supra*, MN 111 *et seq.*

³⁷⁰ Cf. *infra*, MN 153–154.

³⁷¹ Thirlway aptly notes that ‘elementary considerations of humanity’ cannot be employed ‘as such, as a source’ by the Court (‘Law and Procedure, Part One and Two’, *BYIL* 76 [2005], p. 79).

³⁷² Dupuy, in *Mélanges Valticos, supra*, fn. 361, pp. 117, 130.

³⁷³ Lauterpacht, in *Symbolae Verzijl, supra*, fn. 205, pp. 196–221, p. 219.

³⁷⁴ Cf. e.g. *Barcelona Traction case, supra*, fn. 296, ICJ Reports (1970), pp. 3, 46–47 (para. 89). In its 1996 advisory opinion in the *Nuclear Weapons case*, the Court expressed regret at the actual state of the legal rules concerning nuclear weapons: ‘In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons’ (*supra*, fn. 107, ICJ Reports [1996], p. 226, 263 [para. 98]). Cf. also *Judgment No. 2867 of the ILOAT case, supra*, fn. 359, Advisory Opinion of 1 February 2012, paras. 45–46.

³⁷⁵ Cf. e.g. *Icelandic Fisheries cases, supra*, fn. 129, ICJ Reports (1974), pp. 3, 23–4 (para. 53) and pp. 175, 192 (para. 45); cf. also *ibid.*, pp. 3, 19 (para. 40).

distinction between the *lex lata* and the *lex ferenda*:³⁷⁶ ‘the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down’.³⁷⁷

148 This conclusion can, however, be qualified. In *Continental Shelf* (Tunisia/Libya), the parties had requested the Court ‘to take into account’, in rendering its decision, ‘equitable principles and the relevant circumstances which characterize the area, *as well as the recent trends* admitted at the Third Conference on the Law of the Sea’.³⁷⁸ Using rather obscure *formulae*, the Court, after recalling its statement in the *Icelandic Fisheries cases*,³⁷⁹ made three rather different points:

- in the *Continental Shelf case* (Tunisia/Libya), the *renvoi* in the special agreement did not make these trends a *lex specialis*;
- ‘[i]n any event, ... any consideration and conclusion of the Court in connection with the application of the “trends” is confined exclusively to the relations of the Parties in the present case’;
- ‘[f]urthermore, the Court would have had *proprio motu* to take account of the progress made by the Conference, even if the Parties had not alluded to it in their Special Agreement; for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law’.³⁸⁰

149 Here again, in spite of what could be seen as an express authorization to escape from strict legal rules,³⁸¹ the Court took great care in relating ‘the new accepted trends’ mentioned in the special agreement to ‘the legal sources specified in Art. 38, paragraph 1’ of its Statute to which it ‘is bound to have regard’.³⁸² In fact, it remained entirely faithful to the firm position taken in its 1969 judgment on the *North Sea Continental Shelf cases* where it had concluded that Art. 6 of the Geneva Convention on the Continental Shelf ‘did not embody or crystallize any pre-existing or emergent rule of customary law’.³⁸³ Similarly, in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court noted, in regard to treaties dealing with acquisition, manufacture, possession, deployment and testing of nuclear weapons, that ‘these treaties could ... be seen as foreshadowing a future general prohibition of the use of such weapons, but

³⁷⁶ On this fundamental distinction *cf.* in particular Thirlway, H., ‘Reflexions on *Lex Ferenda*’, *NYIL* 32 (2001), pp. 3–26; and Virally, M., ‘A propos de la “*lex ferenda*”’, in *Mélanges offerts à Paul Reuter: le droit international—unité et diversité* (1981), pp. 519–33; and Tanaka, Y., ‘Rethinking *Lex Ferenda* in International Adjudication’, *GYIL* 51 (2009), pp. 467–95.

³⁷⁷ *Icelandic Fisheries cases*, *supra*, fn. 129, ICJ Reports (1974), pp. 3, 23–4 (para. 53) and pp. 175, 192 (para. 45). This cardinal principle has been stressed by several judges inside or outside the Court: *cf. e.g. Nuclear Weapons case*, *supra*, fn. 17, Sep.Op. Guillaume, ICJ Reports (1996), pp. 287 *et seq.*; Diss. Op. Schwebel, *ibid.* pp. 311 *et seq.*; or Shahabuddeen, pp. 375 *et seq.*

³⁷⁸ Special agreement of 10 June 1977 (Art. 1), reproduced in ICJ Reports (1982), pp. 18, 21.

³⁷⁹ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 37 (para. 23). On the *Icelandic Fisheries cases cf. supra*, fn. 375.

³⁸⁰ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 38 (para. 24).

³⁸¹ On this point *cf. infra*, MN 161–172.

³⁸² *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 37 (para. 23); and *cf. already supra*, MN 79–80.

³⁸³ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 41 (para. 69), and also p. 38 (para. 62).

they do not constitute such a prohibition by themselves,³⁸⁴ and considered that while a number of resolutions of the UN General Assembly ‘are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons’.³⁸⁵ An ‘emergent rule’ is not a legal rule. Belonging to the ‘upstream’, it is part of the process which could lead to the formation of a new rule.³⁸⁶

However, when the relevant ‘trend’ has crystallized in a new rule or imposes a new interpretation of an existing rule, the Court must take it into consideration and decide accordingly. In particular, in the matter of decolonization, ‘the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore’.³⁸⁷ A comparable position had been adopted by the Court in the *Aegean Sea case* when it considered that ‘in interpreting and applying [Greece’s] reservation ... with respect to the present dispute the Court has to take account of the evolution which has occurred in the rules of international law concerning a coastal State’s rights of exploration and exploitation over the continental shelf’.³⁸⁸ In the *Gabčíkovo-Nagymaros case*, the Court pointed out ‘that newly developed norms of environmental law are relevant for the implementation of the [1977] Treaty and that the parties could, by agreement, incorporate them’.³⁸⁹ And, more recently, the Court took quite an audacious position in applying the principle of equality of the parties during the proceedings concerning the review of a judgment of the ILOAT:

That principle must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds ... For the reasons given, questions may now properly be asked whether the system established in 1946 meets the present-day principle of equality of access to courts and tribunals. While the Court is not in a position to reform this system, it can attempt to ensure, so far as possible, that there is equality in the proceedings before it.³⁹⁰

As the Court has consistently recalled: ‘Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable’.³⁹¹

If, indeed, ‘The Court has not been expressly authorized by its Statute to apply equity as distinguished from law’, it must, nevertheless be concluded ‘that under Art. 38 of the Statute, if not independently of that Art., the Court has some freedom to consider principles of equity as part of the international law which it must apply’.³⁹²

This assimilation of law to justice (or this inclusion of equity into law) is of course realized when equity constitutes the very content of the legal rule. The most striking (if not

³⁸⁴ *Nuclear Weapons case*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 253 (para. 62).

³⁸⁵ *Ibid.*, p. 255 (para. 71).

³⁸⁶ For another example of such a process which has not resulted in a new legal rule *cf. supra*, MN 115.

³⁸⁷ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 31–2 (para. 53); *cf. also Western Sahara*, *supra*, fn. 104, ICJ Reports (1975), pp. 12, 32 (para. 56).

³⁸⁸ *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 34 (para. 80).

³⁸⁹ *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 67 (para. 112); *cf. also Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010, para. 204.

³⁹⁰ *Judgment No. 2867 of the ILOAT case*, *supra*, fn. 359, para. 44.

³⁹¹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 48 (para. 88). *Cf. also Continental Shelf (Tunisia/Libya)*, *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71), and Judge Jiménez de Aréchaga’s Sep. Op., *ibid.*, p. 106 (para. 25); *Continental Shelf (Libya/Malta)*, *supra*, fn. 92, ICJ Reports (1985), pp. 13, 39 (para. 45).

³⁹² *Diversion of Water from the Meuse case*, *supra*, fn. 348, PCIJ, Series A/B, No. 70, Sep. Op. Hudson, pp. 76 and 77.

always convincing) example of such a *renvoi* is given by the rules relating to the delimitation of maritime areas, in particular the continental shelf and the Exclusive Economic Zone (EEZ) between States with opposite or adjacent coasts.³⁹³ Such delimitations must ‘be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution’.³⁹⁴ The very wording of this rule, the origin of which goes back to the Court’s Judgment of 1969 in the *North Sea Continental Shelf cases*,³⁹⁵ clearly shows that ‘in this field it is precisely a rule of law that calls for the application of equitable principles’.³⁹⁶ As the Court clarified in the *Icelandic Fisheries cases*: ‘It is not a matter of finding simply an equitable solution but an equitable solution derived from the applicable law’.³⁹⁷ And, even more prudently, in the *Land and Maritime Boundary case*, the Court stressed:

in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court’s jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.³⁹⁸

And, for the latest position, the Court recalled in *Romania v. Ukraine* that:

The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64).³⁹⁹

154 Delimitation of maritime areas, however, is not the only field where equity is co-substantial to the rule itself. The same is also largely true with respect to the determination of reparation for an internationally wrongful act.⁴⁰⁰ Thus, in its 1956 advisory opinion on the *Judgments of the ILOAT Made against the UNESCO*, the Court recognized that,

³⁹³ On the role of equity in maritime delimitations cf. e.g. Bedjaoui, M., ‘L’énigme’ des ‘principes équitables’ dans le droit des délimitations maritimes’, *Rivista spagnola de derecho internacional* 42 (1990), pp. 367–88; or Jiménez de Aréchaga, E., ‘The Conception of Equity in Maritime Delimitations’, in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, vol. II (1987), pp. 229–39; Schachter, O., ‘Linking equity and law in maritime delimitation’, in *Liber amicorum judge Shigeru Oda* (2002), pp. 1163–8 and Kolb, R., *Case law on equitable maritime delimitation: digest and commentaries. Jurisprudence sur les délimitations maritimes selon l’équité: répertoire et commentaires* (2003), p. 575. For further references on equity in general cf. *supra*, fn. 345.

³⁹⁴ Arts. 75, para. 1, and 83, para. 1 UNCLOS.

³⁹⁵ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3 *et seq.* In these cases, the Court clearly acted as a quasi-legislator; cf. *infra*, MN 329 and fn. 980.

³⁹⁶ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 48 (para. 88), and also p. 47 (para. 85).

³⁹⁷ *Icelandic Fisheries cases*, *supra*, fn. 129, ICJ Reports (1974), pp. 3, 33 (para. 78), and pp. 175, 202 (para. 69). This passage was also quoted by the Chamber in the judgment of 22 December 1986 in the *Frontier Dispute case (Burkina Faso/Mali)* (ICJ Reports [1986], pp. 554, 568 [para. 28]); however, that case was different: in land territorial disputes, as in all international law disputes, equity is seen as an attribute of the rules to be applied (cf. *infra*, MN 155), whereas in maritime delimitations, it is the very content of the applicable rules. Cf. further *Continental Shelf case (Tunisia/Libya)*, *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71).

³⁹⁸ *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 443 (para. 294).

³⁹⁹ *Maritime Delimitation in the Black Sea case*, *supra*, fn. 92, ICJ Reports (2009), pp. 61, 100 (para. 111). Cf. also *ibid.*, p. 103 (paras. 120–122); *Territorial and Maritime Dispute case (Nicaragua/Honduras)* *supra*, fn. 147, ICJ Reports (2007), pp. 659, 741 (paras. 270–272).

⁴⁰⁰ Cf. the ILC’s commentaries on the Articles on Responsibility of States for Internationally Wrongful Acts, *supra*, fn. 302, especially Art. 35 (Restitution), para. (11); Art. 36 (Compensation), paras. (7) and (19).

while ‘the Tribunal said: “That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below”, ... [i]t does not appear from the context of the Judgment that the Tribunal thereby intended to depart from the principles of law’.⁴⁰¹

As far as the land territory of the State is concerned, there exists no equivalent to the application of ‘equitable principles’ in the field of maritime delimitation. However, in the *Frontier Dispute* between Burkina Faso and Mali, the Chamber of the ICJ, which made clear that it ‘will not apply equity *praeter legem*’, decided to ‘have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force’,⁴⁰² *i.e.* a ‘legal concept [being] a direct emanation of the idea of justice’.⁴⁰³ This is a very general guideline. In the words of the Court, ‘when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case to be closest to the requirements of justice’,⁴⁰⁴ provided it does not ‘have to go beyond what can reasonably be regarded as being a process of interpretation and ... to engage in a process of rectification or revision’.⁴⁰⁵ Applying this general guideline, the Court rejected a purely literal interpretation of Thailand’s 1950 Declaration of the compulsory jurisdiction of the Court considering the result reached by this method to be ‘something unreasonable or absurd’.⁴⁰⁶ 155

As has been observed: ‘Equity is not used to usurp the function of law, but to ensure its proper operation in accordance with the principles of justice.’⁴⁰⁷ It is not a “*joker judiciaire*”.⁴⁰⁸ And although equity plays an important part in international law as applied by the Court, it is not a substitute for law, nor a source—at least not a formal source—of it. Rather, it is a postulated attribute inherent to it—a factor which has concrete consequences, especially in respect of the interpretation of the rules—and, in some cases, it forms the very content of the rule itself. 156

2. *The Exception in Para. 2*

Paragraph 2 of Art. 38 was not proposed by the 1920 Advisory Committee of Jurists. It was added by the Sub-Committee of the Third Committee of the Assembly of the 157

⁴⁰¹ *Judgments of the Administrative Tribunal of the ILO upon Complaints made against the UNESCO*, ICJ Reports (1956), pp. 77, 100. *Cf.* also the judgment of the Court of 15 December 1949 on the *Assessment of the Amount of Compensation Due from the People’s Republic of Albania to the United Kingdom of Great Britain and Northern Ireland*, in the *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 249 *et seq.*

⁴⁰² *Frontier Dispute case* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 567–8 (para. 28); *cf.* also the Chamber judgment of 11 September 1992 in *Land, Island and Maritime Frontier Dispute*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 514 (para. 262).

⁴⁰³ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71); *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 633 (para. 149); *Land, Island and Maritime Frontier Dispute*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 558 (para. 396).

⁴⁰⁴ *Continental Shelf* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71).

⁴⁰⁵ *South West Africa cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 48 (para. 91).

⁴⁰⁶ *Preah Vihear case*, *supra*, fn. 234, Preliminary Objections, ICJ Reports (1961), pp. 17, 33. *Cf.* also *Polish Postal Service in Danzig*, PCIJ, Series B, No. 11, p. 39; *Ambatielos case*, *supra*, fn. 233, ICJ Reports (1952), pp. 28, 45; *Arbitral Award of 31 July 1989*, ICJ Reports (1991), pp. 53, 69–70 (para. 48); *(Bosnian) Genocide case*, *supra*, fn. 93, ICJ Reports (2007) pp. 43, 109–10 (para. 160) and p. 222 (para. 431). On the role of reasonableness in the Court’s case law, *cf.* Corten, O., *L’utilisation du ‘raisonnable’ par le juge international* (1997) and the very complete bibliography contained therein.

⁴⁰⁷ Cheng, B., ‘Justice and Equity in International Law’, *Current Legal Problems* (1955), p. 211.

⁴⁰⁸ *Cf.* Dupuy, in *Mélanges Valticos*, *supra*, fn. 361, pp. 117, 128.

League of Nations.⁴⁰⁹ The very idea of a Court entitled to decide on the basis of equity had nevertheless been touched upon by the jurists. Lapradelle suggested that it:

would be too strict and even unjust to force the Court to consider only law. There would be no danger in allowing the Court to consider whether any particular legal solution were just and equitable, and if necessary to modify, if the situation arose, the legal solution according to the exigencies of justice and equity.⁴¹⁰

Hagerup, who in principle agreed with Lapradelle's viewpoint, considered, however, that 'if there is a rule of international law, the Court must apply it. The Court should only have recourse to equity if authorised to do so by the parties.'⁴¹¹ This concept of equity—coming close to the *ex aequo et bono* formula—was not further discussed by the Committee. Ricci-Busatti regretted the absence of any reference to equity in the draft provision.⁴¹² However, he understood 'principles of equity' as 'general rules which permit the solution of any question',⁴¹³ which should then be included in the 'general principles of law' as a supplemental means to avoid *non liquet*. However, since Lapradelle had made clear that 'justice includes equity',⁴¹⁴ any reference to the latter seemed superfluous.

158 In the Sub-Committee of the Third Committee of the First Assembly of the League, however, an amendment was proposed in order eventually to include equity as part of the law to be applied by the Court. To that end, Fromageot, inspired by the precedent of the 1907 Hague Convention,⁴¹⁵ suggested a modification of (then) para. 3 in order to refer to 'general principles of law and justice', which was adopted by the Sub-Committee.⁴¹⁶ Fromageot explained that this amendment empowered the Court to decide both in law and in equity. However, soon after, the question was reopened by Politis who had doubts about the new draft. Accordingly he proposed to introduce what became the second paragraph of Art. 38 in order to highlight that the Court is, first and foremost, a court of justice applying law. Only with the consent of the interested parties, should the Court be allowed to depart from legal rules and decide under principles of equity.⁴¹⁷

159 During the redrafting of the Statute of the new Court in 1945, para. 2 of Art. 38 was not questioned,⁴¹⁸ neither during the works of the Washington Advisory Committee of Jurists nor at the San Francisco Conference.

160 Clearly, the wording of para. 2 of Art. 38 implies that—in contrast to its 'usual' function, which, according to para. 1, is to decide disputes 'in accordance with international law'—when it is called to decide a case *ex aequo et bono*, the Court may depart from applying strict legal rules. Since it stands in clear contrast to the usual function of a

⁴⁰⁹ Cf. *supra*, MN 39.

⁴¹⁰ Procès-Verbaux, *supra*, fn. 16, p. 296.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*, p. 332.

⁴¹³ *Ibid.*, p. 314. *Contra* Lord Phillimore, *ibid.*, p. 333, or de Lapradelle, *ibid.*, p. 335.

⁴¹⁴ *Ibid.*, p. 335.

⁴¹⁵ Cf. *supra*, MN 11–13.

⁴¹⁶ League of Nations, Documents of the First Assembly, Meetings of the Committees, vol. I, p. 386.

⁴¹⁷ *Ibid.*, p. 403.

⁴¹⁸ The Cuban proposition, however, omitted in its Art. 31 (concerning the applicable law) a corresponding provision authorizing the Court to decide a case *ex aequo et bono* (UNCIO, vol. XIV, pp. 435 and 436). Guatemala took the opposite approach, arguing that 'To render the Court effective, it is considered essential that it be empowered to pass upon specific disputes *ex aequo et bono* upon the request of one of the parties' (*ibid.*).

court of law—at least in the national sphere⁴¹⁹—this possibility is subject to an agreement between the parties, a condition which the Court has strictly interpreted.

a) The Notion of *ex aequo et bono*

Certainly, the expression *ex aequo et bono* is not a ‘term of art’.⁴²⁰ The relative ambiguity resulting from the *travaux* and the wording of para. 2 has never been completely cleared up nor will it be as long as the Court is not called upon to decide *ex aequo et bono*. 161

There is broad agreement among commentators that: ‘In a case where the parties are agreed that it may decide *ex aequo et bono*, the provision in the Statute would seem to enable the Court to go outside the realm of law for reaching its decision. It relieves the Court of the necessity of deciding according to law.’⁴²¹ This is hardly debatable: according to the principle of *ut res magis valeat quam pereat*,⁴²² Art. 38, para. 2 must be given some meaning in order not to ‘be devoid of purport or effect’.⁴²³ 162

This would also seem to be the Court’s own position which, on several occasions, emphasized that in the absence of an express request from the parties based on para. 2 of Art. 38, it was bound to apply international law, *not* to decide *ex aequo et bono*. Thus: 163

- ‘such power [to decide *ex aequo et bono*], which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect’;⁴²⁴
- ‘[t]he Court can take ... a decision [*ex aequo et bono*] only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement’;⁴²⁵

⁴¹⁹ The possibility for international tribunals to decide *ex aequo et bono* is far from unprecedented; *cf. supra*, paras. 5 and 11.

⁴²⁰ Hudson, *PCIJ*, p. 618.

⁴²¹ *Ibid.*, p. 620. *Cf.* also, among others, Brownlie, I., *Principles of Public International Law* (7th edn., 2008), pp. 26 and 720; Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 387–8; Habicht, M., ‘Le pouvoir du juge international de statuer “*ex aequo et bono*”’, *Rec. des Cours* 49 (1934-III), pp. 281–369, pp. 282 and 347; Jennings/Watts, *supra*, fn. 164, p. 44; Strupp, K., ‘Le droit du juge international de statuer selon l’équité’, *Rec. des Cours*, 30 (1930-III), pp. 357–481, Thirlway, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 51. In contrast, Rousseau, considers Art. 38, para. 2 as empowering the Court to decide in the absence of legal rules, by filling the *lacunae* of international law proper (*supra*, fn. 74, p. 412).

⁴²² *Cf.* the order of 19 August 1929 in the *Free Zones case*, *supra*, fn. 139, *PCIJ*, Series A, No. 22, p. 13; the advisory opinions on the *Acquisition of Polish Nationality*, *supra*, fn. 306, *PCIJ*, Series B, No. 7, pp. 16–17; the *Exchange of Greek and Turkish Populations*, *supra*, fn. 306, *PCIJ*, Series B, No. 10, p. 25; and on the *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, *PCIJ*, Series B, No. 13, p. 19; as well as the ICJ’s judgments in *Corfu Channel*, *supra*, fn. 125, *ICJ Reports* (1949), pp. 4, 24; on the *Sovereignty over Certain Frontier Land* (Belgium/Netherlands), *ICJ Reports* (1959), pp. 209, 221–2; and in the *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), *ICJ Reports* (1994), pp. 6, 23–4 (para. 47) and *CERD case*, *supra*, fn. 144, para. 133.

⁴²³ *Corfu Channel*, *supra*, fn. 125, *ICJ Reports* (1949), pp. 4, 24.

⁴²⁴ *Free Zones case*, *supra*, fn. 139, Order of 6 December 1930, *PCIJ*, Series A, No. 24, p. 10. The absolute character of this requirement has equally been stressed by arbitral tribunals: *cf.*, for instance, Anglo-Italian Conciliation Commission, decision on *Dual Nationality*, *RIAA*, vol. XIV, pp. 27, 33 (‘It is only in default of rules of law which are applicable that it can make laws *ex aequo et bono*. But, this is not the case. It must be said that it is within the jurisdiction of the doctrine and the decisions of the Court that the application of the general principles does not exceed the limits of positive right; in applying them the judge does not become free to decide *ex aequo et bono*. This arises from the fact that Art. 38 of the Statute demands a formal agreement between the Parties, if the Court wishes to have the faculty to decide according to the principles of justice and equity.’); *cf.* also *Arbitral award relating to the question of the boundaries between Brazil and French Guyana*, *RIAA*, vol. XXVIII, pp. 349, 357.

⁴²⁵ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, *ICJ Reports* (1982), pp. 18, 60 (para. 71). *Cf.* also *South West Africa cases*, *supra*, fn. 115, *ICJ Reports* (1966), pp. 6, 48 (para. 90); *Continental Shelf case* (Libyal Malta), *supra*, fn. 92, *ICJ Reports* (1985), pp. 13, 39 (para. 45).

- '[t]he Chamber is however bound by its Statute, and required by the Parties, not to take a decision *ex aequo et bono*, but to achieve a result on the basis of law';⁴²⁶
- '[i]t is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*';⁴²⁷
- '[t]his reference [in the Special Agreement] to the rules of international law and to the "first paragraph" of Art. 38 obviously excludes the possibility of any decision *ex aequo et bono*';⁴²⁸

164 The position taken by the Court in the *Appeal Relating to the Jurisdiction of the ICAO Council* also leads to this conclusion. In this case, the Court considered that a complaint made under sect. 1 of the 1944 International Air Services Transit Agreement whose primary purpose was 'to permit redress against legally permissible action that nevertheless causes injustice or hardship', does not lend itself to a right of appeal to the Court since 'the findings and recommendations to be made by the Council under this section would not be about legal rights or obligations: they would turn on considerations of equity and expediency such as would not constitute suitable material for appeal to a court of law'.⁴²⁹

165 Similarly, it is interesting to note that several treaties concluded during the inter-war years,⁴³⁰ using various formulas, provide for the jurisdiction of the Court *ex aequo et bono* in the *absence of applicable rules of international law* or 'if the International Court finds that the dispute does not involve a question of law'.⁴³¹

166 It must then be accepted that, if so authorized by the parties, the Court can, and should, apply 'something' other than international law as provided for in para. 1. But this leaves several outstanding questions open:

- what are the actual content and limits of the power of the Court to decide *ex aequo et bono*?
- in particular, to what extent is an *ex aequo et bono* decision different from a decision based on equitable considerations?
- when the Court is entitled to take such a decision, does this exclude the application of international law?

⁴²⁶ *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 278 (para. 59).

⁴²⁷ *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 567 (para. 28).

⁴²⁸ *Land, Island and Maritime Frontier Dispute*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 390 (para. 47).

⁴²⁹ *Appeal Relating to the Jurisdiction of the ICAO Council* (India/Pakistan), ICJ Reports (1972), pp. 46, 58–59 (para. 20).

⁴³⁰ The pre-1920 treaties of arbitration are usually most ambiguous: some provide for decisions *ex aequo et bono*. However, they do not normally distinguish between equity, justice and law (e.g. see Art. 7 of Convention XII of 1907 creating the International Prize Court, referred to *supra*, para. 11), and nothing clear can be inferred from them. For examples *cf. e.g.* Hudson, *PCIJ*, pp. 615–16 or Rousseau, *supra*, fn. 74, pp. 412–13. Post-1945 treaties much more rarely provide for the application of equity. But *cf.* Art. 18, para. 2 of the Treaty of Friendship, Conciliation and Judicial Settlement (Turkey/Italy), Rome, 24 March 1950, 96 UNTS, pp. 217 *et seq.* (No. 1338); Art. 16 of the Agreement concerning Conciliation and Judicial Settlement (Brazil/Italy), Rio de Janeiro, 24 November 1954, 284 UNTS, pp. 344 *et seq.* (No. 4146).

⁴³¹ *Cf.* *PCIJ*, Series D, No. 6, p. 482, fn. 2; as well as the examples given by Hudson, *PCIJ*, pp. 618–19; Rousseau, *supra*, fn. 74, pp. 412–13; and von Stauffenberg, pp. 281–2. In the same spirit, Art. 28 of the 1928 General Act of Arbitration provided: 'If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Art. 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.'

The *travaux* of para. 2 of Art. 38 do not throw much light on the true meaning of this provision.⁴³² Nor does the case law of the Court which has never been invited to decide *ex aequo et bono*—at least positively. However, in the absence of a clear definition of what it is, the case law of the Court does give an indication of what *ex aequo et bono* is not. First, as explained previously,⁴³³ the meaning of the expression *ex aequo et bono* must be sought outside the prescriptions of strict law. And, second, since (and as far as) equity is an integral part of law,⁴³⁴ this implies that, when deciding *ex aequo et bono*, the Court would not refer to equity in its ‘legal’ manifestations. 167

This can be inferred from the *dictum* of the Permanent Court in the *Free Zones* case where, while showing reticence vis-à-vis the very idea of deciding outside the framework of international law,⁴³⁵ the Court said (without mentioning Art. 38): 168

even assuming that it were not incompatible with the Court’s Statute for the Parties to give the Court power to prescribe *a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only*, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect.⁴³⁶

The present Court has been clearer. On several occasions, it has asserted that when it applied ‘equity’ or ‘equitable principles’, or based itself on ‘elementary considerations of justice’,⁴³⁷ it was not deciding *ex aequo et bono*. For example, it has noted that ‘Application of equitable principles is to be distinguished from a decision *ex aequo et bono*’⁴³⁸; and has observed that: ‘If these principles and rules are applicable as elements of law in the present case, they remain so whatever Mali’s attitude. If the reverse is true, the Chamber could only take account of them if the two Parties had requested it to do so.’⁴³⁹ 169

It might be true that, in reality, when it has had recourse to equity *infra* or *intra legem*, the Court has, in fact, applied a subjective element since the concept of ‘equity within the law’ is so vague that it paves the way for too wide a margin of appreciation, which erases the differentiation thus made between this kind of equity and the one to be applied *ex aequo et bono*.⁴⁴⁰ Nevertheless, the distinction must be firmly maintained.⁴⁴¹ equity, as defined by the Court, gives it reasonable flexibility⁴⁴² to apply international 170

⁴³² Cf. *supra*, MN 157–158.

⁴³³ *Supra*, MN 157.

⁴³⁴ Cf. *supra*, MN 140–156.

⁴³⁵ In his famous Sep. Op. in the *Free Zones* case, Judge Hudson declared: ‘it is scarcely possible that it was intended that, even with the consent of the Parties, the Court should take jurisdiction of political questions, should exercise the function of drafting treaties between nations or decide questions upon grounds of political and economic expediency’ (*supra*, fn. 139, Order of 6 December 1930, PCIJ, Series A, No. 24, p. 34; and cf. more generally, his opinion in its entirety, pp. 29–43).

⁴³⁶ *Ibid.*, PCIJ, Series A, No. 24, p. 10 (emphasis added).

⁴³⁷ Cf. *supra*, MN 144–156.

⁴³⁸ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71). Cf. also *North Sea Continental Shelf case*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 48 (para. 88); *Continental Shelf* (Libya/Malta), *supra*, fn. 92, ICJ Reports (1985), pp. 13, 39 (para. 45).

⁴³⁹ *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 575 (para. 42).

⁴⁴⁰ Cf. e.g. *Abi-Saab* (1994), *supra*, fn. 182, pp. 29–49, p. 35; Lauterpacht, E., ‘Equity, Evasion, Equivocation and Evolution in International Law’, *Proceedings of the American Branch of the ILA* (1977–1978), pp. 45 *et seq.*; or Weil (1996), *supra*, fn. 345, p. 132.

⁴⁴¹ Cf. Jennings (1986), *supra*, fn. 345, pp. 27–38, p. 30.

⁴⁴² For a similar view, cf. Hudson, *PCIJ*, p. 620. It is, however, the opinion of the present writer that, in the past, the Court has gone far beyond what is reasonable in applying ‘equitable principles’ in maritime delimitation cases (cf. Weil, P., *The Law of Maritime Delimitation: Reflections* (1989), *passim*). The recent

law as it stands and develops; Art. 38, para. 2, offers the parties a possibility to widen this margin and to give to the Court a ‘discretionary power’ (pouvoir discrétionnaire) to find, outside the strict legal prescriptions, the basis for a satisfactory solution when it considers, or has a premonition, that strict law would lead to an unjust decision—*summum jus, summa injuria* ...

171 Some *caveats*, however, are necessary:

- First, exactly as in French or international administrative law, ‘discretionary’ does not mean ‘arbitrary’;⁴⁴³ the judges must find a solution which remains within the realm of the judicial function of the Court;⁴⁴⁴ when deciding *ex aequo et bono*, they may depart from particular rules leading to an unjust solution in the given case; they cannot leave the general framework of international law and, certainly, they could not rule out peremptory or intransgressible norms (*jus cogens*).
- Second, it goes without saying that decisions based on Art. 38, para. 2, would have the same legal effect as those made in application of international law as provided in para. 1 and that Arts. 59 and 60 of the Statute would apply; however, such decisions would hardly be part of the jurisprudence of the Court envisaged as a ‘subsidiary means for the determination of rules of law’ within the meaning of Art. 38, para. 1 (d): as a matter of definition, they are not based on rules of law.
- Third, an authorization to decide *ex aequo et bono* certainly does not *prevent* the Court from applying international law; it *authorizes* it to push it aside in so far as it finds it suitable; it would then only be when, for one reason or another, the Court finds the law to be either defective or incomplete,⁴⁴⁵ that it could base itself on extra-legal considerations.⁴⁴⁶

172 It must, however, be admitted that this is somehow paradoxical if, as the Court sometimes seems to postulate,⁴⁴⁷ equity is inherently part of the rule of law. However, such an optimistic view ignores the fact that law only reflects the relations of power at a given time.⁴⁴⁸ It can therefore happen that the maxim *summum jus, summa injuria* turns out to be correct; in such a case, Art. 38, para. 2 could be a useful safety valve. It is, however, revealing that States have never used it yet: apparently, they feel more comfortable with the law as it is than as it should be. This is probably in the order of things and certainly is a token of legal safety—not of a great aspiration to justice.

jurisprudence of the Court in this respect is certainly much more in line with the very idea of ‘equity within the law’ than it used to be.

⁴⁴³ Cf. e.g. Conseil d’Etat, 14 January 1916, *Camino*, *Recueil Lebon*, p. 15; or Conseil d’Etat, Assemblée, 2 November 1973, *Société anonyme Librairie François Maspero*, *Recueil Lebon*, p. 611; and also the judgment No. 191 of the ILO Administrative Tribunal of 15 May 1972 in *Ballo v. UNESCO*.

⁴⁴⁴ The composition of the Court provides strong guarantees in this respect. These, however, would not be as strong if a Chamber were to be authorized to decide *ex aequo et bono*. For comment on the system of geographical representation cf. Fassbender on Art. 9 MN 22–37.

⁴⁴⁵ If one assumes that this is conceptually possible—cf. *supra*, MN 87–90, for a discussion of *non liquet*.

⁴⁴⁶ For an interesting, explicit illustration of such a complementary role of law on the one hand and considerations *ex aequo et bono* on the other cf. e.g. Art. 26 of the 1957 European Convention for the Peaceful Settlement of Disputes, which confers on the Arbitral Tribunal envisaged in that provision the competence to ‘decide *ex aequo et bono*, having regard to the general principles of international law, while respecting the contractual obligations and the final decisions of international tribunals which are binding on the parties.’

⁴⁴⁷ Cf. *supra*, MN 151.

⁴⁴⁸ Cf. *supra*, MN 145.

b) **The Condition for Recourse to Equity *Contra Legem*—
'... If the Parties Agree Thereto'**

On several occasions, the Court, basing itself on Art. 38, para. 2 has recalled that it can take a decision *ex aequo et bono* 'only on condition that the Parties agree'.⁴⁴⁹ 173

As recalled previously,⁴⁵⁰ in the *Free Zones* case, the PCIJ very firmly took the view that such an authorization to decide *ex aequo et bono*⁴⁵¹ 'could only be derived from a clear and explicit provision to that effect'.⁴⁵² This requirement is in keeping with the text of Art. 38, para. 2 and with the 'absolutely exceptional character'⁴⁵³ of such a power conferred on a judicial organ 'whose function is to decide in accordance with international law'.⁴⁵⁴ Rightly, in its 1982 judgment in the *Continental Shelf case* (Tunisia/Libya), the present Court did not challenge the parties' views that the request contained in the special agreement 'for account to be taken of accepted trends' did not amount to 'authorizing it to decide *ex aequo et bono*'.⁴⁵⁵ 174

As a result, it is most implausible that the Court be invited to decide *ex aequo et bono* in a case brought before it by a unilateral application: it could happen only if the parties were to conclude a clear agreement to that effect; and even in this case, there can be some doubt that the parties could change the very nature of the dispute after having seised the Court.⁴⁵⁶ *A fortiori*, the absence of 'parties' in advisory proceedings excludes any possibility for the Court to decide *ex aequo et bono* when it exercises its advisory function:⁴⁵⁷ this is certainly a case where Art. 68 of the Statute does not apply.⁴⁵⁸ 175

D. The Sources of International Law in Art. 38

Article 38 gets its fame from the enumeration and concise definitions of the sources of international law contained in para. 1—even though, as will be seen later,⁴⁵⁹ neither the jurisprudence, nor, certainly, the doctrine, mentioned in para. 1 (d) can be defined as a 'source' 176

⁴⁴⁹ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 60 (para. 71); similarly *South West Africa cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 48 (para. 90); *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 567 (para. 28). For further references *cf. supra*, MN 163.

⁴⁵⁰ MN 168.

⁴⁵¹ It is worth underlining that the Court's order in the *Free Zones* case does not use that expression.

⁴⁵² *Free Zones case*, *supra*, fn. 139, PCIJ, Series A, No. 24, p. 10; and *cf.* also pp. 11 and 14.

⁴⁵³ *Ibid.*, p. 10. It is revealing that, in modern times, even when authorized to decide *ex aequo et bono*, arbitrators hesitate to have recourse to arguments not founded on legal rules; *cf. e.g.* Hudson, *PCIJ*, p. 620 or Rousseau, *supra*, fn. 74, p. 414.

⁴⁵⁴ Cheng, *supra*, fn. 407, p. 204; but contrast Rosenne, *Law and Practice*, vol. III, p. 1541.

⁴⁵⁵ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 47 (para. 46).

⁴⁵⁶ *Cf.* the order of 6 December 1930 in the *Free Zones case*, *supra*, fn. 139, PCIJ, Series A, No. 24, pp. 11–13. More generally, on several occasions, the Court has declared that it 'cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character' (*Société commerciale de Belgique*, *supra*, fn. 140, PCIJ, Series A/B, No. 78, p. 173; *cf.* also the ICJ's judgments in the *Nicaragua case*, *supra*, fn. 115, ICJ Reports [1984], pp. 392, 427 [para. 80]; *Certain Phosphates Lands in Nauru* [Nauru/Australia], ICJ Reports [1992], pp. 240, 267 [para. 69]). However, it should be noted that during the revision of Rules of Court in 1934, a proposal was made which would have required the parties to stipulate in the *compromis* if they wished the Court to decide *ex aequo et bono*; this proposal, however, was rejected (*cf.* Guyomar, p. 247).

⁴⁵⁷ Moreover Art. 65, para. 1 of the Statute expressly limits the Court's jurisdiction to 'legal questions'. For comment on the Court's interpretation of that expression *cf.* Frowein/Oellers-Frahm on Art. 65 MN 21–28.

⁴⁵⁸ For further detail on the relationship between Arts. 68 and 38 *cf. supra*, MN 58–59.

⁴⁵⁹ MN 304 *et seq.*

properly speaking. It goes far beyond the province of this commentary to deal extensively with each of the particular sources listed in Art. 38.⁴⁶⁰ However, some cursory remarks are in order to briefly explain how the Court itself views the three ‘main sources’ appearing in Art. 38, para. 1 (a), (b) and (c) and how it devises their relationship in practice.

I. The Particular Sources Listed in Art. 38

- 177 The formulation of Art. 38 in general, and that of para. 1 in particular, has been criticized.⁴⁶¹ However, it has worked well in practice,⁴⁶² even if uncertainties remain—more for custom than for conventions, and more for general principles than for custom.

1. International Conventions

- 178 There could hardly exist a case before the Court where a treaty—or a convention⁴⁶³—is not relevant, if only the special agreement on the basis of which the case has been brought to the Court or the Court’s Statute itself. Sometimes a treaty is the very object of the dispute as is formally envisaged in Art. 36, para. 2 (a);⁴⁶⁴ in such a case, the Court will be ‘satisfied that the difference of opinion which has arisen regarding the meaning and scope of the word “established”, is a dispute regarding the interpretation of a treaty and as such involves a question of international law’.⁴⁶⁵ In virtually all cases one or,

⁴⁶⁰ The present contribution is not the right place to discuss in detail the notion of sources itself. For fruitful discussions cf. e.g. Abi-Saab (1994), *supra*, fn. 182, pp. 29–49, pp. 30–2. While generally in agreement with the views expressed in that article, the present writer does not share the criticism made of the concise but illuminating description of the sources as being ‘Recognized Manifestations of International Law—A New Theory of ‘Sources’, set out in an article under this title by Marten Bos (GYIL 19 [1977], pp. 9–76): this, indeed, is what formal sources of international law are. Cf. also, d’Aspremont, *supra*, fn. 180, p. 266; Borchard, E.M., ‘The Theory and Sources of International Law’ in *Recueil sur les sources du droit en l’honneur de François Gény* (1935), vol. II, pp. 328–61; Dupuy, P.M., ‘Théorie des sources et coutume en droit international contemporain’ in *Le droit international dans un monde en mutation—Liber Amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (1994), pp. 51–68, especially pp. 52–8; Kennedy, *supra*, fn. 180, pp. 1–96; Guggenheim, P., ‘Contribution à l’histoire des sources du droit des gens’, *Rec. des Cours* 94 (1958-II), pp. 1–84; Kopelmanas, L., ‘Essai d’une théorie des sources formelles du droit international’, *Rev. de droit intern. et de lég. comp.* (1938), pp. 101–50; Scelle, G., ‘Essai sur les sources formelles du droit international’, in *Mélanges Gény* (1934), vol. III, pp. 400–30; Sørensen (1946); Fitzmaurice (1958), pp. 153–76; Van Hoof, G.J.H., *Rethinking the Sources of International Law* (1983), p. 322; or Verdross, A., *Die Quellen des Universellen Völkerrechts—Eine Einführung* (1973), p. 148; and the classical discussions of the theory of sources by Visscher, C. de, ‘Contribution à l’étude des sources du droit international’, *Rev. de droit international et de lég. comp.* 60 (1933), pp. 395–420.

⁴⁶¹ Cf. *supra*, MN 81–82.

⁴⁶² Cf. *supra*, MN 43, 45 and 83.

⁴⁶³ On the indiscriminate use of both terms (and others) cf. *infra*, MN 181.

⁴⁶⁴ As D. Bodansky rightly puts it: ‘Today, we live in a world of treaties’ (‘Prologue to a Theory of Non-Treaty Norms’, in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* [Arsanjani, M. H. et al., eds., 2011], p. 121.) Curiously, Art. 36, para. 2 (a) only contemplates ‘legal disputes concerning ... the interpretation of a treaty’. But disputes also arise in respect to the application of a treaty; this case can be deemed to be covered under letter (c) of Art. 36 (2): ‘the existence of any fact which, if established, would constitute a breach of an international obligation’. For examples of cases essentially concerning the interpretation or application of a treaty cf. e.g. *The Oscar Chinn Case*, PCIJ, Series A/B, No. 63; *Lockerbie cases*, *supra*, fn. 246, ICJ Reports (1998), pp. 9 *et seq.* and pp. 115 *et seq.*; *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7 *et seq.*; *LaGrand*, *supra*, fn. 115, ICJ Reports (2001), pp. 466 *et seq.*; *Avena case*, *supra*, fn. 115, ICJ Reports (2004), pp. 12 *et seq.*; *Dispute regarding Navigational and Related Rights* (Costa Rica/Nicaragua), ICJ Reports (2009), pp. 213, 232 *et seq.* (paras. 32 *et seq.*); *Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010, paras. 25 *et seq.*; *CERD case*, *supra*, fn. 144, paras. 30 *et seq.*; *Interim Accord of 13 September 1995 case*, *supra*, fn. 133, paras. 58 *et seq.*

⁴⁶⁵ *Exchange of Greek and Turkish Populations*, *supra*, fn. 306, PCIJ, Series B, No. 10, p. 17; cf. also *Interim Accord of 13 September 1995 case*, *supra*, fn. 133, para. 58: ‘The question put before the Court, namely,

more often, several treaties will be invoked by the contesting States, their relevance—or non-relevance—giving rise to differences between the parties, which the Court must solve in order to decide the dispute.

In so doing, the Court has greatly contributed to consolidating and developing the law of treaties.⁴⁶⁶ This commentary is not the proper place to elaborate on this important contribution of the World Court to the development of international law,⁴⁶⁷ but it is worth mentioning its role in, *e.g.*, the development of a *corpus juris* concerning the rules and principles of treaty interpretation⁴⁶⁸ or the principles governing the validity, termination and suspension of treaties;⁴⁶⁹ not to speak of the ‘Copernican’ revolution its advisory opinion of 28 May 1951 on *Reservations to the Genocide Convention* has introduced in the law of reservations to treaties.⁴⁷⁰ It is only possible to give some indications as to the way the Court has interpreted its mandate to apply international conventions

whether the Respondent’s conduct is a breach of Art. 11, paragraph 1, of the Interim Accord, is a legal question pertaining to the interpretation and implementation of a provision of that Accord’. In its first advisory opinion, the ICJ also held that the ‘interpretative function ... falls within its normal exercise of its judicial powers’ (*Conditions of Admission case, supra*, fn. 105, ICJ Reports [1947–1948], pp. 57, 61).

⁴⁶⁶ Cf. *e.g.* Briggs, H.W., ‘Unilateral Denunciation of Treaties: the Vienna Convention and the International Court of Justice’, *AJIL* 68 (1974), pp. 51–68; Mendelson (1996), pp. 63, 65–66; Scott, G.L./Carr, C.L., ‘The International Court of Justice and the Treaty/Custom Dichotomy’, *Tex. ILJ* 16 (1981), pp. 347–59; Torres Bernárdez, S., ‘Interpretation of Treaties by the I.C.J. following the Adoption of the 1969 Vienna Convention on the Law of Treaties’, in Hafner/*et al.* (1998), *supra*, fn. 270, pp. 721–48; Vierdag, E.W., ‘The International Court of Justice and the Law of Treaties’, in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Lowe, V./Fitzmaurice, M., eds., 1996), pp. 145–66; Watts, Sir A., ‘The International Court of Justice and the Continuing Customary International Law of Treaties’, in *Liber Amicorum Judge Shigeru Oda* (Ando, N./McWhinney, E./Wolfrum, R., eds., 2002), pp. 251–66; Gowlland-Debbas, V., ‘The Contribution of the International Court of Justice to the Development of the Law of Treaties’, in *Perspectives of international law in the 21st century: Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday* (2012), pp. 299–319.

⁴⁶⁷ For more general considerations on law-making by the Court cf. *infra*, MN 322–334.

⁴⁶⁸ Cf. *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer, supra*, fn. 422, PCIJ, Series B, Nos. 2–3, p. 21; *Competence of the General Assembly, supra*, fn. 280, ICJ Reports (1950), pp. 4, 8, *Territorial Dispute case* (Libya/Chad), *supra*, fn. 422, ICJ Reports (1994), pp. 6, 21–2 (para. 41); *Maritime Delimitation and Territorial Questions, supra*, fn. 207, ICJ Reports (1995), pp. 6, 18 (para. 33); *Kasikili/Sedudu Island case, supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1060 (para. 20); *Legality of Use of Force* (Serbia and Montenegro/Belgium), *supra*, fn. 163, Preliminary Objections, ICJ Reports (2004), pp. 279, 318 (para. 100); *Navigational and Related Rights case, supra*, fn. 464, ICJ Reports (2009), p. 213 *passim*. Cf. also Fitzmaurice, *Law and Procedure*, vol. I, pp. 42–65 and 337–72; Oraison, A., ‘La Cour internationale de Justice, l’article 38 de son Statut et l’interprétation des Conventions internationales’, *Revue de droit international, de sciences diplomatiques et politiques* 79 (2001), pp. 223–84; Bernárdez, *supra*, fn. 466, pp. 721–48; and more generally Sur, S., *L’interprétation en droit international public* (1974); de Visscher, C., *Problèmes d’interprétation judiciaire en droit international public* (1963); Crema, L., ‘Disappearance and New Sightings of Restrictive Interpretation(s)’, *EJIL* 21 (2010), pp. 681–700 or Villinger, M., ‘The Rules on Interpretation-Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission’ in Cannizzaro, *supra*, fn. 250, pp. 105–22.

⁴⁶⁹ Cf. *Gabčíkovo-Nagymaros case, supra*, fn. 143, ICJ Reports (1997), pp. 7, 62–68 (paras. 98–112), *Territorial and Maritime Dispute case* (Nicaragua/Honduras), ICJ Reports (2007), pp. 832, 859 (paras. 79–82) and, in particular on the rules concerning ‘error’, *Sovereignty over Certain Frontier Land case, supra*, fn. 422, ICJ Reports (1959), pp. 209, 222 and 225; *Preah Vihear case, supra*, fn. 115, ICJ Reports (1961), pp. 6, 26–8.

⁴⁷⁰ Cf. *e.g.* Bishop, W.W., ‘Reservations to Treaties’, *Rec. des Cours* 103 (1961-II), pp. 245–341, pp. 281–95; Fitzmaurice, G., ‘Reservations to Multilateral Conventions’, *ICLQ* 2 (1953), pp. 1–26; Fitzmaurice, G., *Law and Procedure*, vol. I, pp. 406–27; Imbert, P.-H., *Les réserves aux traités multilatéraux* (1979), pp. 58–78; Pellet, A., ‘La CIJ et les réserves aux traités: remarques cursives sur une révolution jurisprudentielle’, in *Liber Amicorum Judge Shigeru Oda* (Ando, N./McWhinney, E./Wolfrum, R., eds., 2002), pp. 481–514; Zemanek, K., ‘Re-examining the Genocide Opinion: Are the Object and Purpose of a Convention Suitable Criteria for

‘establishing rules expressly recognized by the contesting states’, whether the said conventions are ‘general or particular’.

a) International Conventions as ‘Establishing Rules Expressly Recognized by the Contesting States’

aa) A Definition of Treaties in an Embryonic Stage

- 180 While less complete than the definition of treaties in Art. 2, para. 1 (a) VCLT to which the Court has referred on several occasions,⁴⁷¹ the formula used in Art. 38 unambiguously defines what a treaty—or a convention—in force is, at least to the end of adjudication: ‘whatever its particular designation’ or form, it is an ‘act or transaction’,⁴⁷² establishing rules expressly recognized by the parties and, therefore, to be applied by the Court.
- 181 Nothing in particular can probably be inferred from the use, in Art. 38, para. 1 (a) of the word ‘conventions’ rather than ‘treaties’,⁴⁷³ usually seen as the generic term.⁴⁷⁴ Generally speaking, the Statute of the Court is not very consistent in this respect: it uses the expressions ‘convention’,⁴⁷⁵ ‘treaty’,⁴⁷⁶ ‘treaty [and] [or] convention’,⁴⁷⁷ in the singular or the plural, without any apparent reason, without even mentioning the words ‘instrument’⁴⁷⁸ and ‘[special] agreement’,⁴⁷⁹ which also appear with a more specific meaning.
- 182 In any case, the Court itself has never paid much attention to the use of a particular term. In its advisory opinion of 5 September 1931 on the *Customs Régime between Austria and Germany*, the PCIJ observed that: ‘From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes.’⁴⁸⁰ For its part, the present Court has constantly considered that ‘Terminology is not a determinant factor as to the character of an international

Determining the Admissibility of Reservations?’, *ibid.*, pp. 335–48; Riquelme-Cortado, R., *Las reservas a los tratados. Lagunas y ambigüedades del Régimen de Viena* (2004); Ruda, J.M., ‘Reservations to Treaties’, *Rec. des Cours* 146 (1975-III), pp. 95–218, pp. 133–48; de Visscher, C., *Théories et réalités en droit international public* (4th edn., 1970), pp. 291–5.

⁴⁷¹ *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 39 (para. 96); *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (1994), pp. 112, 120 (para. 23); *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 429 (para. 263). According to Art. 2, para. 1 (a) VCLT: ‘For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’

⁴⁷² This expression is used in the *Aegean Sea case*, *supra*, fn. 133 case, ICJ Reports (1978), pp. 3, 39 (para. 96).

⁴⁷³ The initial proposal in 1920 brought by Baron Descamps before the other members of the Advisory Committee of Jurists had referred to ‘conventional international law’ (*supra*, MN 21). This formula was not discussed at all, but was nevertheless replaced, somewhat surprisingly, by ‘international conventions’ in Root’s ‘compromise’ proposal (*supra*, MN 31).

⁴⁷⁴ In its advisory opinion concerning the *Austro-German Customs Régime*, the Permanent Court underlined the limited importance of the denomination of a given instrument to determine its legal status—*cf. infra*, MN 182.

⁴⁷⁵ Art. 34, para. 3 and Art. 63. *Cf.* also Art. 43, Art. 82, paras. 2 (a), (b) and 3 of the Rules of Court.

⁴⁷⁶ Art. 36, para. 2 (a) of the Statute.

⁴⁷⁷ Art. 36, para. 1, Art. 37, para. 1, of the Statute. *Cf.* also Art. 87, para. 1 of the Rules of Court.

⁴⁷⁸ Art. 34, para. 1 of the Statute.

⁴⁷⁹ Art. 36, para. 2, Art. 39, para. 2, Art. 40, para. 1 of the Statute. *Cf.* also Art. 26, para. 1 (e), Art. 39, paras. 1 and 2, Art. 40, para. 3, Art. 42, Art. 44, para. 2, Art. 46, paras. 1 and 2, Art. 79, para. 10, Art. 91, Art. 92, para. 1, Art. 96, Art. 98, paras. 1, 2 and 4 of the Rules of Court.

⁴⁸⁰ *Customs Régime between Austria and Germany*, PCIJ, Series A/B No 41, p. 47.

agreement or undertaking',⁴⁸¹ and that 'international agreements may take a number of forms and be given a diversity of names'.⁴⁸² In determining the nature of the act or transaction in question, 'the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up',⁴⁸³ whether it is 'general' or 'special', what matters is that it establishes 'rules expressly recognized by the contesting States'. If it does, the Court is bound too; if it does not, '[c]onsequently, the [Court] also is not so bound'.⁴⁸⁴

It has been queried why Art. 38 did not resort to the simpler terminology used in Art. 36, para. 1, which mentions 'treaties and conventions in force'. Besides the fact that the language used in the Statute is marked with some measure of fantasy,⁴⁸⁵ it has been suggested that 'a State may have recognized a rule established by a convention though it is not a party to the convention'.⁴⁸⁶ This might be so, although nothing in the *travaux* testifies to this interpretation. But, if this was the intention, it can be noted that in these cases, the Court would, nowadays, more conveniently refer to the unilateral expression of will of the 'recognizing' State as a unilateral act creating legal obligations.⁴⁸⁷ Moreover, as the Court noted in the *North Sea Continental Shelf cases*:

In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of right,—if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.⁴⁸⁸

And if the alleged 'recognition' of the rules included in the treaty is through acceptance of a general practice as law, Art. 38, para. 1 (b) removes the need to have recourse to para. 1 (a) for this purpose. It can therefore be safely considered that the somewhat tortuous formulation of the latter simply means 'treaties in force'.

⁴⁸¹ *South West Africa cases*, *supra*, fn. 115, Preliminary Objections, ICJ Reports (1962), pp. 319, 331.

⁴⁸² *Maritime Delimitation and Territorial Questions*, *supra*, fn. 207, ICJ Reports (1994), pp. 112, 120 (para. 23); and *cf.* also *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 39 (para. 96).

⁴⁸³ *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 39 (para. 96).

⁴⁸⁴ *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 312 (para. 155). As for the consequences of this basic principle *cf.* MN 194 *et seq.*

⁴⁸⁵ *Cf. supra*, MN 181.

⁴⁸⁶ Hudson, *PCIJ*, p. 608.

⁴⁸⁷ *Cf. supra*, MN 93–94. In the *Free Zones case*, the PCIJ observed that 'it is certain that, in any case, Art. 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it. That extent is determined by the note of the Federal Council of May 5th, 1919, an extract from which constitutes Annex 1 of the said Art It is by that instrument, and by it alone, that Switzerland has acquiesced in the provision of Art. 435; and she did so under certain conditions and reservations ...' (*supra*, fn. 139, PCIJ, Series A/B, No. 46, p. 141).

⁴⁸⁸ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 25–6 (para. 28); *cf.* also *Armed Activities case (New Application) (DRC/Rwanda)*, *supra*, fn. 231, ICJ Reports (2006), pp. 6, 26 (paras. 42–43).

- 185 Basing itself on this formulation, the Court has experienced no real difficulty in finding, in particular cases, whether there existed ‘international conventions ... defining rules expressly recognized by the contesting States’. Two main questions can arise in this respect: first, is the instrument, or are instruments, invoked by the parties (or one of them) a treaty in the proper sense of the term? And second, is it ‘in force’?
- 186 As for the first question, the answer is straightforward: the criterion is the intention of the parties to be bound under international law. As the PCIJ stated—in a *dictum* that for other reasons was most unfortunate: ‘The rules of law binding upon States ... emanate from their own free will as expressed in conventions ...’.⁴⁸⁹ This must, however, be read in conjunction with another, rightly celebrated, statement:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.⁴⁹⁰

- 187 If it appears from the text or the context of the instrument in question that the States intended to be bound, it will be a treaty; if this is not the case, it will not be a treaty. Thus in the *Aegean Sea case*:

having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court.⁴⁹¹

On the contrary, in the *Maritime Delimitation and Territorial Dispute case*, the ICJ considered that the 1990 Minutes of a meeting between the Foreign Ministers of the two States:

are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.⁴⁹²

⁴⁸⁹ *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 18. This is stating the obvious; what is unacceptable is the next part of the sentence, which reads: ‘...or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims’. This simplistic view (that international law is exclusively based on the will of States) is unacceptable and does not fit with reality (*cf. infra*, para. 225). For the views of the present writer on this crucial issue *cf. e.g.* the two articles referred to in fn. 270; as well as ‘Aspects des sources du droit international de l’économie et du développement’, *Thesaurus Acroasium* XIX (1992), pp. 287–355, in particular at pp. 291–314 or ‘Lotus que de sorties on profère en ton nom!’, *remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale*, in *Mélanges en l’honneur de Jean-Pierre Puisseux: L’Etat souverain dans le monde d’aujourd’hui* (2008), pp. 215–30. In the (1951) *Genocide case* the Court applied the fundamental principle that treaty law is based on consent to reservations to treaties: ‘It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto’ (*supra*, fn. 365, ICJ Reports [1951], pp. 15, 21). *Cf.* also the advisory opinion of 11 July 1950 on the *International Status of South West Africa case*, *supra*, fn. 288, ICJ Reports (1950), pp. 128, 139.

⁴⁹⁰ *Wimbledon*, *supra*, fn. 304, PCIJ, Series A, No. 1, p. 25.

⁴⁹¹ *Aegean Sea case*, *supra*, fn. 133, ICJ Reports (1978), pp. 3, 44 (para. 107).

⁴⁹² *Maritime Delimitation and Territorial Dispute case*, *supra*, fn. 207, ICJ Reports (1994), pp. 112, 121 (para. 25). This judgment clarifies that the *ex post facto* interpretation of the original intent by one of the

The second question—is the treaty in force?⁴⁹³—has given rise to innumerable difficulties which can only be touched upon in the present commentary. Suffice it to say, that in *Gabčíkovo-Nagymaros* the Court has recalled that the ‘determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties’.⁴⁹⁴ Applying this general guideline, the Court has, *e.g.*:

- found that in the event a State had not complied with the formal method specially prescribed by a treaty in order to express consent to be bound, that State could not be considered to be a party to the treaty, which, consequently, could not be deemed as ‘establishing rules expressly recognized by the contesting states’ and could not be applied by the Court;⁴⁹⁵
- determined whether or not ‘a State becomes bound by a treaty as a successor State or remains bound as a continuing State’;⁴⁹⁶
- examined whether a treaty could be held to establish rules expressly recognized by the contesting states in case of an alleged error which, potentially, ‘may affect the reality of the consent supposed to have been given’;⁴⁹⁷
- been called to decide upon the question of whether a given treaty still reflected rules ‘expressly recognized by the contesting states’ or if it had been terminated for some reason.⁴⁹⁸

However, where the treaty is in force, it does not ensue that all of its provisions establish rules imposing rights or obligations to the Parties:

signatories cannot vitiate a conclusion based on the terms of the instrument and the circumstances in which it was drawn up (*ibid.*, pp. 121–2 [para. 27]); *cf.* also *Kasikili/Sedudu Island case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1106–8 (para. 102–103) and p. 1108 (para. 104 [3]); as well as the PCIJ’s reasoning in the *Eastern Greenland case* with respect to the Ihlen Declaration (although the declaration is more probably a unilateral act than an instrument, part of a treaty; *cf. supra*, MN 93).

⁴⁹³ The Court has had several opportunities to interpret the expression ‘treaties [and conventions] in force’ in relation to Arts. 35, para. 2 and 36, para. 1. However, in those cases, it was concerned with the date at which the treaty had to be in force for the implementation of those provisions: *cf.* the discussion of the issue in the *Legality of Use of Force case* (Serbia and Montenegro/Belgium), *supra*, fn. 163, Preliminary Objections, ICJ Reports (2004), pp. 279, 315–24 (paras. 92–114); as well as Müller, D., ‘Procedural Developments at the International Court of Justice’, *LPICT* 4 (2005), pp. 149–51; and further Zimmermann on Art. 35 MN 25–35 (on the ICJ’s jurisprudence under Art. 35, para. 2).

⁴⁹⁴ *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 38 (para. 47).

⁴⁹⁵ *North Sea Continental Shelf*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 25–6 (para. 28). *Cf.* also *Territorial Jurisdiction of the International Commission of the River Oder*, *supra*, fn. 133, PCIJ, Series A, No. 23, p. 20; (1951) *Genocide case*, *supra*, fn. 365, ICJ Reports (1951), pp. 15, 28; and, for an example of a treaty not requiring ratification, but only signature, to become effective: *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 429 (para. 264).

⁴⁹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), ICJ Reports (2008), pp. 412, 450–1 (para. 109).

⁴⁹⁷ *Sovereignty over Certain Frontier Land case*, *supra*, fn. 422, ICJ Reports (1959), pp. 209, 222 and 225; *Preah Vihear case*, *supra*, fn. 234, Preliminary Objections, ICJ Reports (1961), pp. 17, 30; and Merits, ICJ Reports (1962), pp. 6, 26.

⁴⁹⁸ *Cf. e.g. Diversion of Water from the Meuse*, *supra*, fn. 348, PCIJ, Series A/B, No. 70, p. 32; *ICAO Council case*, *supra*, fn. 429, ICJ Reports (1972), pp. 46, 67–69 (paras. 38–43) or *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 62–64 (paras. 98–112) and 68 (para. 114).

multilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow.⁴⁹⁹

- 190 This is certainly true concerning the preambular provisions;⁵⁰⁰ however, as made clear in Art. 31, para. 2 of the 1969 Vienna Convention, they are part of the context relevant for the interpretation of the Convention, and the Court has constantly treated them so.⁵⁰¹ The same is true in respect of certain provisions in the operative part of certain treaties. Thus in the *Oil Platforms case*, the Court affirmed that Art. I of the 1955 Treaty of Amity between Iran and the United States ‘is not without legal significance for [interpreting other provisions of the Treaty], but cannot, taken in isolation, be a basis for the
- 191 jurisdiction of the Court’.⁵⁰²

In some cases, the Court has accepted that treaties clearly not in force between the parties could contribute to determining rules relevant for settling the dispute. This is particularly the case for treaties establishing objective régimes, like delimitation treaties,⁵⁰³ or in cases where treaty practice is part of the customary process.⁵⁰⁴ A treaty which is not in force between the parties can also give evidence of the conviction of the parties (or of one of them) as to a point of law or of fact. Thus, in the *Maritime Delimitation and Territorial Questions case*, the Court observed that ‘signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature’.⁵⁰⁵

⁴⁹⁹ *ICAO Council case*, *supra*, fn. 429, Sep.Op. Dillard, ICJ Reports (1972), pp. 92, 107, fn. 1; for a similar view *Cf. Baxter*, *supra*, fn. 270, pp. 549–66, p. 553.

⁵⁰⁰ *Cf. e.g. South West Africa cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 34 (para. 50); and *cf.* already *supra*, MN 113.

⁵⁰¹ *Cf. e.g. Lotus*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 17; *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*, *supra*, fn. 422, PCIJ, Series B, No. 13, p. 23; *Rights of Minorities in Upper Silesia (Minority Schools)*, PCIJ, Series A, No. 15, pp. 27–8; *Free Zones case*, *supra*, fn. 139, Order of 19 August 1928, PCIJ, Series A, No. 22, pp. 15–6; *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, PCIJ, Series B, No. 16, p. 19; *Free Zones case*, *supra*, fn. 139, PCIJ, Series A/B, No. 46, p. 138; *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, PCIJ, Series A/B, No. 50, pp. 373 and 380; *Lighthouses case between France and Greece (France/Greece)*, PCIJ, Series A/B, No. 62, pp. 13–16; *Pajzs, Csáky, Esterházy*, PCIJ, Series A/B, No. 68, p. 60. As for the ICJ, *cf. Rights of US Nationals in Morocco case*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 197; *South West Africa cases*, *supra*, fn. 115, Preliminary Objections, ICJ Reports (1962), pp. 319, 330; *Nicaragua case*, *supra*, fn. 115, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 428 (para. 83) and Merits, ICJ Reports (1986), pp. 14, 138 (para. 275); *Oil Platforms (Islamic Republic of Iran/United States of America)*, Preliminary Objections, ICJ Reports (1996), pp. 803, 813 (para. 27); *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 81 (para. 151); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Reports (2002), pp. 625, 652 (para. 51) and pp. 660–1 (para. 71–72) and *Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010, para. 66.

⁵⁰² *Oil Platforms case*, *supra*, fn. 501, ICJ Reports (1996), pp. 815 (para. 31); and *cf. also ibid.*, pp. 813–14 (para. 27–28) and (Merits), ICJ Reports (2003), pp. 161, 178 (para. 31) and p. 182 (para. 41).

⁵⁰³ *Cf. Territorial Dispute (Libya/Chad)*, *supra*, fn. 422, ICJ Reports (1994), pp. 6, 37 (para. 73)—*cf. infra*, para. 193; *cf.* also the comparable—but different—case of an alleged violation of the treaty by a party, which cannot ‘have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes’ (*Tehran Hostages case*, *supra*, fn. 132, ICJ Reports [1980], pp. 3, 28 [para. 53]); and further *Avena case*, *supra*, fn. 115, ICJ Reports (2004), pp. 12, 38 (para. 47).

⁵⁰⁴ *Cf. infra*, fn. 588, for references to the Court’s case law.

⁵⁰⁵ *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (2001), pp. 40 68 (para. 89): ‘In the circumstances of this case the Court has come to the conclusion that the Anglo-Ottoman Convention [of 1913, which was never ratified] does represent evidence of the views of Great Britain and the

In the same spirit, rules provided for in a treaty not in force for one of the contesting parties may extend ‘automatically and immediately to the benefit’ of this party by virtue of a most-favoured nation clause.⁵⁰⁶ In such a case, this State may rely on the treaty containing the clause, but, in itself, the ‘third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between [the contesting States]: it is *res inter alios acta*.’⁵⁰⁷ 192

It can also be noted that in the *Territorial Dispute case* (Libya /Chad), the Court stressed that the establishment of a boundary by a treaty: 193

is a fact which, from the outset, has ... a life of its own, independently of the fate of the [t]reaty. ... A boundary established by treaty thus enjoys a permanence that the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary.⁵⁰⁸

In saying this, the Court clearly accepted that treaties may continue to produce legal effects after their termination when they have established ‘objective’ situations or regimes.⁵⁰⁹ In some respects, this situation can be compared to the one taken into account by the Court with regard to the creation of the United Nations in the *Reparation for Injuries case*, where it stated:

that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.⁵¹⁰

bb) Application of Treaty Rules by the Court

When faced with a treaty:

the first question to be considered by the Court is whether it is binding for all the Parties in [the] case ... Clearly, if this is so, then the provisions of the [treaty] will prevail in the relations between the Parties and would take precedence of any rules having a more general character, or derived from another source.⁵¹¹ 194

In such a case:

as between the Parties the relevant provisions of the [treaty would represent] the applicable rules of law—that is to say [would constitute] the law for the Parties—and [the Court’s] sole remaining

Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913’. *Cf.* also *Sovereignty over Certain Frontier Land case*, *supra*, fn. 422, ICJ Reports (1959), pp. 209, 229.

⁵⁰⁶ *Rights of US Nationals in Morocco case*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 187.

⁵⁰⁷ *Anglo-Iranian Oil Co.* (United Kingdom/Iran), ICJ Reports (1952), pp. 20, 109.

⁵⁰⁸ *Territorial Dispute case* (Libya/Chad), *supra*, fn. 422, ICJ Reports (1994), pp. 6, 37 (paras. 72 and 73). *Cf.* also *Territorial and Maritime Dispute* (Nicaragua/Colombia), ICJ Reports (2007), pp. 832, 861 (para. 89); or *Navigational and Related Rights*, *supra*, fn. 464, ICJ Reports (2009), pp. 213, 243 (para. 68).

⁵⁰⁹ On this legal phenomenon *cf. e.g.* the Sep. Op. by Sir Arnold McNair in the *International Status of South West Africa case*, *supra*, fn. 288, ICJ Reports (1950), pp. 128, 153–5; and also Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 273–5; or Tomuschat, C., ‘Obligations Arising for States Without or Against Their Will’, *Rec. des Cours*, 241 (1993-IV), pp. 9–292, pp. 244–7.

⁵¹⁰ *Reparation for Injuries case*, *supra*, fn. 206, ICJ Reports (1949), pp. 174, 185 (The situation thus described is convincing; the reasoning is highly debatable). *Cf.* also *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 56 (para. 126).

⁵¹¹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 24 (para. 25).

task would be to interpret those provisions, in so far as their meaning was disputed or appeared to be uncertain, and to apply them to the particular circumstances involved.⁵¹²

- 195 A clear illustration is given by the Court's 1994 Judgment in the *Territorial Dispute* between Chad and Libya, where the ICJ:

first [considered] Article 3 of the 1955 Treaty [of Friendship and Good Neighbourliness between France and Libya], together with the Annex to which that Article refers, in order to decide whether or not that Treaty resulted in a conventional boundary between the territories of the Parties.⁵¹³

- 196 Having done this, it found 'that the dispute before the Court ... is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France' and that this 'rendered it unnecessary to consider the other arguments made by the Parties, which were therefore "not matters for determination in this case".⁵¹⁴ This can be seen as a good example of the principle of 'economy of decisions'⁵¹⁵ and as a striking recognition that treaties are the 'primary source, if not of law, at least of litigation',⁵¹⁶ even if the *lex specialis*⁵¹⁷ constituted by the treaty or treaties in force is often checked against the background of general international law.⁵¹⁸ When a relevant treaty is found to be in force it must be implemented in good faith by the parties.⁵¹⁹ This obligation to implement *bona fide* the obligations deriving from a treaty has been stressed by the Court on several occasions.⁵²⁰ Thus, the PCIJ

⁵¹² *Ibid.*

⁵¹³ *Territorial Dispute case* (Libya/Chad), *supra*, fn. 422, ICJ Reports (1994), pp. 6, 20 (para. 38).

⁵¹⁴ *Ibid.*, p. 38 (paras. 25 and 26).

⁵¹⁵ Jennings, Sir R., 'The Proper Work and Purposes of the International Court of Justice', in Muller *et al.*, ICJ, pp. 33, 35. *Cf.* also *supra*, fns. 934 and 935.

⁵¹⁶ Kearney, pp. 610, 623; Bastid, *supra*, fn. 222, pp. 3–4; Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 385; Jennings/Watts, *supra*, fn. 164, p. 31; Rousseau, *supra*, fn. 74, p. 59. *Cf.* also the Colombian declaration at the San Francisco Conference, UNCIO, vol. XIII, p. 287.

⁵¹⁷ *Cf. e.g. Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 76 (para. 132): 'In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.' *Cf.* also the Court's judgment in *Nicaragua*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 137 (para. 274), underlining that: 'In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on customary law rule if it has by treaty already provided means for settlement of such a claim.' In *Maritime Delimitation in the Black Sea case*, the Court envisaged the application of a bilateral treaty as a form of *lex specialis* to which general international law itself expressly referred, *supra*, fn. 92, ICJ Reports (2009), pp. 61, 86–7 (para. 69).

⁵¹⁸ *Cf.* further *infra*, MN 289 *et seq.*

⁵¹⁹ *Cf. Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010, para. 145. Conversely, when the treaty is not in force between the parties, they are not bound by its rules—with the exceptions mentioned previously (MN 191–193)—and the Court will not apply the rules established by it; *cf. e.g. Territorial Jurisdiction of the International Commission of the River Oder*, *supra*, fn. 233, PCIJ, Series A, No. 23, pp. 19–22; *Free Zones case*, *supra*, fn. 139, PCIJ, Series A/B, No. 46, p. 141; *North Sea Continental Shelf case*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 25–6 (para. 28); *Jurisdictional Immunities case*, *supra*, fn. 115, Judgment of 3 February 2012, paras. 54–55; as well as the reference *infra*, fn. 548.

⁵²⁰ *Netherlands Workers Delegate at the Third Session of the International Labour Conference*, PCIJ, Series B, No. 1, p. 19: 'The engagement contained in the third paragraph [of Art. 389 of the Treaty of Versailles] is not a mere moral obligation. It is a part of the Treaty and constitutes an obligation by which the Parties to the Treaty are bound to one another.' *Cf.* also *Rights of US Nationals in Morocco case*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 212; *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 68 (para. 114).

laid ‘stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.’⁵²¹ In *Nicaragua*, the ICJ considered ‘that there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it’, thus depriving it of its object and purpose, without a particular provision being clearly breached.⁵²² In the same vein, in *Interim Accord of 13 September 1955* the Court noted ‘that although Art. 5, paragraph 1, [of the Interim Accord of 13 September 1955] contains no express requirement that the Parties negotiate in good faith, such obligation is implicit under this provision.’⁵²³

That being so, the Court’s task is clear:

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Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it (*Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.L.J., Series B, No 7, p. 20*).⁵²⁴

And, according to a celebrated and often repeated *dictum*: ‘It is the duty of the Court to interpret the Treaties, not to revise them.’⁵²⁵

‘[I]t is clear that refusal to fulfil a treaty obligation involves international responsibility’,⁵²⁶ whatever the demands of the domestic law of the wrongdoer.⁵²⁷ Moreover, notwithstanding the complex relationship between the law of responsibility and the law of treaties,⁵²⁸ the Court has accepted the customary character of Art. 60,

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⁵²¹ *Exchange of Greek and Turkish Populations, supra*, fn. 306, PCIJ, Series B, No. 10, p. 20.

⁵²² *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), p. 14, 138 (para. 275). *Cf.*, however, the Court’s merits judgment in the *Oil Platforms* case, considering that in the absence of an ‘actual impediment of commerce or navigation’, no breach of treaty can be established, even if as a ‘matter of public record’ the navigation in the Persian Gulf involved much higher risks, *supra*, fn. 501, Merits, ICJ Reports (2003), pp. 161, 217 (para. 123) (emphasis in the original).

⁵²³ *Interim Accord of 13 September 1955 case, supra*, fn. 133, para. 131 and the case law cited therein.

⁵²⁴ *Territorial Dispute (Libya/Chad), supra*, fn. 422, ICJ Reports (1994), pp. 6, 25 (para. 51); and *cf.* also *LaGrand, supra*, fn. 115, ICJ Reports (2001), pp. 466, 494 (para. 77).

⁵²⁵ *Interpretation of Peace Treaties, supra*, fn. 108, ICJ Reports (1950), pp. 221, 229; and *cf.* also *Acquisition of Polish Nationality, supra*, fn. 306, PCIJ, Series B, No. 7, p. 20; *Rights of US Nationals in Morocco, supra*, fn. 141, ICJ Reports (1952), pp. 176, 196; *South West Africa cases, supra*, fn. 115, ICJ Reports (1966), pp. 6, 48 (para. 91).

⁵²⁶ *Interpretation of Peace Treaties, supra*, fn. 108, ICJ Reports (1950), pp. 221, 228. *Cf.* also *Gabčíkovo-Nagymaros case, supra*, fn. 143, ICJ Reports (1997), pp. 7, 38–9 (para. 47); as well as Arts. 3 and 12 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts and corresponding commentaries, *supra*, fn. 302.

⁵²⁷ *Cf. supra*, MN 120–121.

⁵²⁸ *Cf. Gabčíkovo-Nagymaros case, supra*, fn. 143, ICJ Reports (1997), pp. 7, 38 (para. 47); and, from the vast literature on the subject, *e.g.* Bowett, D., ‘Treaties and State Responsibility’, in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991), pp. 137–45; Dupuy, P.-M., ‘Droit des traités, codification et responsabilité internationale’, *AFDI* 43 (1997), pp. 7–30; Weckel, P., ‘Convergence du droit des traités et du droit de la responsabilité internationale’, *RGDIP* 102 (1998), pp. 647–84; Weil, P., ‘Droit des traités et droit de la responsabilité’, in *Le droit international dans un monde en mutation—Liber Amicorum en hommage au Professeur Eduardo Jiménez de Aréchaga* (Fundación de cultura universitaria, 1994), pp. 523–43; Yahi, A., ‘La violation d’un traité: L’articulation du droit des traités et du droit de la responsabilité internationale’, *RBDI* 26 (1993), pp. 437–69; Szabo, M. (ed.), *State Responsibility and the Law of Treaties* (2010), p. 220.

para. 3 VCLT⁵²⁹ and has based itself on ‘the general principle of law that a right of termination must be presumed to exist in respect of all treaties’.⁵³⁰ However, except from the *Namibia* opinion, the Court has shown reluctance to accept such a consequence. Thus, in *Gabčíkovo-Nagymaros*, the ICJ was of the view:

that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance.⁵³¹

199 Among the treaties the Court is called to apply, a special category must be distinguished: the special agreements on the basis of which a case is brought before the Court. Two different considerations must be taken into account in this respect. On the one hand, as the Court rightly pointed out in the *Continental Shelf case* (Tunisia/Libya): ‘While the Court is, of course, bound to have regard to all the legal sources specified in Art. 38, paragraph 1, of the Statute ... it is also bound, in accordance with paragraph 1 (a) of that Article, to apply the provisions of the Special Agreement.’⁵³² Consequently, if the two parties request the Court to apply particular rules or principles in the special agreement, the Court could ‘take account of them ... as “rules expressly recognized by the contesting States” (Art. 38, para. 1 (a), of the Statute)’.⁵³³

200 On the other hand, ‘the Court cannot, on the proposal of the Parties, depart from the terms of the Statute’.⁵³⁴ As a consequence, in the *Free Zones case*, the PCIJ was reluctant to agree to take into account ‘considerations of pure expediency only’ without ‘a clear and explicit provision to that effect’.⁵³⁵ However, it must be noted that, in that case, what the parties seem to have had in mind was to authorize the Court to depart from the application of strict law—a situation envisaged and addressed in Art. 38, para. 2.⁵³⁶ Moreover, in several cases, when requested to do so in the special agreement, the Court has agreed to take into account:

⁵²⁹ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 47 (para. 94). Cf. also *ICAO Council case*, *supra*, fn. 429, ICJ Reports (1972), pp. 46, 67 (para. 38); as well as Diss. Op. Anzilotti in *Diversion of Water from the Meuse*, *supra*, fn. 348, PCIJ, Series A/B, No. 70, p. 50.

⁵³⁰ *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 47 (para. 96).

⁵³¹ *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 58 (para. 114).

⁵³² *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 37 (para. 23). Cf. also *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 575 (para. 42).

⁵³³ *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 575 (para. 42). In that case, the Chamber seemed to accept that the parties could request the Court to do so outside the special agreement. There is no reason not to accept such a latent form of *forum prorogatum*. However, as rightly noted by Max Sørensen, it would be quite unusual for the parties to agree on requesting the Court to decide on particular grounds when the case is brought before the Court by way of a written application (p. 43). Cf. also *infra*, fn. 537 and 538.

⁵³⁴ *Free Zones case*, *supra*, fn. 139, Order of 19 August 1929, PCIJ, Series A, No. 22, p. 12.

⁵³⁵ *Ibid.*, Order of 6 December 1930, PCIJ, Series A, No. 24, p. 10. For further details on the case cf. also *supra*, MN 72, 168 and 174.

⁵³⁶ Cf. *supra*, MN 157–175.

- particular treaties,⁵³⁷ including when their applicability could be put into doubt;⁵³⁸
- ‘recent trends of international law’ in a particular field;⁵³⁹
- or, perhaps, even municipal law, but ‘translated’ in the international sphere through a special provision in the *compromise*.⁵⁴⁰

Except concerning this last point, which is might be seen as hardly compatible with the introductory sentence of Art. 38, para. 1 (if, at least, it is accepted that in the relevant cases the Permanent Court did apply municipal law, which is debatable⁵⁴¹) there is no obstacle to the parties choosing the law to be applied by the Court for settling their dispute—provided the said law does not depart from the judicial function of the Court and is compatible with the general guidelines provided for in Art. 38. After all, ‘the judicial settlement of international disputes ... is simply an alternative to the direct and friendly settlement of such disputes between the Parties’,⁵⁴² which could be based on whatever rules the parties deem suitable in their relations *inter se*, provided they are not precluded by peremptory norms. 201

b) ‘whether general or particular’

The meaning of the differentiation between the treaties the Court is bound to decide in accordance with, made in Art. 38, para. 1 (a), is obscure—and it is not clarified by the *travaux préparatoires*. As rightly noted by Manley Hudson: ‘The phrase *general or particular* seems to add little to the meaning.’⁵⁴³ It deserves some credit in that it draws attention to the existence of several kinds of treaties—but the credit is more academic 202

⁵³⁷ In the case concerning the *Diversion of Water from the Meuse*, which was introduced by an application, the Permanent Court stated: ‘In the course of the proceedings, both written and oral, occasional reference has been made to the application of the general rules of international law as regards rivers. In the opinion of the Court, the points submitted to it by the Parties in the present case do not entitle it to go outside the field covered by the Treaty of 1863. The points at issue must all be determined solely by the interpretation and application of that Treaty’ (PCIJ, Series A/B, No. 70, p. 16). Cf. also *ELSI case*, *supra*, fn. 315, ICJ Reports (1989), pp. 15, 41–42 (para. 48) (the Court limited the applicable law to the 1948 Treaty of Friendship, Commerce and Navigation); *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 390–1 (para. 47) (General Peace Treaty); *Territorial Dispute (Libya/Chad)*, ICJ Reports (1994), pp. 6, 20 (para. 36) (the 1955 Treaty as a ‘starting point’ of the Court’s consideration, but no reference to this effect in the special agreement); *Kasikili/Sedudu Island case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1059 (para. 18) (the 1890 Treaty as applicable law as requested by the Parties in the Special Agreement [Art. I]); *Pulau Ligitan case*, *supra*, fn. 501, ICJ Reports (2005), pp. 625, 640 (para. 23) (the 1891 Convention); *Frontier Dispute case (Burkina Faso/Niger)*, pending (the 1987 Agreement as applicable law as requested by the Parties in the Special Agreement [Art. 6]).

⁵³⁸ In the *Oscar Chinn case*, the Permanent Court considered: ‘No matter what interest may in other respects attach to these Acts—the Berlin Act and the Act and Declaration of Brussels—in the present case the Convention of Saint-Germain of 1919, which both Parties have relied on as the immediate source of their respective contractual rights and obligations, must be regarded by the Court as the Act which it is asked to apply; the validity of this Act has not so far, to the knowledge of the Court, been challenged by any government’ (*supra*, fn. 464, PCIJ, Series A/B, No. 63, p. 80). As clarified by Judges van Eysinga and Schücking in their opinions, the possibility that the 1919 Convention had abrogated the Act of Berlin was debatable (*ibid.*, pp. 131–5). It is interesting to note that, here again, the special agreement was silent on the applicable law, and that the Court based its approach on the attitude of the parties during the pleadings.

⁵³⁹ Cf. *supra*, MN 148.

⁵⁴⁰ For a discussion cf. *supra*, MN 127–128.

⁵⁴¹ *Ibid.*

⁵⁴² *Free Zones case*, *supra*, fn. 139, Order of 19 August 1929, PCIJ, Series A, No. 22, p. 13. Cf. further *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 47 (para. 87); *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 143 (para. 285); or *Aerial Incident of 10 August 1999*, *supra*, fn. 144, ICJ Reports (2000), pp. 12, 33 (para. 52); and *CERD case*, *supra*, fn. 144, para. 150.

⁵⁴³ Hudson, *PCIJ*, p. 608.

than practical: in practice, the Court has hardly made any distinction between the different sorts of treaties it was bound to apply.

- 203 There are some exceptions. In *Gulf of Maine*, the Chamber, referring to Art. 38, para. 1 observed:

So far as conventions are concerned, only ‘general conventions’, including, *inter alia* the conventions codifying the law of the sea to which the two States are parties, can be considered. This is not merely because no particular conventions bearing on the matter at issue (apart from the Special Agreement of 29 March 1979) are in force between the Parties to the present dispute, but mainly because it is in codifying conventions that principles and rules of general application can be identified.⁵⁴⁴

Clearly, in that case, the Chamber equated ‘general conventions’ with multilateral treaties.

- 204 Certainly, the distinction between bilateral and multilateral conventions makes sense in several practical respects related to their conclusion and entry into force on the one hand, and to their termination and revision on the other.⁵⁴⁵ But this is of little effect for adjudication purposes: while some special legal institutions apply like adhesion or reservations,⁵⁴⁶ ‘the underlying legal principles of treaty law apply to multilateral treaties as to bilateral treaties.’⁵⁴⁷ Accordingly, the PCIJ refused to accept the existence of a right for any State to adhere to the 1919 Armistice Agreement with Germany:

It is, however, just as impossible to presume the existence of such a right—at all events in the case of an instrument of the nature of the Armistice Convention—as to presume that the provisions of these instruments can ipso facto be extended to apply to third States. A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States.⁵⁴⁸

- 205 The last part of this quotation not only reconfirms the relative effect of treaties,⁵⁴⁹ but also casts a serious doubt on the usefulness of distinguishing—still for adjudication purposes—between ‘law-making treaties’ (*traités-lois*) and ‘synallagmatic treaties’ (*traités-contrats*) to which the distinction between ‘general’ and ‘particular’ conventions has sometimes been assimilated.⁵⁵⁰ In reality, all treaties are ‘particular’ in one sense—since they only apply to the parties—and all are ‘law-making’ in that they create rights and obligations⁵⁵¹—still for the parties⁵⁵²—even if there is no doubt that some treaties have an influence far beyond the circle of the parties.⁵⁵³

⁵⁴⁴ *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 290–1 (para. 83). This statement has rightly been criticized by Hugh Thirlway who notes that, had there existed a particular convention between the parties, ‘such a treaty would have the force of law between the parties, and would prevail as a *lex specialis* over any contrary provisions in conventions, codifying or otherwise, of more general application’ (1990, pp. 1, 22).

⁵⁴⁵ *Cf. e.g. Dailliet/Forteau/Pellet*, *supra*, fn. 164, pp. 183–205 and 326–31.

⁵⁴⁶ *Cf. also (1951) Genocide case*, *supra*, fn. 365, ICJ Reports (1951), pp. 15, 22: ‘The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations.’

⁵⁴⁷ Jennings/Watts, *supra*, fn. 164, p. 1203.

⁵⁴⁸ *Certain German Interests case*, *supra*, fn. 125, PCIJ, Series A, No. 7, pp. 28–9.

⁵⁴⁹ *Cf. supra*, fn. 519.

⁵⁵⁰ *Cf. the Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246 *et seq.* and *supra*, MN 204.

⁵⁵¹ *I.e.* more or less ‘general’, more or less ‘particular’.

⁵⁵² For similar views *cf.* Jennings/Watts, *supra*, fn. 164, p. 32 or Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 22. *Contra*, Fitzmaurice (1958), pp. 153, 158, but this view derives from Fitzmaurice’s incorrect position defining treaties as creating rights and obligations rather than law. For a discussion *cf. supra*, MN 84–86.

⁵⁵³ *Cf.* Jennings/Watts, *supra*, fn. 164, pp. 32 and 1204; and Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 22.

This does not mean that various special categories of treaties do not exist—simply that they do not correspond to the categorization in Art. 38, para. 1 (a). Indeed, the Court has, when it had to, taken into consideration the specific nature of certain treaties, in particular:

- (1) the constituent instruments of international organizations;⁵⁵⁴
- (2) treaties establishing an objective situation;⁵⁵⁵ or
- (3) treaties embodying principles which are ‘binding on States, even without any conventional obligation’;⁵⁵⁶
- (4) including those adopted ‘for a purely humanitarian and civilizing purposes’,⁵⁵⁷ whose rules ‘are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’.⁵⁵⁸

In these two last cases:

general and customary law rules and obligations embodied in such treaties ... by their very nature must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.⁵⁵⁹

However, when applying those rules and principles, the Court does not apply them as treaty law but takes the treaties formalizing them into account as part of the customary process or as a reflection of customary rules.⁵⁶⁰ Therefore, these provisions may be the subject to reservations—with the usual conditions—but the obligations they state remain binding upon the reserving State as customary obligations.⁵⁶¹

⁵⁵⁴ Cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*, ICJ Reports (1996), pp. 66, 74–5 (para. 19): ‘from a formal standpoint, the constituent instruments of international organizations are multilateral treaties ... But [they] are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation’; and also *Certain Expenses case, supra*, fn. 244, ICJ Reports (1962), pp. 151, 157: ‘the Charter is a multilateral treaty, albeit a treaty having certain special characteristics’.

⁵⁵⁵ Cf. *supra*, MN 193.

⁵⁵⁶ *(1951) Genocide case, supra*, fn. 365, ICJ Reports (1951), pp. 15, 23; cf. also *(Bosnian) Genocide case, supra*, fn. 93, ICJ Reports (2007), pp. 43, 109–10 (para. 160).

⁵⁵⁷ *(1951) Genocide case, supra*, fn. 365, ICJ Reports (1951), pp. 15, 23; and cf. also *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 14, 114 (para. 218); cf. also also *(Bosnian) Genocide case, supra*, fn. 93, ICJ Reports (2007), pp. 43, 111 (para. 162).

⁵⁵⁸ *Nuclear weapons case, supra*, fn. 107, ICJ Reports (1996), pp. 226, 257 (para. 79); cf. also *Wall case, supra*, fn. 104, ICJ Reports (2004), pp. 136, 199 (para. 157), and further *supra*, MN 145.

⁵⁵⁹ *North Sea Continental Shelf cases, supra*, fn. 115, ICJ Reports (1969), pp. 3, 38–9 (para. 63).

⁵⁶⁰ Cf. further *supra*, MN 191 and *infra*, MN 217–218 and MN 289–294.

⁵⁶¹ Pellet (2002), *supra*, fn. 470, pp. 481–514, pp. 507–9; and Pellet, A., 10th Report on Reservations to Treaties, UN Doc. A/CN.4/558/Add.1; cf. also, in the ILC *Guide to Practice on Reservations to treaties*, guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and obligations under customary international law) and their commentaries (Report on the Work of its 63rd session [2011], General Assembly, Official Records, 66th Session, Supplement No. 10 [UN Doc. A/66/10, Annex], pp. 368–76, and pp. 498–501); cf. also guideline 4.4.3 (Absence of effect on a peremptory norm of general international law [*jus cogens*]) and its commentary (*ibid.*, pp. 501–2). When the rules in question are peremptory, the possibility of formulating reservations to the treaty provisions embodying them is dubious (cf. *ibid.*, pp. 27–34, para. 116–128).

Whatever the significance of those distinctions, the fact is that they do not cover the differentiation made in Art. 38, para. 1 (a) between general and particular conventions, which definitely has no effect whatsoever in the framework of the Court's function.

2. International Custom

- 209 The relationship between treaty law and customary law is complex; it will be briefly dealt with hereafter.⁵⁶² However, it can be taken for granted that when no bilateral or multilateral treaty is binding on the parties, 'the dispute is to be governed by customary international law',⁵⁶³ which does not mean that custom has no part to play in cases where treaties are applicable. Custom⁵⁶⁴ certainly forms a major part of the sources of law to which the Court must refer in carrying out its function and, even though the seising of the Court is, so to speak, fortuitous, it has played a major role both 'in developing

⁵⁶² Cf. *infra*, MN 289–294.

⁵⁶³ *Continental Shelf case (Libya/Malta)*, *supra*, fn. 92, ICJ Reports (1985), pp. 13, 29 (para. 26). In the *Arrest Warrant case*, the Court considered that the relevant international conventions 'provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case' (*supra*, fn. 325, ICJ Reports [2002], pp. 3, 21 [para. 52]). Equally, in its recent Judgment in the *Jurisdictional Immunities case*, the Court underlined: 'As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 ... Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted on 2 December 2004 ... which is not yet in force in any event. Neither Germany nor Italy has signed the Convention.' (*supra*, fn. 115, para. 54)

⁵⁶⁴ The literature on custom is enormous, cf. e.g. Abi-Saab, G., 'La coutume dans tous ses états', in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, vol. I (1987), pp. 53–65; Akehurst, M., 'Custom as a Source of International Law', *BYIL* 47 (1974–1975), pp. 1–53; d'Amato, A., *The Concept of Custom in International Law* (1971); Barberis, J.A., 'Réflexions sur la coutume internationale', *AFDI* 36 (1990), pp. 9–46; Barberis, J.A., 'La coutume est-elle une source du droit international?', in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991), pp. 43–52; Barboza, J., 'The Customary Rule: From Chrysalis to Butterfly', *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Barea, C.A.A., ed., 2000), pp. 1–14; Bos, M., 'The Identification of Custom in International Law', *GYIL* 25 (1982), pp. 9–53; Cahin, G., *La coutume internationale et les organisations internationales* (2001); Cheng, B., 'Custom: the Future of General State Practice in a Divided World', in *The Structure and Process of International Law* (MacDonald, R. St. J./Johnston, D.M., eds., 1983), pp. 513–54; Danilenko, G.M., 'The Theory of International Customary Law', *GYIL* 31 (1988), pp. 9–47; Dupuy (1994), *supra*, fn. 460, pp. 51–68; Dupuy, R.J., 'Coutume sage et coutume sauvage', in *Mélanges offertes à Charles Rousseau: la communauté internationale* (1974), pp. 75–89; Fidler, D.P., 'Challenging the Classical Concept of Custom', *GYIL* 40 (1997), pp. 198–235; Geiger, R.H., 'Customary International Law in the Jurisprudence of the International Court of Justice: a Critical Appraisal', in *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Fastenrath, U., ed., 2011), pp. 673–94; Lepard, B.D., *Customary International Law: a New Theory with Practical applications* (2010), p. 419; Kelsen, H., 'Théorie du droit international coutumier', *Revue internationale de la théorie du droit* 1 (1939), pp. 253–74; Kopelmanas, L., 'Customs as a Means of Creation of International Law', *BYIL* 18 (1937), pp. 127–51; Mendelson, M., 'The Subjective Element in Customary International Law', *BYIL* 64 (1995), pp. 177–208; Mendelson, M., 'The Formation of Customary International Law', *Rec. des Cours* 272 (1998), pp. 155–410; Mullerson, R., 'On the Nature and Scope of Customary International Law', *ARIEL* 3 (1998), pp. 1–19; Roberts, A., 'Traditional and Modern Approaches to Customary International Law: a Reconciliation', in *International law: classic and contemporary readings* (Riener, L., ed., 2009), pp. 49–75; Seferiades, S., 'Aperçu sur la coutume juridique internationale', *RGDIP* 43 (1936), pp. 129–96; Stern, B., 'La coutume au cœur du droit international', in *Mélanges offerts à Paul Reuter: le droit international—unité et diversité* (1981), pp. 479–99; Sur, S., 'La coutume internationale. Sa vie, son œuvre', *Droits* 1986, pp. 111–24; Tunkin, G., 'Is General International Law Customary Law Only?', *EJIL* 4 (1993), pp. 534–41; Wolfke, K., *Custom in Present International Law* (1993); Wolfke, K., 'Some Persistent Controversies Regarding Customary International Law', *NYIL* 24 (1993), pp. 1–16.

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customary rules in a number of fields⁵⁶⁵ and in clarifying the definition and conditions of application of custom.⁵⁶⁶

Exactly as for treaties, Art. 38, para. 1 (b) offers a useful basis for defining what customary law is—at least for the purposes of international adjudication. That definition in turn has been elaborated by the Court which, in spite of the silence of para. 1 (b) has accepted, more convincingly than in matters of treaties, that customary law could be either general or particular. 210

a) A Generally Accepted Definition of Custom

The formula of Art. 38, para. 1 (b) is disconcerting since one would have thought that 'it is rather the general practice accepted as law which provides the evidence for the existence of an international custom'⁵⁶⁷ than the opposite. However, upon reflection, this is merely logical: the existence of the customary rule attests that, 'upstream', a practice has developed which then became accepted as law.⁵⁶⁸ But it must be added that, in turn, the ensuing norm is a source of rights and obligations for the States to which the rule is directed. And, in any case, this leaves open the crux of the matter: when is this process—which seems to be cumulative of a practice and an acceptance—achieved? 211

In the light of the *travaux préparatoires* of para. 2, this provision does not prescribe a predetermined method for 'discovering' customary rules. Its purpose was simply to enable the Court to apply such rules, without any attempt being made to describe a particular process: 'when a clearly defined custom exists or a rule established by the continual and general usage of nations, which has consequently obtained the force of law, it is also the duty of a judge to apply it'.⁵⁶⁹ Even though the Committee of Jurists of 1920 clearly did not have in mind a splitting-up of the definition of custom into two distinct elements⁵⁷⁰—a 'material' or 'objective' one represented by practice and a 'psychological', 'intellectual' or 'subjective' one, usually called *opinio juris*—Art. 38, para. 1 (b) is nowadays seen as being at the origin of this division, which constitutes an extremely useful tool for 'discovering' customary rules, even though it is not always used by the Court with much rigour, which leaves an impression of a complex and somehow mysterious alchemy through which the 212

⁵⁶⁵ Mendelson (1996), pp. 63, 67.

⁵⁶⁶ For analyses of the particular role of the Court in matters of customary law *cf. e.g.* Alvarez-Jiménez, A., 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009', *ICLQ* 60 (2011), pp. 681–712; Geiger, *supra*, fn. 564; Haggemacher, P., 'La doctrine du droit coutumier dans la pratique de la Cour internationale', *RGDIP* 90 (1986), pp. 5–126; Oraison, A., 'La Cour internationale de Justice, l'article 38 de son Statut et la coutume internationale', *Revue de droit international de sciences diplomatiques et politiques* 77 (1999), pp. 293–344; Skubiszewski, K., 'Elements of Custom and the Hague Court', *ZaöRV* 31 (1971), pp. 810–54; Schlütter, B., *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (2010), p. 370.

⁵⁶⁷ Jennings/Watts, *supra*, fn. 164, p. 26.

⁵⁶⁸ *ibid.*, fn. 5.

⁵⁶⁹ Baron Descamps, Procès-Verbaux, *supra*, fn. 16, p. 322.

⁵⁷⁰ The Committee did not pay much attention to the question of customary law and only very little can be deduced from the Procès-verbaux on this point. The initial formula of Baron Descamps (*supra*, MN 21) was slightly modified several times, but its approach was not changed fundamentally. As has been rightly submitted, this approach did not at all entail the 'two elements' doctrine, but merely aimed at defining the customary process as a unity (*cf.* the detailed analysis of the *travaux préparatoire* by Haggemacher, *supra*, fn. 566, pp. 5–126, pp. 18–32; *accord* Cahin, *supra*, fn. 564, p. 259, fn. 9). According to Manley Hudson, the drafters of the Statute 'had no very clear idea as to what constituted international custom' (*ILC Yearbook* 1950, vol. I, 6 June 1960, p. 6 [para. 45]).

Court, which acts as a 'prominent actor within the process of creation and evolution of customary international rules',⁵⁷¹ enjoys a rather large measure of discretionary power.

aa) The Two 'Elements' of Customary Law

- 213 In spite of harsh (and, in the opinion of the present writer, largely unfounded⁵⁷²) doctrinal criticisms,⁵⁷³ the Court has very firmly maintained that 'only if such abstention [from instituting criminal proceedings] were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom',⁵⁷⁴ and that, in order to establish an international customary rule, 'it has to direct its attention to the practice and *opinio juris* of States'.⁵⁷⁵ In its 1985 judgment in *Continental Shelf* (Libya/Malta), the Court considered that it was '*of course axiomatic* that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'.⁵⁷⁶

It follows that the Court must determine, in accordance with Art. 38 (1) (b) of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969, p. 44, para. 77*).⁵⁷⁷

- 214 The steadfastness of the Court in adhering to the two elements doctrine somehow tempers the alleged inconsistency sometimes noted in its method for ascertaining the existence of a customary rule,⁵⁷⁸ although it cannot be denied that this is not a 'scientific process'.⁵⁷⁹ But this is of course not the end of the question and difficulties begin with the determination of each of these two elements.

⁵⁷¹ Alvarez-Jiménez, *supra*, fn. 566, p. 685.

⁵⁷² As noted by Verhoeven: 'Force est ...de constater qu'il n'y a pas d'alternative très crédible à la théorie des deux éléments, tout insatisfaisante qu'elle soit sur plus d'un point.' (2008, *supra*, fn. 180, p. 115).

⁵⁷³ For a clear and concise presentation of these criticisms cf. e.g. Cahin, *supra*, fn. 564, pp. 257–70; and also Haggemacher, *supra*, fn. 566, pp. 5–126, *passim*; Kohen, M., 'La pratique et la théorie des sources du droit international', in *La pratique et le droit international. Colloque de Genève* (Société française de le droit international, ed., 2004), pp. 81–111, p. 93; Kammerhofer, J., 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', *EJIL* 15 (3) (2004), pp. 523–53.

⁵⁷⁴ *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 28.

⁵⁷⁵ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 97 (para. 183), p. 110 (para. 211). Cf. also *Asylum* (Colombia/Peru), ICJ Reports (1950), pp. 266, 276–7; *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 40; *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 44 (para. 77); or *Legality of the Threat or Use of Force*, *supra*, fn. 163, ICJ Reports (1996), pp. 226, 253–5 (para. 65–73).

⁵⁷⁶ *Continental Shelf case* (Libya/Malta), *supra*, fn. 92, ICJ Reports (1985), pp. 13, 29 (para. 27) (emphasis added).

⁵⁷⁷ *Jurisdictional Immunities case*, *supra*, fn. 115, para. 55.

⁵⁷⁸ For instance, in the *Icelandic Fisheries case* the Court found that both the concepts of 12-mile exclusive fishing zones and that of preferential rights for coastal States within this limit have crystallized into customary rules. However, the Court did not offer examples of State practice (*supra*, fn. 129, ICJ Reports [1974], p. 3). This erratic attitude was harshly criticized, since 'such failure to act consistently with its own asserted methodology undermines the legitimacy of judicial decision-making, and the content of the espoused customary laws' (Boyle/Chinkin, *supra*, fn. 251, p. 280, footnote omitted).

⁵⁷⁹ *Ibid.*, p. 279.

*The material element.*⁵⁸⁰ The principle that it is an indispensable ingredient for the formation of a customary rule has often been recalled by the Court: ‘two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.⁵⁸¹ However, contrary to what could seem logical, determining the existence of practice is far from self-evident. 215

In some cases, the Court has been content simply to postulate that a practice sustaining the norm existed, without taking pains to demonstrate it.⁵⁸² However, the case law of the Court—which it is not possible to detail in the present contribution—gives useful indications as to the character and consistency of practice as one element leading to the formation of customary rules. 216

As for the first aspect—the nature of the acts or behaviours⁵⁸³ which can be taken into consideration in order to determine whether a practice exists—the Court has mentioned: 217

- administrative acts or attitudes,⁵⁸⁴ in particular in the field of diplomatic protection;⁵⁸⁵
- legislation;⁵⁸⁶

⁵⁸⁰ Cf. the contributions in *La pratique et le droit international. Colloque de Genève*, *supra*, fn. 573; in particular Boisson de Chazournes, L., ‘Qu’est-ce que la pratique en droit international?’, *ibid.*, pp. 13–47; Kohen, *supra*, fn. 573, *ibid.*, pp. 81–111; Caffisch, L., ‘La pratique dans le raisonnement du juge international’, *ibid.*, pp. 125–38.

⁵⁸¹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 44 (para. 77); and cf. also *ibid.*, p. 43 (para. 74); as well as *Asylum case*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 276; *Wimbledon*, *supra*, fn. 304, PCIJ, Series A, No. 1, p. 25; *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 139; *Rights of US Nationals in Morocco*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 200; *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 40; *Jurisdictional Immunities case*, *supra*, fn. 115, para. 55.

⁵⁸² This was the usual practice of the Permanent Court; cf. e.g. *German Settlers in Poland case*, *supra*, fn. 312, PCIJ, Series B, No. 6, p. 36; *Certain German Interests case*, *supra*, fn. 125, PCIJ, Series A, No. 7, p. 22. However, e.g. in *Nicaragua*, the present Court too considered it sufficient that ‘Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find’, and declared: ‘The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law’ (*supra*, fn. 115, ICJ Reports [1986], pp. 14, 106 [para. 202]). It is indeed very difficult to rely on a practice in order to find evidence of a prohibitive customary law rule (cf. Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 [1990], pp. 1, 48–50).

⁵⁸³ ‘Both deeds and words are types of state practice ...’ (Bodansky, *supra*, fn. 464, p. 124). As is well known, abstentions from action, just like positive actions, can constitute a practice. Thus, in the *Lotus* case, the Court implicitly admitted that the abstention from instituting criminal proceedings might have crystallized into a customary law rule. But in the absence of an *opinio juris* to this effect, the Court could not finally find such a rule (*supra*, fn. 128, PCIJ, Series A, No. 10, p. 28). Cf. further *Nottebohm case*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 22; *Legality of Threat and Use of Nuclear Weapons*, *supra*, fn. 163, ICJ Reports (1996), pp. 266, 254 (para. 67); *Jurisdictional Immunities case*, *supra*, fn. 115, para. 77.

⁵⁸⁴ *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 39–40.

⁵⁸⁵ *Nottebohm case*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 22–3; *Interhandel*, *supra*, fn. 233, ICJ Reports (1959), pp. 6, 27; or *Barcelona Traction*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 42 (para. 70); *Ahmadou Sadio Diallo*, *supra*, fn. 328, Preliminary Objections, Judgment of 24 May 2007, available at <<http://www.icj-cij.org>>, para. 89.

⁵⁸⁶ Cf. e.g. the Court’s judgment in the *Fisheries case*, in which it relied on the legislation of certain States having adopted the ten-mile rule concerning the delimitation of the territorial sea but could not find sufficient evidence of a ‘general’ practice (*supra*, fn. 234, ICJ Reports [1951], pp. 116, 131). Cf. also *Jurisdictional Immunities case*, *supra*, fn. 115, paras. 70, 88—this latter paragraph excludes the relevance of an isolated example of legislation for the purpose of establishing the existence of practice).

- acts of the judiciary;⁵⁸⁷
- or, and this might be the most important and frequent aspect of practice, treaties.⁵⁸⁸

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However, as the Permanent Court has noted, it can be the case that the conclusion of a treaty, far from being part of a customary process, is the sign of a need to depart from a customary rule to which the treaty rule makes exception.⁵⁸⁹ For its part, the present Court has warned against a purely mechanical consideration of a convention as an element of practice: as is apparent from the 1969 judgment in the *North Sea Continental Shelf cases*, the attitude of States vis-à-vis the treaty, either during its negotiations⁵⁹⁰ or regarding its acceptance,⁵⁹¹ can be more important than the text itself, a difficulty that the Court has not ‘tackled squarely’ in *Nicaragua*.⁵⁹²

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The collective attitude of States at diplomatic conferences⁵⁹³ or in international organizations, as well as the practice of the organizations themselves,⁵⁹⁴ can also be of paramount

⁵⁸⁷ *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 28; *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*, *supra*, fn. 422, PCIJ, Series B, No. 13, p. 20; *Serbian and Brazilian Loans cases*, *supra*, fn. 114, PCIJ, Series A, Nos. 20 and 21, p. 47 and p. 125; *Arrest Warrant case*, *supra*, fn. 325, ICJ Reports (2002), pp. 3, 23 (para. 56) in conjunction with p. 24 (para. 58) or *Jurisdictional Immunities case*, *supra*, fn. 115, paras. 55, 68, 72–77, 85, 87, 96, 118. On the special importance of the case law serving as means of practice *cf. e.g.* Alvarez-Jiménez, *supra*, fn. 566, pp. 698–701; as has been written: ‘Practice thus appears to give judicial decisions a greater weight than that accorded by Article 38 of the Statute’ (Meron, T., *The Humanization of International Law* [2006], p. 402).

⁵⁸⁸ *Cf. e.g. Wimbledon*, *supra*, fn. 304, PCIJ, Series A, No. 1, p. 25; *Chorzów Factory*, *supra*, fn. 307, Jurisdiction, PCIJ, Series A, No. 9, p. 20, 22; 10 September 1929, *Territorial Jurisdiction of the International Commission of the River Oder*, *supra*, fn. 233, PCIJ, Series A, No. 23, p. 27; as well as the ICJ’s judgments in *Nottebohm*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 22–3; *North Sea Continental Shelf*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 41 (para. 71); *Icelandic Fisheries*, *supra*, fn. 129, ICJ Reports (1974), pp. 3, 23 (paras. 51–53) and p. 26 (para. 58); *Continental Shelf (Libya/Malta)*, *supra*, fn. 92, ICJ Reports (1985), pp. 13, 29 (para. 27); *Arrest Warrant case*, *supra*, fn. 325, ICJ Reports (2002), pp. 3, 24 (para. 58) (treaties creating international criminal tribunals, together with, on the same footing, the General Assembly resolutions creating the ICTY and the ICTR); as well as the advisory opinions on the *Agreement between the WHO and Egypt*, *supra*, fn. 357, ICJ Reports (1980), pp. 73, 94 (paras. 45–46) or the *Nuclear weapons case*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 253 (para. 62) and *a contrario* the *Ahmadou Sadio Diallo case*, *supra*, fn. 328, para. 90.

⁵⁸⁹ *Cf. Mavrommatis case*, *supra*, fn. 239, PCIJ, Series A, No. 2, p. 35; *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 27 or the *Ahmadou Sadio Diallo case* where the Court noted: ‘The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.’ (*supra*, fn. 328 [para. 90]).

⁵⁹⁰ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 35 (para. 54), 37 (para. 60), or 43 (para. 76); and *cf.* also *Continental Shelf case (Libya/Malta)*, *supra*, fn. 92, ICJ Reports (1985), pp. 13, 30 (para. 27). However, this is probably more relevant with respect to the *opinio juris* than to practice—*cf. infra*, MN 228.

⁵⁹¹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 43–4 (para. 76).

⁵⁹² Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 48. *Cf. Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 94–6; and further *infra*, MN 228.

⁵⁹³ *Cf.* the PCIJ’s advisory opinion on *The Treaty of Lausanne*, *supra*, fn. 259, PCIJ, Series B, No. 12, p. 30 or, *mutatis mutandis*, *Jurisdictional Immunities case*, *supra*, fn. 115, where the Court refers to ‘the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention’, para. 55.

⁵⁹⁴ On this important issue, which cannot be dealt with in any detail here, *cf.* all the luminous analysis of Cahin, *supra*, fn. 564, *passim*; as well as Dupuy, P.-M., ‘Le droit des Nations Unies et sa pratique dans la jurisprudence de la Cour internationale de Justice’, in *La pratique et le droit international. Colloque de Genève*, *supra*, fn. 573, pp. 138–57; Peters, C., ‘Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?’, *Goettingen Journal of International Law* 3 (2011), pp. 617–42.

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importance in establishing the existence of the material element. In this respect, it is, however, necessary to make a distinction between the internal and purely institutional practice, giving rise to a customary rule within the ‘proper law’⁵⁹⁵ of the organization concerned,⁵⁹⁶ on the one hand, and the contribution of the organization(s) to the formation of general rules of customary law applicable outside the framework of the organization on the other. Clearly, in both hypotheses, resolutions adopted by the organs of the international organizations are of tremendous importance in the customary process, but they play a different part. As far as the law of the organization itself is concerned, resolutions are part of the practice.⁵⁹⁷ In the case of ascertaining a customary rule of general international law, however, things are different: it is suggested that, in that case, they belong more to the manifestation of the *opinio juris* than to the formation of a practice.⁵⁹⁸

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Behaviour—whether actions or omissions—is not enough. The acts or omission must furthermore be qualified in a number of respects, which, taken together, are the trademark of the customary process. In its 1969 judgment on the *North Sea Continental Shelf cases*, the Court made clear that:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provisions invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.⁵⁹⁹

This important and well-known *dictum* sets out all the conditions permitting a practice to be taken into account in the customary process, namely:

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- (1) Length: There is no such thing as ‘instantaneous custom’⁶⁰⁰; however ‘implicitly, the Court rejects the necessity of time immemorial’⁶⁰¹ and, in several judgments or advisory opinions, it has accepted that a customary norm existed ‘even without the passage of any considerable period of time’.⁶⁰²
- (2) Generality: In its judgment of 1969, the Court said two different things: first, that the practice must include that of the ‘States whose interests are particularly affected’;

⁵⁹⁵ Cf. Jenks, C.W., *The Proper Law of International Organisations* (1962).

⁵⁹⁶ Cf. e.g. *Complaints Made Against the UNESCO case*, *supra*, fn. 401, ICJ Reports (1956), pp. 77, 91; or *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 22 (para. 22).

⁵⁹⁷ *ibid.*; as well as (1951) *Genocide case*, *supra*, fn. 365, ICJ Reports (1951), pp. 15, 25; *Certain Expenses case*, *supra*, fn. 244, ICJ Reports (1962), pp. 151, 160, 162 and 168–9; *Judgment No. 2867 of the ILOAT case*, where the Court found evidence of the evolution of the law in two General Comments by the Human Rights Committee (*supra*, fn. 359, para. 39).

⁵⁹⁸ Cf. *infra*, MN 228.

⁵⁹⁹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 43 (para. 74).

⁶⁰⁰ Including by way of the unanimous adoption of a resolution by the UN General Assembly (*contra*: Cheng, B., ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law’, *IJIL* 5 (1965), pp. 23–48).

⁶⁰¹ Skubiszewski, *supra*, fn. 566, pp. 810–54, p. 853.

⁶⁰² *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 42 (para. 73). For examples cf. e.g. *Free City of Danzig and International Labour Organization*, PCIJ, Series B, No. 18, p. 13 (conditions and modalities of the conduct of external affairs of the Free City of Danzig by Poland); *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 43 (para. 74) (ten years, concerning maritime delimitation rules); *Continental Shelf case (Tunisia/Libya)*, ICJ Reports (1982), pp. 18, 74 (para. 101) (definition of ‘continental shelf’).

and second that the practice of those States takes place in a more general framework ('including that ...'); this has been repeated elsewhere.⁶⁰³

- (3) Constancy and uniformity: Often reduced to the mere assertion that the usage or practice is 'constant and uniform':⁶⁰⁴ in the *Asylum* case the Court considered that the facts brought before it 'disclose so much discrepancy in the exercise of diplomatic asylum',⁶⁰⁵ that no such 'constant and uniform usage' could be established.

- 222 However, concerning this last aspect, the Court has been satisfied with a 'virtually uniform' standard.⁶⁰⁶ In *Nicaragua*, it observed that '[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect' and it added:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.⁶⁰⁷

However, the persistence of a practice (in that case the doctrine of nuclear 'dissuasion') incompatible with a nascent *opinio juris* (the prohibition of the use of nuclear weapons) has clearly been seen by the Court as an obstacle to its consolidation as a customary rule.⁶⁰⁸

- 223 *The psychological element*: Even if, at first sight, the psychological element might be seen as less perceptible, the Court has strictly maintained that it had to be present in the customary process: absent *opinio juris*, there is no customary rule.⁶⁰⁹ Thus, in the *North Sea Continental Shelf* case, the Court clearly stressed:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.⁶¹⁰

Thus, the Court also defines the meaning of the psychological element: 'The States concerned must ... *feel* that they are conforming to what amounts to a legal obligation.'⁶¹¹

⁶⁰³ *German Settlers in Poland case*, *supra*, fn. 312, PCIJ, Series B, No. 6, p. 36 (speaking of 'an almost universal opinion and practice'); *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 131.

⁶⁰⁴ *Asylum case*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 277; *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 40.

⁶⁰⁵ *Asylum*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 277.

⁶⁰⁶ *North Sea Continental Shelf*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 43 (para. 74). *Cf.* also *Wimbledon*, *supra*, fn. 304, PCIJ, Series A, No. 1, p. 25; *Treaty of Lausanne case*, *supra*, fn. 259, PCIJ, Series B, No. 12, p. 30; *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 131; *Rights of US Nationals in Morocco*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 200.

⁶⁰⁷ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 98 (para. 186). *Cf.* also *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 138.

⁶⁰⁸ *Cf. Nuclear weapons case*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 255 (para. 73).

⁶⁰⁹ It is worth noting, however, that, in some cases, the Court did not bother to investigate 'whether the subjective element was also present' (Mendelson [1996], pp. 63, 70, fn. 37, and the examples cited there). *Cf.* also Mendelson (1998), *supra*, fn. 564, pp. 250–1.

⁶¹⁰ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 44 (para. 77). *Cf.* also, in the same sense, *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 28; *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 108–9 (para. 207), *Jurisdictional Immunities case*, *supra*, fn. 115, para. 55.

⁶¹¹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 44 (para. 77) (emphasis added).

This wording is interesting: a ‘feeling’ that an obligation exists is a very different thing from an expression of will and is not easily grasped either legally or factually.⁶¹² The jurisprudence of the Court nevertheless casts some light on this apparently undefined requirement. 224

Only once,⁶¹³ in the unfortunate *Lotus case*, did the Court equate this ‘feeling’ with an expression of formal consent in the voluntarist sense of the word (‘will’): ‘The rules of law binding upon States ... emanate from their own *free will* as expressed ... by usages generally accepted as expressing principles of law’.⁶¹⁴ This is *not* what Art. 38, para. 1 (b) says: ‘acceptation’ is not necessarily restricted to the will of the States but to an ‘acceptance’, which can be interpreted less strictly, as shown by the *travaux préparatoires* of the provision.⁶¹⁵ Nor is it what the Court usually requires: in parallel with practice, it will usually rely on a *general* opinion, not that of States individually.⁶¹⁶ And there can be no question that customary rules are ‘the Achilles heel of consensualist outlook’, as one of the most eminent representatives of the voluntarist school has put it.⁶¹⁷ 225

This, indeed, does not amount to saying that the attitude of the contesting States vis-à-vis the alleged rule in question has no consequence whatsoever;⁶¹⁸ if they have 226

⁶¹² Cf. Mendelson (1998), *supra*, fn. 564, pp. 281–2; Pellet (1992), *supra*, fn. 270, pp. 22–53, pp. 36–7.

⁶¹³ If exception is made, at this stage, of local custom which can probably only exist if individually accepted by each of the States involved—but, even there, a formal expression of will is not required. The only sign of a voluntarist approach can be found in the phenomenon of the persistent objector which the Court has sanctioned (cf. *Asylum case*, *supra*, fn. 575, ICJ Reports [1950], pp. 266, 277–8; *Fisheries case*, *supra*, fn. 234, ICJ Reports [1951], pp. 116, 131); but in that case, there must be a deliberate and ‘persistent’ expression of will *not* to let the practice turn into a norm; cf. e.g. Charney, J.L., ‘The Persistent Objector Rule and the Development of Customary International Law’, *BYIL* 56 (1985), pp. 1–24; Dupuy, P.-M., ‘A propos de l’opposabilité de la coutume générale: enquête brève sur l’“objecteur persistant”’, in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991), pp. 257–72; Pentassuglia, G., *La rilevanza dell’obiezione persistente nel diritto internazionale* (1996); David, E., ‘L’objecteur persistant, une règle persistante?’, in *Droit international humanitaire coutumier: enjeux et défis contemporains* (Tavernier, P./Henckaerts, J.M., eds., 2008), pp. 89–100.

⁶¹⁴ *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 18.

⁶¹⁵ During the discussion of the 1920 Advisory Committee of Jurists there was no ‘clash of positions’ in respect of customary law rules. The first draft proposal of Baron Descamps referred to ‘international custom, being practice *between nations accepted by them as law*’ (Procès-Verbaux, *supra*, fn. 16, p. 306; emphasis added). It is doubtful that Baron Descamps had a voluntarist approach in mind when he made the proposal. In his explanations, he did not refer to a consensual basis of customary law rules, but considered that ‘It is a very natural and extremely reliable method of development since it results entirely from the constant expression of the legal *convictions* and of the *needs* of the nations in their mutual intercourse’ (*ibid.*, p. 322, emphasis added). Root’s proposal (cf. *supra*, MN 12), which finally formed the basis of the compromise reached, emphasized the difference between the States’ consent required in the case of international conventions and the acceptance required under sub-para. 2. However, the Committee did not engage in a real discussion of the issue. Cf. further Hagenmacher, *supra*, fn. 566, pp. 5–126, pp. 28–30.

⁶¹⁶ *Wimbledon*, *supra*, fn. 304, PCIJ, Series A, No. 1, pp. 26–8; *Nottebohm case*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 12–26; *Barcelona Traction*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 42–47 (paras. 70–91); *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 292–3 (para. 90); *Jurisdictional Immunities case*, *supra*, fn. 115, para. 88.

⁶¹⁷ Weil (1983), *supra*, fn. 270, pp. 413–42, p. 433. While the Court, in conformity with its function as a judicial organ, usually does not elaborate on the ‘foundation’ of custom, it has sometimes hinted at the possibility that a customary rule might be the ‘necessary expression in the field of delimitation’ in regard to the equidistance principle (*North Sea Continental Shelf case*, *supra*, fn. 115, ICJ Reports [1969], pp. 3, 28–9 [para. 37] and p. 32 [para. 46]). Cf. also *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 106 (para. 102) (‘corollary’). In the *Frontier Dispute* (Burkina Faso/Mali), the Chamber of the Court defined the principle of *uti possidetis* as ‘a general principle which is *logically connected* with the principle of the obtaining of independence, wherever it occurs’, *supra*, fn. 115, ICJ Reports (1986), pp. 554, 565 (para. 20).

⁶¹⁸ The express acceptance of the rule can reinforce the reasoning of the Court; cf. e.g. the Court’s judgment in *Nicaragua*, where much significance was attached to the fact that the United States had accepted

‘consented, ... so much the better; but ... consent has never yet been held to be a *necessary* condition’;⁶¹⁹ nor is it sufficient.⁶²⁰ As a consequence:

The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Art. 38 of its Statute to apply, *inter alia*, international custom ‘as evidence of a general practice accepted as law’, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.⁶²¹

227 The last part of this quotation is somewhat confusing since the Court seems to link its search of the *opinio juris* to ‘practice’. Yet the practice in question is not the material practice relevant for establishing the existence of the objective element; rather it is the practice which reflects the ‘feeling’ of the States that they are conforming to a legal obligation (or right).⁶²² In the contemporary world, the practice in question is mainly represented by the resolutions of international organizations and general treaties and, even more importantly, by the attitudes of the States vis-à-vis these instruments.

228 The present Court⁶²³ has made great use of the resolutions of the UN General Assembly to prove the existence (or the non-existence⁶²⁴) of an *opinio juris*.⁶²⁵ Thus, in *Western Sahara*, it found support of the customary law status of the self-determination principle in General Assembly Resolutions 1514 (XV) of 14 December 1960 and 2625 (XXV) of 24 October 1970, reconfirming its previous analysis in the *Namibia* advisory opinion.⁶²⁶ It is, however,

the interdiction to use force in international relations at the Sixth Conference of American States or in the Helsinki Act, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 100 (para. 189).

⁶¹⁹ Mendelso (1998), *supra*, fn. 564, p. 260 (emphasis in the original).

⁶²⁰ *Contra*: Mendelson, *ibid.* Citing the 1951 *Fisheries case* (*supra*, fn. 234, ICJ Reports [1951], pp. 116, 138–9), Mendelson considers that in some instances consent ‘is a *sufficient* condition for being bound’; in reality, it seems that, in that case, the Court simply excluded the possibility that the United Kingdom could be considered as a persistent objector; moreover, the historical rights at stake can be assimilated to a local custom, for which a clear consent from the interested States is required: *cf. infra*, MN 245–246.

⁶²¹ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 97–98 (para. 184). *Cf.* also *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 294 (para. 94) and p. 299 (para. 111).

⁶²² In the *Jurisdictional Immunities case*, the Court found that: ‘*Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.’ (*supra*, fn. 115, para. 55).

⁶²³ The Permanent Court usually did not take pains to prove the existence of an *opinio juris*; it simply asserted that it existed. Thus, it referred, without any explanation, to the ‘well-known’ character of the rule that no one can act as a judge in his own case (*Treaty of Lausanne case*, *supra*, fn. 259, PCIJ, Series B, No. 12, p. 32) or underlined that the rules it applied were ‘ordinary’ (‘*usuels*’ in the French version: *Treatment of Polish Nationals case*, *supra*, fn. 301, PCIJ, Series A/B, No. 44, p. 23).

⁶²⁴ For clear examples of resolutions as evidence of a ‘negative *opinio juris*’ (Thirlway, ‘Law and Procedure, Part One and Two’, *BYIL* 76 [2005], p. 97), *cf. Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 255 (para. 72) and *Kosovo Declaration of Independence*, *supra*, fn. 244, para. 81. *Cf.* also Öberg, M.D., ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’, *EJIL* 16 (2005), pp. 879–906 or Pellet (2007), *supra*, fn. 250, pp. 28–32.

⁶²⁵ When customary rules existing within the legal order of the organization itself are at stake, resolutions can be evidence of practice; *cf. supra*, MN 219.

⁶²⁶ *Western Sahara*, *supra*, fn. 104, ICJ Reports (1975), pp. 6, 31–33 (para. 55–59); and *Namibia case*, *supra*, fn. 244, ICJ Reports (1971), pp. 16, 31 (para. 52) respectively; *cf.* also *East Timor*, *supra*, fn. 237, ICJ Reports (1995), pp. 90, 102 (para. 29) and *Kosovo Declaration of Independence case*, *supra*, fn. 244, para. 80.

the Court's judgment in *Nicaragua* which gives the most striking example of recourse to resolutions of the General Assembly: in that case, *e.g.*, the ICJ paid much attention to 'the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"' in order to conclude that it seems 'apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules)'.⁶²⁷ The Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, is even more straightforward:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.⁶²⁸

Another common means of establishing an *opinio juris* is to refer to codification conventions. In its 1969 judgment on the *North Sea Continental Shelf*, which is unquestionably the leading case relating to proof of the existence of a customary rule, the ICJ dealt meticulously with the question of whether Art. 6 of the 1958 Convention on the Continental Shelf could be seen as having 'reflected or crystallized' the equidistance method with regard to the delimitation of the continental shelf between adjacent or opposite States as a customary rule. In this respect, the Court:

- rejected the idea that the notion of equidistance was 'logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine';⁶²⁹
- found that a 'review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion';⁶³⁰
- noted that 'the principle of equidistance ... was proposed by the International Law Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary law';⁶³¹
- considered that the possibility to make reservations to Art. 6 was a sign that it was 'not regarded as declaratory of [a] previously existing or emerging [rule] of law';⁶³²

⁶²⁷ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 100 (para. 188), p. 101 (para. 191) or p. 106 (para. 202). *Cf.* also the use made by the Court of GA Res. 3314 (XXIX) of 14 December 1974 as reflecting customary international law (*ibid.*, p. 103 [para. 195]), or Res. 2131 (XX) ('Declaration on the inadmissibility of intervention in the domestic affairs of States and the Protection of Their Independence and Sovereignty', 21 December 1965), notwithstanding the fact that the United States had considered this resolution, at the time of its adoption, to be 'only a statement of political intention and not a formulation of law' (*ibid.*, p. 107 [para. 203]). *Cf.* further *infra*, MN 238. The Court reaffirmed its 1986 findings in the advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, especially with respect to GA Res. 2625 (XXV) (*supra*, fn. 104, ICJ Reports [2004], pp. 136, 171–2 [paras. 87–88]); *Armed Activities case* (DRC/Uganda), *supra*, fn. 132, ICJ Reports (2005), pp. 168, 223 (para. 146) and p. 226 (para. 162).

⁶²⁸ *Nuclear Weapons case*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 254–5 (para. 70), and further *ibid.*, paras. 71–73.

⁶²⁹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 32 (para. 46), and, more generally, pp. 28–32 (paras. 37–45).

⁶³⁰ *Ibid.*, p. 32 (para. 47), and, more generally, pp. 32–56 (paras. 47–56).

⁶³¹ *Ibid.*, para. 62, p. 38 (referring again to pp. 33–6 [paras. 48–55]).

⁶³² *Ibid.*, p. 39 (para. 64), and, more generally, pp. 38–41 (paras. 63–68). This aspect of the Judgment has quite often been misinterpreted; *cf.* further on this aspect the references in fn. 561.

- examined in great detail whether this treaty-rule had, after the conclusion of the Convention, transformed into ‘a rule of customary international law binding on all States’;⁶³³
- and finally concluded that ‘the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors’.⁶³⁴

Among the codification conventions to which it has referred,⁶³⁵ the Court has, in particular, made an impressive use of the 1969 Vienna Convention on the Law of Treaties, which it has repeatedly considered as a codification of existing customary rules in many respects.⁶³⁶ Similarly, the Court has frequently referred to the Geneva Conventions on

⁶³³ *Ibid.*, p. 41 (para. 70), and, more generally, pp. 41–5 (paras. 70–80).

⁶³⁴ *Ibid.*, pp. 44–5 (para. 78). It is revealing that, even in this case, the Court experienced difficulties in distinguishing the existence of a practice on the one hand and of an *opinio juris* on the other. On this aspect cf. further *infra*, para. 237–238.

⁶³⁵ In the *Tehran Hostages case*, the Court considered that the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations ‘codify the law of diplomatic and consular relations [and] state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions’ (*supra*, fn. 132, ICJ Reports [1980], pp. 3, 24 [para. 45]). In the Tunisian-Libyan *Continental Shelf case*, the Court referred to the 1978 Vienna Convention on Succession of States in respect of Treaties, which had been drafted by the International Law Commission as well, *supra*, fn. 92, ICJ Reports (1982), pp. 66 (para. 84); cf. also *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 554, 563 (para. 17). As far as humanitarian law is concerned, the Court recognized that the 1907 Hague Regulations reflected customary law (*Armed Activities case* (DRC/Uganda), *supra*, fn. 132, ICJ Reports (2005), pp. 168, 229–30 (para. 172) and 242 (para. 214)). In the *Jurisdictional Immunities case* the Court referred to the European Convention on State Immunity and the United Nations Convention on the Jurisdictional Immunities of States and their Property as being ‘relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law’ (*supra*, fn. 115, para. 66).

⁶³⁶ *E.g.* with regard to Arts. 31 and 32 VCLT on the interpretation of treaties (*ELSI case, supra*, fn. 315, ICJ Reports (1989), pp. 15, 70–71 (para. 118); *Arbitral Award of 31 July 1989, supra*, fn. 406, ICJ Reports (1991), pp. 53, 70 (para. 48); *Land, Island and Maritime Frontier Dispute case, supra*, fn. 115, ICJ Reports (1992), pp. 351, 582–3 (para. 373) and p. 586 (para. 380); *Territorial Dispute case* (Libya/Chad), ICJ Reports (1994), pp. 6, 21–2 (para. 41); *Maritime Delimitation and Territorial Questions, supra*, fn. 207, Jurisdiction and Admissibility, ICJ Reports (1995), pp. 6, 18 (para. 33); *Nuclear Weapons (WHO), supra*, fn. 554, ICJ Reports (1996), pp. 66, 75 (para. 19); *Oil Platforms case, supra*, fn. 501, ICJ Reports (1996), pp. 803, 812 (para. 23); *Kasikili/Sedudu Island, supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1059 (para. 18); *LaGrand, supra*, fn. 115, ICJ Reports (2001), pp. 466, 501 (para. 99) and p. 502 (para. 101); *Pulau Ligitan case, supra*, fn. 501, ICJ Reports (2002), pp. 625, 645 (para. 37); *Oil Platforms case, supra*, fn. 501, Merits, ICJ Reports (2003), pp. 161, 182 (para. 41); *Avena case, supra*, fn. 115, ICJ Reports (2004), pp. 12, 48 (para. 83); *Wall case, supra*, fn. 104, ICJ Reports (2004), pp. 136, 174 (para. 94); *Navigational and Related Rights, supra*, fn. 464, ICJ Reports (2009), pp. 213, 242 (para. 64); *Maritime Delimitation and the Black Sea case, supra*, fn. 92, ICJ Reports (2009), pp. 61, 78 (para. 42). Similarly, the Court has referred to the Vienna Convention’s provisions ‘concerning the termination and operation of treaties set forth in Arts. 60 to 62 (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*), *Advisory Opinion, I.C.J. Reports 1971, p. 47 and Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18*; cf. also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 95–6*)’ (*Gabčíkovo-Nagymaros case, supra*, fn. 143, ICJ Reports [1997], pp. 7, 38 [para. 46]). Cf. also *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 14, 95 (para. 178); *Frontier Dispute* (Burkina Faso/Mali), *supra*, fn. 115, ICJ Reports (1986), pp. 563 (para. 17). Cf. also *Icelandic Fisheries case* (United Kingdom/Iceland), *supra*, fn. 129, Jurisdiction of the Court, ICJ Reports (1973),

the Law of the Sea of 1958,⁶³⁷ and subsequently to the Convention of Montego Bay of 1982.⁶³⁸ However, it has scarcely explained why it considered these conventions to be evidence of an *opinio juris*.⁶³⁹

In quite a number of cases, the Court also referred to the work of the ILC as a means of establishing the existence (*vel non*) of the psychological element of a particular customary rule.⁶⁴⁰ It has done so in two different ways: either by investigating the process of elaboration of the resulting codification convention, as it did in the *North Sea Continental Shelf case* of 1969, where the Court concluded from the work of the Commission that

pp. 3, 14 (para. 24) (Art. 52 VCLT); *Aegean Sea case*, *supra*, fn. 133, Jurisdiction of the Court, ICJ Reports (1978), pp. 3, 39 (para. 96) (Arts. 2, 3 and 11 VCLT); *Nicaragua case*, *supra*, fn. 115, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 421 (para. 66) (Art. 46 VCLT); *Border and Transborder Armed Actions* (Nicaragua/Honduras), (Jurisdiction and Admissibility), ICJ Reports (1988), pp. 69, 85 (para. 35) (provisions concerning reservations); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia) (Provisional Measures), ICJ Reports (1993), pp. 3, 11 (para. 13) (Art. 7 VCLT); *Nuclear Weapons*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 264 (para. 102) (Art. 26 VCLT); *Arrest Warrant of 11 April 2000*, ICJ Reports (2002), pp. 3, 21–2 (para. 53) (Art. 7); *Land and Maritime Boundary Between Cameroon and Nigeria*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 429–30 (paras. 263–265) (Arts. 7 and 46 VCLT).

⁶³⁷ Thus, the Court referred to the 1958 Geneva Conventions as ‘generally declaratory of established principles of international law’ (*Icelandic Fisheries cases*, *supra*, fn. 129, Jurisdiction of the Court, ICJ Reports [1973], pp. 3, 22 (para. 50) and p. 29 [para. 67]); *cf.* also *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 22 (para. 19) and 38–9 (para. 63); *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 45–6 (para. 41–42); *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 111 (para. 212); *Land, Island and Maritime Frontier Dispute*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 558 (para. 383).

⁶³⁸ The Court referred to the Montego Bay Convention well before it entered into force: *cf.* *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 47 (para. 45), p. 49 (para. 49), p. 65 (para. 82), pp. 66–67 (para. 87), p. 74 (para. 101), p. 89 (para. 128) (where the Court referred, although with some measure of caution, to the Draft of the Third United Nations Conference on the Law of the Sea, which was not yet finalized). *Cf.* also *Continental Shelf case* (Libya/Malta), *supra*, fn. 92, Application for Permission to Intervene, ICJ Reports (1984), pp. 3, 11 (para. 16), pp. 29–30 (para. 26), pp. 33–4 (para. 33–34); *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 111–2 (paras. 212 and 214); *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 588–9 (paras. 383–384); *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 59 (paras. 47–48), p. 62 (para. 55), pp. 64–66 (paras. 59–62), pp. 73–74 (para. 80). After the entry into force of the 1982 Convention, the Court kept referring to it even if the Convention did not bind both parties: *cf.* *Maritime Delimitation and Territorial Questions*, *supra*, fn. 207, ICJ Reports (2001), pp. 40, 91 (para. 167).

⁶³⁹ Such a pedagogical effort is, however, present in the *Jurisdictional Immunities case*, *supra*, fn. 115: ‘Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been “adopted as a general rule of customary international law solidly rooted in the current practice of States”’ (*ILC Yearbook*, 1980, vol. II [2], p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.’ (*supra*, fn. 115, para. 56).

⁶⁴⁰ *Cf. e.g.* ‘Introduction—The Achievement of the International Law Commission’, in *International Law on the Eve of the Twenty-first Century—Views from the International Law Commission* (ILC, ed., 1997), pp. 1–18; *cf.* also Boyle/Chinkin, *supra*, fn. 251, pp. 200–4; Pellet, A., ‘Shaping the Future in International Law: The Role of the World Court in Law-Making’, in Arsanjani/*et al.*, *supra*, fn. 464, pp. 1074–8; Schwebel, S., ‘The Inter-active Influence of the International Court of Justice and the International Law Commission’, in *Justice in International Law. Further Selected Writings* (2011), pp. 66–94; Sinclair, Sir I., ‘International Law: the Court, Commission and Judges’, in *The United Kingdom—the United Nations* (Jensen, E./Fisher, T., eds., 1990), pp. 120–46.

the equidistance rule was not envisaged by it as a customary rule,⁶⁴¹ or by invoking the ILC draft, even before it had turned into a convention.⁶⁴² The most striking example⁶⁴³ of this latter approach is the 1997 judgment in the *Gabčíkovo-Nagymaros case*, where the Court quoted not less than seven times from the Articles on State Responsibility adopted *after first reading* by the Commission.⁶⁴⁴

However, as has been rightly noted, ‘the work of the ILC, where members participate in a personal capacity, cannot be equated with State practice, or evidence an *opinio juris*’.⁶⁴⁵ It is but an important ‘subsidiary means for the determination of rules of law’.⁶⁴⁶ As the present writer has written elsewhere, ‘l’utilisation (sélective) de l’argument d’autorité constitué par le recours aux travaux de la C.D.I. tient moins à une sorte de ‘révérence’ (qui n’aurait pas lieu d’être ...) de la Cour pour sa ‘petite sœur’, elle aussi, à sa manière, ‘organe du droit international’, qu’est la Commission, qu’à la commodité de s’abriter derrière les travaux de celle-ci pour établir l’existence d’une règle juridique lorsque ceci lui paraît opportun. Il s’agit d’un élément de la ‘politique judiciaire’ de la Cour, qui s’efforce de ne pas apparaître comme un législateur international alors qu’elle l’est éminemment, efficacement et, souvent, très heureusement’.⁶⁴⁷

231 It is suggested that the same holds true in part with regard to resolutions of international organizations or codification conventions: these instruments may give ‘paper

⁶⁴¹ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 33 (para. 49): ‘there is no indication at all that any of its members supposed that it was incumbent on the Commission to adopt a rule of equidistance ... because such a rule must ... be mandatory as a matter of customary international law’. Cf. further *supra*, MN 229. For other examples cf. *Continental Shelf (Tunisia/Libya)*, *supra*, fn. 92, ICJ Reports (1982), pp. 74 (para. 101) and p. 79 (para. 109).

⁶⁴² On the Court’s references to the ILC Articles on State Responsibility, cf. Pellet, A., ‘Remarques sur la jurisprudence récente de la Cour Internationale de Justice dans le domaine de la responsabilité internationale’ in *Perspectives of international law in the 21st century: Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday* (2012), pp. 32–45, available also in English, ‘Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues’, in *International Law—A Quiet Strength. Miscellanea in memoriam Geza Herczegh* (Kovács, P., ed., 2011), pp. 111–33 and Villalpando, S., ‘Le codificateur et le juge face à la responsabilité internationale de l’Etat: interaction entre la CDI et la CIJ dans la détermination des règles secondaires’, *AFDI* (2009), pp. 39–61.

⁶⁴³ In addition to the *Gabčíkovo-Nagymaros case* cf. also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1999), pp. 62, 87 (para. 62); *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 136, 195 (para. 140), *Armed Activities case (DRC/Uganda)*, *supra*, fn. 132, ICJ Reports (2005), pp. 168, 226, (para. 160), and p. 266 (para. 293), *(Bosnian) Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 116 (para. 173), p. 202 (para. 385), p. 207 (para. 398), p. 209 (para. 401). In other cases, the Court has referred to other ILC draft Articles and commentaries: Cf. e.g. *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 33–35 (paras. 48–54); *Agreement between the WHO and Egypt*, *supra*, fn. 357, ICJ Reports (1980), pp. 73, 94–95 (para. 47) (ILC draft Articles on treaties between States and international organizations or between international organizations); *Kasikili/Sedudu Island*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1075–6 (para. 49) (Commentary to draft Art. 27 [now Art. 30 VCLT] of the ILC’s work on the law of treaties); *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (2001), pp. 40, 76–7 (para. 113) (ILC’s work on arbitral procedure); *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 430 (para. 265) (Commentary to draft Art. 6 (now Art. 7 VCLT) of the ILC’s work on the law of treaties); *Jurisdictional Immunities case*, *supra*, fn. 115, paras. 56 and 69 referring to the ILC Commentaries on the draft Articles of the United Nations Convention on the Jurisdictional Immunities of States and their Property.

⁶⁴⁴ *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 38–42 (paras. 47, 50–54), p. 46 (para. 58).

⁶⁴⁵ Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 59–60.

⁶⁴⁶ Cf. *infra*, MN 339.

⁶⁴⁷ Pellet (2007), *supra*, fn. 250, p. 42 (footnote omitted). On the law-making role of the Court, cf. *supra*, MN 322–333.

substance' to customary rules but, in assessing their legal value, the important element is not what *they* say, but what *the States* have had to say about them.⁶⁴⁸

opinio juris may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions ... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules).⁶⁴⁹

In its 1986 judgment in *Nicaragua*, the Court, without expressly taking position as to the merit of this proposition, added: 232

A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Art. 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law,

that is a 'principle of *jus cogens*', a position also taken by the ILC and by the contesting States themselves.⁶⁵⁰

This throws light on the interesting fact that, when establishing that a legal norm is of a peremptory character, the Court's approach is the same as when it investigates the existence of an *opinio juris* in relation to an 'ordinary rule' of customary law: what matters is whether there exists such an 'intensified *opinio*' according to which an obligation—or a right—is 'erga omnes', 'peremptory' (or *cogens*), 'essential' 'inderogable' or 'intransgressible'.⁶⁵¹ 233

⁶⁴⁸ It being accepted that silence, too, can be revealing of an *opinio juris*: cf. *Chorzów Factory*, *supra*, fn. 307, PCIJ, Series A, No. 17, pp. 27–8; *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 18; *Effect of Awards case*, *supra*, fn. 136, ICJ Reports (1954), pp. 47, 53; *Complaints Made against the UNESCO*, ICJ Reports (1956), pp. 77, 85–86; *Jurisdictional Immunities case*, *supra*, fn. 115, para.69.

⁶⁴⁹ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 99–100 (para. 188) (emphasis added). For the implementation of this guideline *ibid.*, pp. 100–1 (para. 189–190). For another example concerning the way States parties to a treaty have implemented it cf. the references to the *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3 *et seq.* and *supra*, MN 229. Cf. also *Territorial Jurisdiction of the International Commission of the River Oder*, *supra*, fn. 233, PCIJ, Series A, No. 23, p. 27: 'It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815, and applied or developed by subsequent conventions, is undoubtedly based' (emphasis added).

⁶⁵⁰ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 100–1 (para. 190). It is simply erroneous to allege that, in *Nicaragua*, the Court 'asserted that the international prohibition on the use of force was "a conspicuous example in a rule of international law having the character of *jus cogens*."' (Murphy, *supra*, fn. 180, p. 24; cf. also the rather unreliable remarks by D'Amato, A., 'It's a Bird, It's a Plane, It's Jus Cogens!', *Conn. JIL* 6 [1990], pp. 2–3); in the passage quoted, the Court was only quoting the ILC and took no position on the matter (*Nicaragua case*, *supra*, fn. 115, ICJ Reports [1986], pp. 14, 100 [para. 190]).

⁶⁵¹ The Court has shown extreme parsimony in resorting to these qualifications. However, it has used 'erga omnes' on at least nine occasions: *Barcelona Traction*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 32 (para. 33); *East Timor case*, *supra*, fn. 237, ICJ Reports (1995), pp. 90, 102 (para. 29); (*Bosnian Genocide case*, *supra*, fn. 93, Preliminary Objections, ICJ Reports (1996), pp. 595, 616 (para. 31); *Armed Activities case (New Application) (DRC/Rwanda)*, Provisional Measures, ICJ Reports (2002), pp. 219, 245 (para. 71) and Judgment, ICJ Reports (2006), pp. 6, 31 (para. 64); and *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 136, 199 (para. 155–157); (*Bosnian Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 104 (para. 1)). It has also described as 'intransgressible' the basic rules of international humanitarian law applicable to armed conflicts (*Nuclear Weapons case*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 257 (para. 79); *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 136, 199 (para. 157); *Jurisdictional Immunities case*, *supra*, fn. 115, para. 52. And, in *East Timor*, e.g., it has defined the principle of self-determination as 'one of the essential principles of contemporary international law', *supra*, fn. 237, ICJ Reports (1995), p. 102 (para. 29). While sometimes mentioning the position of the parties that a particular norm was peremptory (Cf.

- 234 Without it being necessary to discuss whether these expressions are interchangeable,⁶⁵² it is suggested that the particular or superior nature of the norms involved can only result from the general belief that these norms are of such a nature, a belief or a ‘feeling’⁶⁵³ which can only be determined by the Court according to the same method (or absence of method) used for the determination of ‘simple’ or ‘ordinary’ *opinio*. It must also be noted that, in the cases in which the Court has recognized such a superior norm, it has restricted itself to purely and simply stating that the rule in question had such character,⁶⁵⁴ including when it expressly referred to a peremptory norm. In this respect, it must be noted that, while, for a long time, the Court simply mentioned the position of the parties that a particular norm was peremptory,⁶⁵⁵ since 2006 the Court has endorsed this terminology as its own.⁶⁵⁶

bb) A Complex Alchemy

- 235 As noted previously, it is far from exceptional for the Court simply to contend that a customary rule does exist without taking pains to investigate the practice or the *opinio juris*, or both⁶⁵⁷—and, in many cases, this is probably acceptable:

e.g. Nicaragua case, supra, fn. 115, ICJ Reports [1986], pp. 14, 100–1 [para. 190], *Nuclear Weapons case, supra*, fn. 107, ICJ Reports [1996], pp. 226, 258 [para. 83] [‘*jus cogens*’]) and using once the word ‘imperative’ to describe the obligations flowing from diplomatic and consular relations (*Tehran Hostages case, supra*, fn. 132, Provisional Measures, ICJ Reports [1979], pp. 3, 20 [para. 41]), the Court never adopted this terminology as its own until 1986. The—quite unfortunate—reason for this reluctance was that ‘des sensibilités différentes se manifestent au sein de la Cour à l’endroit de cette catégorie normative’ (Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 390; *cf.* also Pellet, A., ‘Conclusions’ in *Les règles fondamentales de l’ordre juridique international. jus cogens et obligations erga omnes* (Tomuschat, C./Thouvenin, J.M., eds., 2006), p. 417).

⁶⁵² As very aptly shown by C. Tams (*Enforcing Obligations Erga Omnes in International Law* (2010), in particular pp. 139–52), ‘it seems beyond doubt that there is, at the very least, considerable overlap between obligations *erga omnes*, and norms of *jus cogens*’ (p. 140). The present writer shares the view that the question is ‘bedevilled ...by an unfortunate looseness of terminology’ (Thirlway, ‘Law and Practice, Part One and Two’, *BYIL* 76 [2005], p. 53), for which the Court bears responsibility (*cf.* also Bianchi, A., ‘*Human Rights and the Magic of Jus Cogens*’, *EJIL* 19 [2008], p. 502). The answer is clearly in the negative, as the expression ‘*erga omnes* obligations’, in spite of the ambiguous precedents (*cf. supra*, fn. 651), only denotes that the obligation in question is owed to the international community as a whole, without taking into consideration ‘the importance of the rights involved’, ICJ Reports (1970), pp. 3, 32 (para. 33). The four other expressions do not involve any clear difference (*cf.*, for instance, Picone, P., ‘The Distinction between *Jus Cogens* and Obligations *Erga Omnes*’, in Cannizzaro, *supra*, fn. 250, pp. 411–24).

⁶⁵³ *Cf. supra*, MN 224.

⁶⁵⁴ *Cf.* the cases cited *supra*, fn. 651. *Cf. e.g.* Tams, *supra*, fn. 652, pp. 117–57; Kadelbach, S., ‘*Jus Cogens, Obligations Erga Omnes* and Other Rules—The Identification of Fundamental Norms’, in Tomuschat/Thouvenin, *supra*, fn. 651; Tavernier, P., ‘L’identification des règles fondamentales, un problème résolu?’, *ibid.*, pp. 1–20; Orakhelashvili, A., *Peremptory Norms in International Law*, (2006), pp. 36–66 and Zemanek, K., ‘The Metamorphosis of *Jus Cogens*: from an Institution of Treaty Law to the Bedrock of the International Legal Order’, in Cannizzaro, *supra*, fn. 250, p. 389.

⁶⁵⁵ *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 14, 100 (para. 190) and *East Timor, supra*, fn. 237, ICJ Reports (1995), pp. 90, 102, (para. 29), *Arrest Warrant case, supra*, fn. 325, ICJ Reports (2002), pp. 3, 23 (para. 56).

⁶⁵⁶ *Armed Activities (New Application) (DRC/Rwanda), supra*, fn. 231, ICJ Reports (2006), pp. 6, 31–2 (para. 64); *Bosnian Genocide case, supra*, fn. 93, ICJ Reports (2007), pp. 43, 104 (para. 147), p. 111 (para. 161); *Kosovo Declaration of Independence, supra*, fn. 244, para. 81; *Jurisdictional Immunities case, supra*, fn. 115, paras. 84, 89 and 92–97. In that last judgment, the Court endorsed the definition of a *jus cogens* norm as it derives from Art. 53 VCLT: ‘a rule accepted by the international community of States as a whole as one from which no derogation is permitted’ (*Jurisdictional Immunities case, supra*, fn. 115, para. 94—however, in French the formulation is slightly different: ‘une règle ...dont la communauté internationale des Etats dans son ensemble s’accorderait à estimer qu’elle ne peut souffrir aucune dérogation’ [emphasis added]).

⁶⁵⁷ *Cf. supra*, fns. 582, 609 and 623 for references.

It is perhaps unsurprising that, where a norm, such as the freedom of the high sea, is generally accepted, the Court tends simply to assert that it is a (well-established) rule (or principle) of customary law (or sometimes, just ‘of international law’) without more ado: there is no need to ‘reinvent the wheel’.⁶⁵⁸

Yet it must be admitted at the same time that in some cases those assertions were made in regard to ‘rules’ which are far from self-evident.⁶⁵⁹ In such cases, it is certainly to be regretted that the Court’s practice seems somewhat erratic or ‘rather delphic’.⁶⁶⁰

Even accepting that law in general, and international law in particular, is more an ‘art’ (*ars juris*) than a hard science, and that it calls more for an *esprit de finesse* than for an *esprit de géométrie*,⁶⁶¹ and that discovering a customary rule clearly is a typical matter where sensitivity and wise intuition unavoidably play a part, there can be no doubt that the appreciation of the two elements of custom described in Art. 38, para. 1 (b) lies within the province of law and that ‘it is a task for persons trained in law’.⁶⁶² This being so, it is indeed not certain that the Court’s approach for finding customary rules evidencing general practice accepted as law has always been as rigorous as it could have been, even within the large margin of appreciation implied by such a definition.⁶⁶³

Quite often, both elements coincide; even in the cases where it has proclaimed the validity of the theoretical distinction between practice and *opinio juris*, the Court mixes them up; thus in the *Right of Passage case*, the Court squarely declared with regard to the passage of private persons, civil officials and goods:

This practice having continued over a period extending beyond a century and a quarter ... the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.⁶⁶⁴

⁶⁵⁸ Mendelson (1996), pp. 63, 67. For examples of such mere assertions Cf. e.g. *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 25 (‘principle of the freedom of the seas’); *Treatment of Polish Nationals case*, *supra*, fn. 301, PCIJ, Series A/B, No. 44, p. 25 (‘general principle of the international responsibility of States’); *Mavrommatis case*, *supra*, fn. 239, PCIJ, Series A, No. 2, p. 12; *Reparation for the Injuries case*, *supra*, fn. 206, ICJ Reports (1949), pp. 174, 186; *Barcelona Traction*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 38 (paras. 53–54) (the latter three examples concerning diplomatic protection); *Mavrommatis case*, *supra*, fn. 239, PCIJ, Series A, No. 5, p. 48 (‘fundamental principles of the maintenance of contracts and agreements duly entered into’); *Treaty of Lausanne case*, *supra*, fn. 259, PCIJ, Series B, No. 12, p. 32 (‘The well-known rule that no one can be judge in his own suit’); *Polish Postal Service in Danzig*, PCIJ, Series B, No. 11, p. 39 (‘a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context’); *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 22 (‘certain general and well-recognized principles namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication, and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’); *Interhandel case*, *supra*, fn. 233, ICJ Reports (1959), pp. 6, 27 (‘The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law’); cf. also *Ahmadou Sadio Diallo case*, *supra*, fn. 328, para. 42.

⁶⁵⁹ Cf. e.g. *Western Sahara case*, *supra*, fn. 104, ICJ Reports (1975), pp. 12, 39 (para. 79) (legal definition of *terra nullius* at the end of the 19th century); *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 110–11 (para. 211) (‘States do not have a right of “collective” armed response to acts which do not constitute an “armed attack”’); or *Frontier Dispute (Burkina Faso/Mali)*, *supra*, fn. 115, ICJ Reports (1986), pp. 554, 565–6 (para. 22) (*uti possidetis* as ‘a rule of general scope’).

⁶⁶⁰ Mendelson (1996), pp. 63, 67.

⁶⁶¹ Pascal, B., *Pensées* (1954), p. 1091.

⁶⁶² Hudson, *PCIJ*, p. 609.

⁶⁶³ For a general analysis, with which the present writer largely concurs, see Dupuy, P.-M., ‘Le juge et la règle générale’, *RGDIP* 93 (1989), pp. 569–98.

⁶⁶⁴ *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 40. Cf. also *Icelandic Fisheries case*, *supra*, fn. 129, ICJ Reports (1974), pp. 3, 26 (para. 58) and pp. 175, 195 (para. 50).

Clearly, in a case such as this, practice invades the whole picture and takes the place of *opinio juris*: since it has lasted for a long period of time the practice in question must be accepted as law.⁶⁶⁵

- 238 Conversely, as shown previously,⁶⁶⁶ the Court has shown a strong inclination towards using the same instruments, mainly General Assembly resolutions and, to a lesser extent, the conventions of codification, as a ‘judicial joker’⁶⁶⁷ capable of evidencing at one and the same time both elements of the customary process.⁶⁶⁸ It must be stressed again that, except when the internal law of an international organization is concerned,⁶⁶⁹ resolutions—and, more conveniently, the attitudes of States towards them—can provide evidence of an *opinio juris*, not a practice.⁶⁷⁰
- 239 This, again, is not to say that *opinio juris*, while a ‘feeling’ of the States,⁶⁷¹ is a pure matter of ‘feeling’ for the interpreters, including the judges: it can, at least intellectually—and concretely as well in certain cases—be deduced from the attitude of States as it transpires from another kind of practice. Here again, resolutions of international organizations are a good example.⁶⁷²
- 240 All this having been said, globally, in practice, the Court’s approach has worked well and the alchemy has been satisfactory: the chrysalis is transformed into butterfly⁶⁷³ through a process which remains partly mysterious but leads to a globally acceptable result. It must certainly be accepted that the ‘theory’ of the two elements of custom is a doctrinal reconstruction, to which the Court has sometimes paid lip service,⁶⁷⁴ but which had not really been envisaged by the founding fathers,⁶⁷⁵ and to which, as brilliantly demonstrated by Haggemacher, it has not always stuck in practice.⁶⁷⁶ Instead, it has drawn out the ‘proper rule’ or ‘principle’ in relation to a given case from the ‘impression’ the judges hold based on their scrutiny of ‘the practice’ very widely envisaged. In so doing, the Court, probably unconsciously, takes up the initial intentions of the drafters of its Statute.

⁶⁶⁵ This is all the more remarkable as, in principle, consent of the parties is necessary with regard to ‘local customs’—*cf. infra*, paras. 246–247.

⁶⁶⁶ *Supra*, MN 228–230.

⁶⁶⁷ *Cf. supra*, fn. 408.

⁶⁶⁸ It has been alleged in this respect that ‘Over the last thirty years [this Article having been written in 1996], the ICJ has significantly changed the way it applies Art. 38’: in the first period, as attested by the 1969 *North Sea Continental Shelf cases*, *supra*, fn. 115, it ‘focused heavily on evidence of actual state practice in the real world’; more recently, as shown by the 1986 judgment in *Nicaragua*, ‘it relied heavily on resolutions of the United Nations, other intergovernmental organizations and treaties’ (Charney, *supra*, fn. 613, pp. 171, 174). It is suggested that there is no such clear-cut *caesura*, nor even such a clear trend. At worst, *Nicaragua* could be held as a special case, which can be explained in part by the wish of the majority of judges to neutralize the effects of the ‘Vandenberg reservation’ (*cf. infra*, MN 280) excluding the application of the Charter (*cf. supra*, fn. 115, ICJ Reports [1986], pp. 14, 38 [para. 56]). It is interesting to note that, *e.g.*, in its 2003 judgment in the *Oil Platforms case*, the Court has not mentioned *any* General Assembly resolution although there too it had to deal with issues related to the use of force by States in international relations. It might be added that the changing composition of the Court can also partly explain the changing sensitivity of the Court regarding the relative weight of the various factors to be taken into consideration when appreciating the existence of a customary rule.

⁶⁶⁹ *Cf. supra*, MN 219.

⁶⁷⁰ *Cf. supra*, MN 228.

⁶⁷¹ *Cf. supra*, MN 223 *et seq.*

⁶⁷² *Cf. supra*, MN 228.

⁶⁷³ *Cf. Barboza, supra*, fn. 564.

⁶⁷⁴ *Cf. supra*, MN 215.

⁶⁷⁵ *Cf. supra*, MN 212.

⁶⁷⁶ Haggemacher, *supra*, fn. 566, *RGDIP* 90 (1986), pp. 5–126; *cf. also* Dupuy (1989), *supra*, fn. 663, pp. 569–98, pp. 585–6 or Alvarez-Jiménez, A., *supra*, fn. 566, pp. 686–90.

These observations also draw attention to an important aspect: the significance of the circumstances of the case. The Court is a judicial body, not a teacher or scholar. When it seeks a customary rule, it does so in relation to a particular case and, as wisely noted by Charles de Visser:

Nothing lends itself less easily to synthesis or even to the mere definition of clearcut criteria than the conditions that justify recognizing in a given practice the character and authority of custom. An impatient logic tends to regard as incoherent or even contradictory judicial decisions that are explained by the special features of each case. It loses sight of the relative rarity of the instances of international practice submitted to judicial examination and the frequently imprecise, equivocal or excessively individualized nature of the usage invoked. A more exact view presumes serious knowledge of the record, finds in some of the judgments rendered in these days merely the necessarily sparse tothing-stone of a building that will be long in construction.⁶⁷⁷

Moreover, it must be kept in mind that, almost as a matter of definition, customary rules are rarely if ever precise. As the Chamber of the Court observed in *Gulf of Maine*:

A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community.⁶⁷⁸

It therefore is a matter for the Court to apply this 'limited set of norms' to the concrete dispute it has to settle. In doing so, again, it enjoys a large margin of appreciation and plays a significant legitimizing role.⁶⁷⁹ Up to now this has been exercised with discernment and a relative measure of caution.

b) Whether General or Particular?

Clearly, the jurists of 1920 had not contemplated the possibility of custom of a limited geographical scope. The contrast between the respective drafting of Art. 38, para. 1 (a) and (b) is telling: while the treaties are expressly defined as 'whether general or particular', custom is only envisaged 'as evidence of a *general* practice'. By no means has this prevented the Court from accepting the possibility of custom of a limited geographical scope.⁶⁸⁰

Even though it is often suggested that the Permanent Court resorted to the notion of regional custom,⁶⁸¹ this is highly debatable and, in any case, the Court never used expressions such as 'particular' or 'regional' or 'local custom' before 1945.⁶⁸² However,

⁶⁷⁷ *Theory and Reality in Public International Law* (1968), p. 398, as quoted in Kearney, pp. 610, 705.

⁶⁷⁸ *Gulf of Maine*, *supra*, fn. 92, ICJ Reports (1984), pp. 299 (para. 111). In the following passage, the Chamber seems to make a difference between general principles of international law and customary rules ('together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas'); the present writer is not persuaded that such a distinction can be made: customary rules are, usually, vague and general enough to qualify as 'principles'.

⁶⁷⁹ *Cf. infra*, MN 327.

⁶⁸⁰ On particular custom *cf.* (in addition to the general literature on international custom, *supra*, fn. 566) e.g. Cohen-Jonathan, G., 'La coutume locale', *AFDI* 7 (1961), pp. 119–40; d'Amato, A., 'The Concept of Special Custom in International Law', *AJIL* 63 (1969), pp. 211–23; Heinrich, W., 'Recherches sur la problématique du droit coutumier', *Recueil d'études sur les sources du droit en l'honneur de F. Geny* (1935), vol. II, pp. 277 *et seq.*

⁶⁸¹ *Cf. e.g.* Sørensen (1946), pp. 103–4; *contra*: Haggemacher, *supra*, fn. 566, pp. 5–126, pp. 36–43.

⁶⁸² In its advisory opinion of 18 December 1927 on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, the PCIJ considered that it was 'not necessary to examine whether, in international law, the continued exercise of certain powers might not have converted into a legal right even a situation considered by Roumania as a mere toleration' since this practice had been converted into a legal treaty right by the Convention of 23 July 1921 (PCIJ, Series B, No. 14, p. 36). In another advisory opinion, the Court took into consideration 'a practice, which seems now to be well understood by both Parties,

there is no doubt that the actual Court had little difficulty in accepting such customary rules. In the *Asylum case*, it considered Colombia's allegations, which had 'relied on an alleged regional or local custom peculiar to Latin American States'. Although, in this case, the Court did not find the existence of such a custom to have been proved, it said:

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent of the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.⁶⁸³

Ten years later in the *Right of Passage case*, the Court specified:

It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.⁶⁸⁴

245 In this last case, the usage at the origin of the 'mutual rights and obligations between the two States' appears as an 'historical right', which can be analysed as a specific form of local custom. As the Court observed in 1982: 'Historic titles must enjoy respect and be preserved as they have always been by long usage'.⁶⁸⁵ While usually used in matters of historical rights at sea,⁶⁸⁶ there is no particular reason why the notion could not be transposed in regard to land territory.⁶⁸⁷

246 It would therefore seem that these rules of 'particular custom' differ from general customary rules in at least two important respects:

[and which] has gradually emerged from the decisions of the High Commissioner and from the subsequent understandings and agreements arrived at between the Parties under the auspices of the League' (*Free City of Danzig case*, *supra*, fn. 602, PCIJ, Series B, No. 18, pp. 35–6). In both cases, the practice in question looks like what Art. 31, para. 2 (b) VCLT calls 'a subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'; such a practice may be seen as a 'kind' of custom but is not autonomous vis-à-vis the treaty.

⁶⁸³ *Asylum case*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 276–7. Cf. also *Rights of US Nationals in Morocco case*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 200. The possibility of a regional custom also results *a contrario* from the 1986 judgment in the *Frontier Dispute case* (Burkina Faso/Mali) where the Chamber considered that the principle of *uti possidetis* 'is not a special rule which pertains solely to one specific system of international law' (*supra*, fn. 115, ICJ Reports [1986], pp. 554, 565 [para. 20])—however, in *Land, Island and Maritime Frontier Dispute case*, another Chamber of the Court clearly dealt with that same principle as an American rule (*supra*, fn. 115, ICJ Reports [1992], pp. 351, 386 [paras. 40–41]).

⁶⁸⁴ *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 40. In this case, the Court accepted the existence of such a right 'with regard to private persons, civil officials and goods'; cf. *supra*, MN 237.

⁶⁸⁵ *Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 73 (para. 100).

⁶⁸⁶ Cf. *Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 138–9; *Icelandic Fisheries cases*, *supra*, fn. 129, ICJ Reports (1974), pp. 3, 28–9 (paras. 63–68); *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 586–90 (paras. 381–387); *Territorial and Maritime Dispute case* (Nicaragua/Honduras), *supra*, fn. 147, ICJ Reports (2007), pp. 659, 728 (para. 232).

⁶⁸⁷ Without it being necessary to enter into the nice legal debate as to whether 'international servitude' is at all a legal notion in international law, it can certainly not be excluded that a territorial situation may result from a usage 'accepted as law' in one way or another: Cf. e.g. *Sovereignty over Certain Frontier Land*, *supra*, fn. 422, ICJ Reports (1959), pp. 209, 229 (*a contrario*). In some respects, the role of the *effectivités* in post-colonial territorial disputes—at least in the absence of title and between States succeeding to different colonial powers—also relates to this general idea (Cf. e.g. *Pulau Ligitan*, *supra*, fn. 501, ICJ Reports (2002), pp. 625, 685 [para. 148]: 'at the time when these activities [of Great Britain] were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed a disagreement or protest').

PELLET

- First, ‘Being in the nature of an exception, [their] existence will be a matter of strict proof⁶⁸⁸: while the Court ‘is deemed itself to know what [international] law is’,⁶⁸⁹ it is incumbent upon ‘the Party which relies on a custom of this kind’ to prove it.⁶⁹⁰
- Second, unlike in the case of general custom,⁶⁹¹ the *opinio juris* attached to them is of a consensualist kind.

This last point must, however, be qualified. As for regional custom, on the contrary, 247 the most pertinent case seems to show that a general ‘feeling’ of the States in question is enough.⁶⁹² Concerning bilateral custom, it is usually maintained that it must be accepted by the two States concerned. This is probably true,⁶⁹³ but it does not mean that this acceptance must be express: in the *Right of Passage case*, the Court unambiguously inferred the acceptance of the parties from the long continued practice it had described.⁶⁹⁴ However, in the case concerning the *Dispute Regarding Navigational and Related Rights*, the Court adopted a much more flexible view and presumed the existence of a customary right for the Costa Rican riparians of the San Juan river to fish in it for their subsistence, from a mere practice not denied by Nicaragua.⁶⁹⁵

Another related issue must be discussed: what, if any, is the role of the international 248 community as a whole in respect to particular custom? Clearly, these customary rules appear as *leges speciales* departing from the general rule.⁶⁹⁶ This, in itself, is not a problem: customary law, except when *cogens*, is derogable; however, as an exception, the particular customary rule will have to be strictly interpreted. Moreover, the Court has sometimes deemed it useful to point out that the other States had not objected to the special customary rule;⁶⁹⁷ but this, in a way, is superfluous: it can only confirm that, if their rights could be at stake, those States recognize the local rule as opposable to them.⁶⁹⁸

In his dissenting opinion appended to the 1950 judgment in the *Asylum case*, Judge 249 Alvarez alleged: ‘if American precepts are not recognized by the countries of other continents, they must be applied only in the New World’; but he added: ‘American law is binding upon all the States of the New World: it is also binding upon States of other continents in matters affecting America.’⁶⁹⁹ This last assertion is debatable: it is more

⁶⁸⁸ Jennings/Watts, *supra*, fn. 164, p. 30.

⁶⁸⁹ *Brazilian Loans case*, *supra*, fn. 114, PCIJ, Series A, No. 21, p. 124. *Cf.* further *supra*, MN 67.

⁶⁹⁰ *Cf. Asylum case*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 276; and already *supra*, MN 244. *Cf.* also *Rights of US Nationals in Morocco*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 200. This is logical: the Court is the ‘World Court’, as such it knows general international law; but it is not deemed to know municipal law, even when it has to take it into account (*cf. supra*, MN 117–139), and the same holds true for particular international law: it is dubious that the Court would—or could—apply a treaty not invoked by the parties.

⁶⁹¹ *Supra*, MN 225.

⁶⁹² *Asylum case*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 276–7. Moreover, this case provides a good illustration of the persistent objector doctrine (on which *cf. supra*, fn. 613).

⁶⁹³ *Cf. Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 138; or *Rights of US Nationals in Morocco*, *supra*, fn. 141, ICJ Reports (1952), pp. 176, 200.

⁶⁹⁴ *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 40; and *cf.* already *supra*, MN 237.

⁶⁹⁵ *Navigational and Related Rights*, *supra*, fn. 464, ICJ Reports (2009), pp. 213, 265, 266 (paras. 140–141).

⁶⁹⁶ *Cf.* the interesting analysis of the relationship between general custom and special custom in relation to the *Right of Passage case* by Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 104–5.

⁶⁹⁷ *Cf. Fisheries case*, *supra*, fn. 234, ICJ Reports (1951), pp. 116, 138: ‘The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact.’

⁶⁹⁸ Exactly as when a third State recognizes a rule included in a treaty to which it is not a party: *cf. supra*, MN 183–184.

⁶⁹⁹ *Asylum case*, *supra*, fn. 575, ICJ Reports (1950), pp. 266, 293–4.

likely that a particular customary rule cannot affect the enjoyment, by the other States, of their rights under general customary law.⁷⁰⁰ This seems to have been the Chamber's conclusion in *Land, Island and Maritime Frontier Dispute*: after finding that the Gulf of Fonseca was an historic bay with a very special regime, it added that 'rights of passage must be available to vessels of third States seeking access to any one of the three coastal States'.⁷⁰¹

3. General Principles of Law

- 250 Article 38, para. 1 (c)⁷⁰² is a response to the need for completeness of the law. International law is—or is seen as being—fuzzier and more uncertain than municipal law.⁷⁰³ There can be no doubt that this was the intention of the Committee of Jurists of 1920: while certainly not agreeing on the meaning of the expression 'general principles of law recognized by civilized nations',⁷⁰⁴ they were all in agreement that (i) the first purpose of para. 3 was to avoid a *non liquet*;⁷⁰⁵ (ii) without giving to the Court the possibility to legislate.⁷⁰⁶ Moreover, they were more concerned with finding an acceptable formula for States than with doctrinal theoretical views.⁷⁰⁷
- 251 In his initial proposal, Baron Descamps had suggested that the judge should apply: 'the rules of international law as recognized by the legal conscience of civilised nations'.⁷⁰⁸ To some members of the Committee, this dangerously seemed to open the

⁷⁰⁰ Compare with Art. 41 VCLT ('Agreements to modify multilateral treaties between certain of the parties only').

⁷⁰¹ *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 605 (para. 412).

⁷⁰² On general principles of law, *cf.* from an abundant literature: Akehurst, M., 'Equity and General Principles of Law', *ICLQ* 25 (1976), pp. 801–25; Battaglini, B., 'Il riconoscimento internazionale dei principi generali del diritto', in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, vol. I (1987), p. 97–140; Cassese, A., 'The Contribution of the International Criminal Tribunal for the former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in *International law in the post-Cold War world: essays in memory of Li Haopei* (2001), pp. 43–55; Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (1953); Dupuy, P.-M., 'Formation of Customary International Law and General Principles', in *The Oxford Handbook of International Environmental Law*, (Bodansky, D./et al., eds., 2007), pp. 449–66; Elias, O./Lim, C., "'General Principles of Law", "Soft Law" and the Identification of International Law', *NYIL* 28 (1997), pp. 3–49; Lauterpacht (1927), *supra*, fn. 339; Herczegh, G., *General Principles of Law and the International Legal Order* (1969); McNair, A.D., 'The General Principles of Law Recognised by Civilised Nations', *BYIL* 33 (1957), pp. 1–19; Pellet, A., *Recherches sur les principes généraux de droit en droit international* (1974); Ripert, G., 'Les règles du droit civil applicables aux rapports internationaux', *Rec. des Cours* 44 (1933-II), pp. 569–663; Verdross, A., 'Les principes généraux de droit dans le système des sources du droit international public', in *Recueil d'études de droit international en hommage à P. Guggenheim* (IUHEL, ed., 1968), pp. 521–30; Vitanyi, B., 'La signification de la généralité des principes de droit', *RGDIP* 80 (1976), pp. 536–45.

⁷⁰³ *Cf. supra*, MN 87.

⁷⁰⁴ Bin Cheng identifies no fewer than five different positions among the ten Jurists ([1953], *supra*, fn. 702, pp. 10–14).

⁷⁰⁵ *Cf.* Procès-Verbaux, *supra*, fn. 16, pp. 318 and 338 (Descamps), p. 311 (Loder), pp. 312–13 (La Pradelle), pp. 307 and 317 (Hagerup).

⁷⁰⁶ *Ibid.*, p. 296 (La Pradelle), p. 309 (Root), p. 314 (Ricci-Busatti), p. 316 (Phillimore) and p. 319 (Hagerup).

⁷⁰⁷ Nevertheless scholars have subsequently invoked the *travaux* in support of their respective very different views. For a detailed panorama of the doctrinal views on general principles *cf.* Vitanyi, B., 'Les positions doctrinales concernant le sens de la notion de "principes généraux de droit reconnus par les nations civilisées"', *RGDIP* 86 (1982), pp. 48–116.

⁷⁰⁸ Procès-Verbaux, *supra*, fn. 16, p. 306; and *cf.* already *supra*, MN 21.

door to subjectivity.⁷⁰⁹ In response, Descamps specified that he had in mind ‘the fundamental law of justice and injustice’, thus indicating to the judges ‘the lines which [they] must follow; and compel them to conform to the dictates of the legal conscience of civilised nations’.⁷¹⁰ In view of these explanations, Root and Lord Phillimore, the US and the British members of the Committee, suggested the wording which now appears in Art. 38.⁷¹¹

In spite of the hesitations of some members, it seems that the jurists of 1920 were not of the opinion that they were innovative in making this proposal.⁷¹² Indeed they were not. It is no exaggeration to say that the general principles, ambiguous though they are, were a major source of inspiration for the ‘founding fathers’ of international law.⁷¹³ And it is a matter of fact that ‘recourse to general principles of law was a characteristic feature’ of the arbitral awards prior to 1920⁷¹⁴ and was also frequent in the practice of States and the works of scholars.⁷¹⁵ The adoption of the Statute did of course encourage the arbitrators to resort to the principles of Art. 38,⁷¹⁶ which are sometimes expressly referred to in their decisions.⁷¹⁷

The Court itself has referred to Art. 38, para. 1 (c) with an extreme parsimony. If the present author is not mistaken, this provision has been expressly mentioned only four times in the entire case law of the Court since 1922⁷¹⁸ and each time, it has been ruled out for one reason or another.⁷¹⁹ However, without referring expressly to Art. 38, both

⁷⁰⁹ First of all to Root, the US member who felt that mentioning the recognition by the different nations would lead the Court to apply ‘principles, differently understood in different countries’ (*ibid.*, p. 308, and *cf.* also p. 309).

⁷¹⁰ *Ibid.*, pp. 310 and 318.

⁷¹¹ *Ibid.*, p. 331 and Annex 1.

⁷¹² *Cf.* the explanations given by Baron Descamps, *ibid.* p. 316.

⁷¹³ *Cf. e.g.* Lauterpacht (1927), *supra*, fn. 339, pp. 8–15.

⁷¹⁴ Jenks, C.W., *The Prospects for International Arbitration* (1964), p. 266. *Cf.* the long list of relevant awards given by this author (*ibid.* pp. 266–7) based on Lauterpacht (1927), *supra*, fn. 339, pp. 216–91. *Cf.* also Verdross, A., ‘Les principes généraux du droit dans la jurisprudence internationale’, *Rec. des Cours* 52 (1935-II), pp. 195–251, pp. 207–19, or Raimondo, F.O., *supra*, fn. 53, pp. 10–16; but contrast Kopelmanas (1936), *supra*, fn. 21, pp. 285–308, pp. 288–90. Among the most illustrative awards in this respect *cf. Van Bokkelen* (United States of America v. Haiti), *Pasicrisie Internationale*, pp. 302 *et seq.*; *Fabiani* (France v. Venezuela), *ibid.*, pp. 356, 362 and 364; *Lourenço Marques Railway* (United States of America v. United Kingdom), *ibid.* pp. 399 *et seq.*; *Walfish Bay Frontier* (Germany v. United Kingdom), RIAA, vol. XI, pp. 263, 294 *et seq.*; *Russia v. Turkey*, *ibid.*, pp. 441 *et seq.*

⁷¹⁵ *Cf. Pellet* (1974), *supra*, fn. 702, pp. 35–46.

⁷¹⁶ *Cf. e.g. Sarropoulos (Greece) v. Bulgarian State*, *Annual Digest* 4 (1927–1928), No. 205, p. 47; *Petroleum Development Ltd v. Sheikh of Abu Dhabi*, ILR 18 (1951), No. 37 and ICLQ 1 (1952), pp. 247–61; the decisions of the United States–Germany Mixed Claims Commission in *Providence Mutual Life Insurance Cy. and others (U.S.) v. Germany*, RIAA, vol. VII, pp. 91, 115; and *Lehigh Valley Railroad Cy. and others (U.S.) v. Germany*, *ibid.*, vol. VIII, pp. 160, 173.

⁷¹⁷ United States–Germany Mixed Claims Commission, Administrative Decision No. 2, RIAA, vol. VII, pp. 23, 25–6; and the arbitral awards in *Responsibility of Germany for Damages Caused in the Portuguese Colonies in the South of Africa*, RIAA, vol. II, pp. 1011, 1016; *Goldenberg & Sons (Romania) v. Germany*, *ibid.*, p. 909; *Lena Goldfields Arbitration*, *Annual Digest* 5 (1929–1930), No. 1. As for the developments since the adoption of Art. 38 (including para. 1 [c]) *cf.* generally *supra*, MN 51–55. Recourse to general principles is particularly frequent in the new fields of international relations (international criminal law, economic transnational law, etc.), *cf. Daillier/Forteau/Pellet*, *supra*, fn. 164, p. 386; and also Weil, P., ‘Principes généraux de droit et contrats d’Etat’, in *Le droit des relations économiques internationales—Etudes offertes à B. Goldman* (1982), pp. 387–414.

⁷¹⁸ And the PCIJ never referred to it expressly.

⁷¹⁹ *Cf. Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 43; *South West Africa cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 47 (para. 91); *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 21 (para. 17); *Avena case*, *supra*, fn. 115, ICJ Reports (2004), pp. 12, 61 (para. 127).

Courts have, in fact, applied general principles; individual judges have shown themselves less shy in this respect; and States have invoked general principles during the pleadings. On the basis of this material, it is possible to clarify the meaning of Art. 38, para. 1 (c) and to understand why the Court so rarely resorted to this provision.⁷²⁰

254 While the intentions of the drafters of the Statute are less obscure than sometimes alleged, international lawyers have never reached agreement on the definition of the general principles mentioned in Art. 38. There is, however, little doubt that they are:

- unwritten legal norms of a wide-ranging character and
- recognized in the municipal laws of States;
- moreover, they must be transposable at the international level.

a) A Much Debated Definition—General Principles Recognized in *foro domestico*

255 As aptly observed by Professor Mendelson, ‘although there is quite a debate among legal theorists as to the difference and hierarchical relation between rules and principles, none of this finds any reflection in the utterances of the ICJ, which tends to treat the two terms as synonymous’.⁷²¹ In *Gulf of Maine*, the Chamber of the Court observed that:

the association of the terms ‘rules’ and ‘principles’ is no more than the use of a dual expression to convey one and the same idea, since in this context ‘principles’ clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term ‘principles’ may be justified because of their more general and more fundamental character.⁷²²

256 However, there can be no doubt that, when associated with ‘general’ the word ‘principle’ implies a wide-ranging norm.⁷²³ And, similarly, when associated with ‘international law’, it cannot be put into doubt that general principles are of a legal nature. In this respect, the *travaux* clearly show that the drafters of the Statute wished judges to be guided by legal considerations. That the roots of such principles lie in the municipal law of States⁷²⁴ is meant as a guarantee that those principles do correspond ‘to the dictates of the legal conscience of civilised nations’.⁷²⁵ This is also confirmed by the fact that it was precisely to make a clear

⁷²⁰ On Art. 38, para. 1 (c) and its use by the Court, *cf. e.g.*—in addition to the works cited in fn. 702—Blondel, A., ‘Les principes généraux de droit devant la C.P.J.I. et la C.I.J.’, *Recueil d’études de droit international en hommage à P. Guggenheim* (IUHEI, ed., 1968), pp. 201–36; Kopelmanas (1936), *supra*, fn. 21, pp. 285–308; Mosler, H., ‘To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law Within the Meaning of Art. 38(1)(c) of the Statute of the International Court of Justice?’ in *International Law and the Grotian Heritage* (T.M.C. Asser Institute, ed., 1985); Oraison, A., ‘La Cour internationale de Justice, l’article 38 de son Statut et les principes généraux’, *RDI* 80 (2002), pp. 103–36; Verdross (1935), *supra*, fn. 714, *Rec. des Cours* 52 (1935-II), pp. 195–251.

⁷²¹ Mendelson (1996), pp. 63, 80.

⁷²² *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 288–90 (para. 79). In its advisory opinion of 11 April 1949 (*Reparation for Injuries case*), the Court based its considerations on ‘the principle underlying this rule’ (the rule of the nationality of claims) (*supra*, fn. 206, ICJ Reports (1949), pp. 174, 182).

⁷²³ Speaking of general principles of international law (not the principles described in Art. 38, para 1 [c]), R. Kolb describes them as ‘norm-sources’ and considers that ‘the principles can lay a middle role between the *lex lata* and the *lex ferenda* ...’ and that ‘Their function is constitutional and not administrative’ ([2006], *supra*, fn. 168, p. 9). For such an understanding of the general principles of international law, *cf.* also the Sep. Op. Cançado Trindade in the *Pulp Mills case*, *supra*, fn. 239, Judgment of 20 April 2010.

⁷²⁴ *Cf. infra*, MN 260–261.

⁷²⁵ *Cf. supra*, MN 251. In that sense, it can be accepted that ‘in Art. 38, para. 1 (c), some natural law elements are inherent’ (*South West Africa cases*, *supra*, fn. 115, Diss. Op. Tanaka, ICJ Reports [1966], pp. 250, 298), but the existence of a ‘natural law’ principle of this kind cannot be appreciated subjectively by the Court, it must be attested by its recognition in domestic laws.

distinction between law on the one hand and ‘justice’ (or equity in the broad sense) on the other that then para. 5 (now para. 2) was introduced by the League of Nations.⁷²⁶

Moreover, as seen previously, the Court itself has made an (intellectually) clear distinction between legal rules and ‘moral principles’ which can be taken into account ‘only in so far as these are given a sufficient expression in legal form’.⁷²⁷ It might be true that ‘in Art. 38, para. 1 (c) some natural law elements are inherent’,⁷²⁸ but these ‘elements’ have to be ‘legalized’ by their incorporation into the legal systems of States. This requirement of recognition of the general principles *in foro domestico* is the criterion which differentiates the principles of Art. 38, para. 1 (c) from both equitable or moral principles and from the general principles of international law.

In the *Lotus case*, the PCIJ pretended to limit international law to conventions and customs emanating from the ‘free will’ of States and considered that ‘the words “principles of international law”, as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States’.⁷²⁹ This might have been an attempt, by a Court led by blind adherence to voluntarism,⁷³⁰ to deprive the general principles mentioned in para. 1 (c) of any specificity.⁷³¹ This restrictive view, however, does not square with the view prevailing among the members of the Committee of Jurists of 1920, who were of the opinion that the general principles of Art. 38, para. 1 (c) were a source of law distinct from the two others.⁷³² Moreover, such an interpretation would leave this provision without any content, in contradistinction to the basic principle *ut res magis valeat quam pereat*:⁷³³ if it were so, the general principles mentioned in Art. 38 would simply be customary rules of a general nature and would come within the realm of para. 1 (b).⁷³⁴

The same objection can be made with regard to the assertion that these general principles derive from both international law *and* municipal law.⁷³⁵ It is certainly true that

⁷²⁶ Cf. *supra*, MN 157–158.

⁷²⁷ *South West Africa cases, supra*, fn. 115, ICJ Reports (1966), pp. 6, 34 (para. 49); and cf. already *supra*, MN 113.

⁷²⁸ Cf. *South West Africa cases, supra*, fn. 115, Diss.Op. Tanaka, ICJ Reports (1966), pp. 250, 298.

⁷²⁹ *Lotus case, supra*, fn. 128, PCIJ, Series A, No. 10, p. 16.

⁷³⁰ Cf. *supra*, MN 186 (fn. 489) and 225.

⁷³¹ For doctrinal views concurring with this approach Cf. e.g. Chaumont, C., ‘Cours général de droit international public’, *Rec. des Cours* 129 (1970-I), pp. 333–528, p. 460; Härle, E., ‘Les principes généraux de droit et le droit des gens’, *Rev. de droit international et de lég. comp.* 62 (1935), pp. 663–87, p. 675; Herczegh, *supra*, fn. 702, p. 97; Sereni, A.P., *Principi di diritto e processo internazionale* (1955), p. 11; Sibert, M., *Traité de droit international public*, vol. II (1951), p. 33; Triepel, H., ‘Les rapports entre le droit interne et le droit international’, *Rec. des Cours* 1 (1923-I), pp. 77–121, pp. 82 and 87. Cf. also Vitanyi, *supra*, fn. 707, pp. 48–116, pp. 56–70.

⁷³² Although Lord Phillimore, followed by Lapradelle, had first assimilated general principles to custom (Procès-Verbaux, *supra*, fn. 16, pp. 334–5), the Committee eventually endorsed the President’s proposal that ‘point 3... was necessary to meet the possibility of a *non-liquet*’ (*ibid.*, p. 336).

⁷³³ Cf. *supra*, fn. 422.

⁷³⁴ The Court frequently resorts to such general principles of international law, quite often without any attempt to investigate or expressly mention their formal source (for examples, cf. *supra*, fn. 658), but it is apparent from the context that they are nothing other than very general legal propositions derived from the system of international law. Another indication that the general principles of Art. 38, para. 1 (c) cannot be assimilated to those general principles of international law is to be found in the French text of this provision: by using the preposition ‘de’ (‘principes généraux de droit international’) instead of ‘du’, it shows that said principles are not limited to international law—they are not the *principes généraux du droit international*.

⁷³⁵ However, two different views are sustained. For some authors, the general principles of Art. 38 must be found in both legal orders (Cf. e.g. Anzilotti, *supra*, fn. 212, pp. 117–18; Reuter, P., *Droit international public* [1968], pp. 56 *et seq.*; Verdross [1974], *supra*, fn. 460, p. 124; Verdross [1968], *supra*, fn. 702,

the Court has at times had recourse to ‘general conception[s] of law’,⁷³⁶ to ‘rule[s] of law generally accepted’,⁷³⁷ to ‘general and well recognized principles’,⁷³⁸ or to ‘principle[s] universally accepted’.⁷³⁹ But, besides the fact that in none of these cases has the Court mentioned Art. 38, para. 1 (c), the recognition of the principles in question in the domestic sphere does not add to the Court’s duty to apply them as general principles of international law; it only reinforces the ‘feeling’ that such principles are inherently binding.

260 There can be no doubt that the expression used in Art. 38, para. 1 (c) must be given some autonomous meaning and this indeed follows from the *travaux*. As clearly explained by Lord Phillimore, the author of the proposal finally adopted: ‘the general principles referred to in point 3 were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.’⁷⁴⁰

261 This explanation also makes it clear that one must not give too much importance to the ‘archaic’⁷⁴¹ requirement of recognition ‘by civilized nations’: apparently, the members of the 1920 Committee themselves considered ‘all nations’ to be civilized.⁷⁴² This being said, there is no question that this formula, which was debated even at that time,⁷⁴³ is nowadays entirely devoid of any particular meaning.⁷⁴⁴ It can

pp. 521–30, p. 525); for others, they are ‘the fundamental principles of every legal system’ (Cheng [1953], *supra*, fn. 702, p. 390; *cf.* also Härle, *supra*, fn. 731, pp. 663–87, p. 683; Tunkin, G., ‘General Principles of Law in International Law’, in *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* [Marcic, R./et al., eds., 1971], pp. 523–32, p. 526; Vitanyi, *supra*, fn. 707, pp. 48–116, pp. 103 *et seq.*)

⁷³⁶ *Chorzów Factory*, *supra*, fn. 307, PCIJ, Series A, No. 17, p. 29 (‘any breach of an engagement involves an obligation to make reparation’—the Court expressly declared that this ‘is a principle of international law, and even a general conception of law’).

⁷³⁷ *Right of Passage case*, *supra*, fn. 115, Preliminary Objections, ICJ Reports (1957), pp. 125, 142: ‘once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court from its jurisdiction’; as the Court explained, this rule had been ‘acted upon by the Court in the past’ (*ibid.*).

⁷³⁸ *Corfu Channel*, ICJ Reports (1949), pp. 4, 22 (‘elementary considerations of humanity’; ‘freedom of maritime communications’ and ‘State’s obligation not to allow knowingly its territory be used for acts contrary to the rights of other States’). *Cf.* also *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), p. 14, 112 (para. 215) and *supra*, MN 145.

⁷³⁹ *Electricity Company of Sofia and Bulgaria* (Belgium/Bulgaria), PCIJ, Series A/B No. 79, p. 199; *LaGrand*, *supra*, fn. 115, ICJ Reports (2001), pp. 466, 503 (para. 103): ‘the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given’; the Court specified that this principle was ‘accepted by international tribunals and likewise laid down in many conventions’.

⁷⁴⁰ Procès-Verbaux, *supra*, fn. 16, Annex No. 3, p. 335; *cf.* also Lapradelle who ‘admitted that the principles which form the bases of national law, were also sources of international law’ (*ibid.*). It must be noted that these clarifications ended the—rather difficult—debate on this point.

⁷⁴¹ *Cf.* e.g. Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 394.

⁷⁴² Lapradelle thought that the phrase was ‘superfluous, because law implies civilization’ (Procès-Verbaux, *supra*, fn. 16, Annex No. 3, p. 335).

⁷⁴³ *Cf.* Vitanyi, *supra*, fn. 707, p. 54.

⁷⁴⁴ For strong criticism *cf.* Judge Ammoun’s Sep. Ops. appended to the Court’s judgments of 20 February 1969 in the *North Sea Continental Shelf cases* (*supra*, fn. 115, ICJ Reports [1969], pp. 100, 132–5) and the *Barcelona Traction case* (*supra*, fn. 296, ICJ Reports [1970], pp. 286, 308–13). *Cf.*, however, the somewhat persuasive point made by Hugh Thirlway who, while stressing that ‘The category of “civilized nations” was not defined once for all in 1920’, accepts that it could be necessary to ‘limit the consideration of municipal systems to those which are sufficiently developed to reveal the extent to which they share common underlying principles’ and gives the example of the *Abu Dhabi* arbitration (*ILR* 18 (1951), p. 144), where ‘it was necessary to exclude the local law simply because that law had nothing to say on the subject’ (‘Law and Procedure, Part Two’, *BYIL* 61 [1990], pp. 1, 124).

be firmly admitted that, for the time being, all States must be considered as ‘civilized nations’.⁷⁴⁵

It could be thought that the wider the circle of States whose law is to be considered, the more unlikely the possibility would be of finding rules common to all of them. This thesis was defended by Kopelmanas as early as 1936⁷⁴⁶ and, more recently, by Kelsen⁷⁴⁷ or Chaumont,⁷⁴⁸ who called into question the possibility of finding rules common to the extremely diversified systems of law. This is so only if one neglects the fact that the principles in question are ‘general’ by nature and that one cannot expect to find ‘ready-made law’ in the principles of Art. 38, para. 1 (c); just as ‘A body of detailed rules is not to be looked for in customary international law’,⁷⁴⁹ it will not be found in the general principles either: in both instances, they provide *general* guidelines which then have to be applied by the Court in the particular case. There is nothing wrong in this, and just as it has not created particular difficulties for the application of customary rules,⁷⁵⁰ it should not be an obstacle to the implementation of the general principles of law.

This leaves open the question of the method to be employed for discovering the principles *in foro domestico*.⁷⁵¹ In the abstract, it could seem that recourse to comparative law is essential;⁷⁵² but it is not and such a requirement would in any case be unrealistic: the material is hardly available to the parties or to the judges who, moreover, are lawyers trained in international law (or national law)⁷⁵³ but who, with all due respect, usually can hardly be seen as comparatists.⁷⁵⁴ In any case this would be unnecessary: all modern domestic laws can be gathered into a few families or systems of law which, insofar as general principles are concerned, are coherent enough to be considered as ‘legal systems’,⁷⁵⁵ and, since only very general rules are to be taken into consideration in any event, it is enough to ascertain that such principles are present in any (or some) of the laws belonging to these various systems.

In some cases, the parties have nevertheless undertaken to provide the Court with a complete comparative study. The most striking example in this respect is the *Right of Passage case*, where Portugal appended to its reply a legal opinion covering 64 different national laws, in order to establish the existence of a general principle concerning

⁷⁴⁵ Cf. e.g. Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 383–4; Herczegh, *supra*, fn. 702, p. 41 or Vitanyi, *supra*, fn. 707, pp. 48–116, pp. 55.

⁷⁴⁶ Kopelmanas (1936), *supra*, fn. 21, pp. 285–308, p. 294.

⁷⁴⁷ Kelsen, H., *The Law of the United Nations* (4th edn., 1964), p. 533.

⁷⁴⁸ Cf. Chaumont, *supra*, fn. 731, pp. 333–528, pp. 460–1.

⁷⁴⁹ *Gulf of Maine*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 299 (para. 111); and cf. already *supra*, fn. 678.

⁷⁵⁰ Cf. *supra*, MN 242.

⁷⁵¹ The issue is different from the hypothesis of a ‘renvoi’ by international law to a particular municipal law system: in such a case, the Court merely has to apply the rules as they are embodied in that law, not to find a principle common to the various national laws (cf. *supra*, MN 135).

⁷⁵² Cf. e.g. Sørensen, M., ‘Principes de droit international public—Cours général’, *Rec. des Cours* 101 (1960–III), pp. 1–251, p. 23; Virally, M., ‘The Sources of International Law’, in *Manual of Public International Law* (Sørensen, M., ed., 1968), p. 146.

⁷⁵³ Art. 2 of the Statute; and cf. Aznar Gomez on Art. 2 MN 16–18 for an analysis of the background and qualifications expected for judges.

⁷⁵⁴ For a similar view cf. Dupuy, in *Collection of Essays by Legal Advisers and Practitioners* pp. 377, 384; or Schlesinger, R.B., and Bonassies, P., ‘Le fonds commun des systèmes juridiques—Observations sur un nouveau projet de recherche’, *Revue critique de droit international privé* 52 (1963), p. 503.

⁷⁵⁵ I.e. mainly, civil (or continental) law and common law, from which probably all contemporary municipal laws borrow part of their rules; to this should certainly be added nowadays, at least in some fields, the Islamic system and the specific characters deriving from adherence to socialist doctrines. Cf. further David, R./Jaufret-Spinosi, C., *Les grands systèmes de droit contemporain* (2002).

the right of access to enclaved pieces of land.⁷⁵⁶ Individual judges, too, have sometimes resorted to the comparative method.⁷⁵⁷ But the Court itself has been most reluctant and, in the *Mavrommatis case*, the PCIJ went as far as to state that it had:

not to ascertain what are, in the various codes of procedure and in the various legal terminologies, the specific characteristics of such an objection; in particular it need not consider whether 'competence' and 'jurisdiction', *incompétence* and *fin de non-recevoir* should invariably and in every connection be regarded as synonymous expressions.⁷⁵⁸

It thus showed a clear disinclination towards the use of the comparative method.⁷⁵⁹

265 Yet this does not mean that the Court has never resorted to general principles of law.⁷⁶⁰ The PCIJ never did so in a straightforward manner, and in most of the cases cited as examples showing the contrary, it has used very vague and cryptic *formulae* which may equally apply both to principles of customary international law and to general principles

⁷⁵⁶ *Right of Passage case*, Pleadings, vol. I, pp. 714 *et seq.* and pp. 858 *et seq.*; *cf.* also the oral pleadings of Mr P. Lalive d'Espinay, *ibid.*, vol. IV, pp. 516–31. The Court did not deal with the argument, but, in his Sep. Op., Judge Wellington Koo considered that, whatever the 'distinctions between a right of passage of an international enclave and that of an enclaved land owned by a private individual, ...the underlying principle of recognition of such a right, in its essence, is the same' (*supra*, fn. 115, ICJ Reports (1960), pp. 54, 66–67). For another example *cf.* the Belgian memorial in *Barcelona Traction*, *supra*, fn. 296, ICJ, Pleadings, vol. I, pp. 136–7.

⁷⁵⁷ *Cf.* in particular Judge Ammoun's Sep. Op. appended to the Court's judgment of 20 February 1969 in the *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 100, 139–40 (para. 38) (with respect to equity as a general principle of law). For much more cursory analyses *cf. e.g.* Judge Hudson's individual opinion, in the *Diversion of Water from the Meuse case*, *supra*, fn. 348, PCIJ, Series A/B, No. 70, p. 77; Judge Azevedo's dissent in the *Conditions of Admission case*, *supra*, fn. 105, ICJ Reports (1947–1948), pp. 67, 80; or Judge Hersch Lauterpacht's, Sep. Op. in the *Certain Norwegian Loans case*, *supra*, fn. 128, ICJ Reports (1957), pp. 34, 49–50; on domestic law analogies, see the Sep. Op. Shahabuddeen in the *Nauru case*, *supra*, fn. 456, ICJ Reports (1992), p. 285; Sep. Op. Simma in the *Oil Platforms case*, attempting to determine whether a doctrine of joint and several liability existed in international law, declared that: 'In order to find a solution to our dilemma, I have engaged in some research in comparative law to see whether anything resembling a "general principle of law" within the meaning of Article 38, paragraph 1(c), of the Statute of the Court can be developed from solutions arrived at in domestic law to come to terms with the problem of multiple tortfeasors. I submit that we find ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy. To state its result forthwith: research into various common law jurisdictions as well as French, Swiss and German tort law indicates that the question has been taken up and solved by these legal systems with a consistency that is striking.' (*supra*, fn. 501, ICJ Reports [2003], p. 354 [para. 66]; *cf.* also *ibid.*, pp. 354–7 [paras. 67–72]); *cf.* also the Sep. Op. Cançado Trindade in *Kosovo Declaration of Independence case*, *supra*, fn. 244, paras. 68–70.

⁷⁵⁸ *Mavrommatis case*, *supra*, fn. 239, PCIJ, Series A, No. 2, p. 10.

⁷⁵⁹ *Cf.* Raimondo, F.O., who rightly notes that 'the absence of explicit reference to comparative law research in the judgments and advisory opinions of the PCIJ and the ICJ does not necessarily imply that they never took account of the comparative legal research offered by parties to the proceedings. This absence does not mean that the ICJ ignores the significance of examining the common denominator of national legal systems' (*supra*, fn. 53, pp. 57–8, footnote omitted).

⁷⁶⁰ Invocation of Latin maxims by the Court or individual judges is an expression of such a recourse to general principles and a substitute for the comparative method. After all, 'Le droit romain a toujours été pour les juristes une source presque inépuisable de décisions. Les internationalistes n'ont pas échappé à la loi commune: s'ils ont moins ouvertement que les civilistes proclamés son autorité, ils se sont conformés avec le même empressement à sa lettre et à son esprit' (Pillet, A., *Les fondateurs du droit international* (1904), p. IX). For examples of such a process *cf. e.g.* *Delimitation of the Polish-Czechoslovakian Frontier*, PCIJ, Series B, No. 8, p. 37: '*ejus est interpretare legem cujus condere*'; *Preah Vihear case*: '*Qui tacet consentire videtur si loqui debuisset ac potuisset*' (*supra*, fn. 234, ICJ Reports [1962], pp. 6, 23); *cf.* also *Land and Maritime Boundary case: 'Nemo dat quod non habet'* (*supra*, fn. 92, ICJ Reports [2002], p. 400 [para. 194], p. 402 [para. 201], or p. 404 [para. 204]) or *Ahmadou Sadio Diallo: 'onus probandi incumbit actori'* (*supra*, fn. 328, para. 54). As for individual opinions *cf. e.g.* '*nemo plus juris transfere potest quam ipse habet*' (*Lighthouses case between France and Greece*, *supra*, fn. 501, Sep. Op. Seferiades PCIJ, Series A/B, No. 62, pp. 49–50; '*audiatur et altera pars*' (*Interpretation of Peace*

in the sense of para. 1 (c).⁷⁶¹ Even in the case of the *Mavrommatis Concessions in Jerusalem*, where the Court mentioned ‘those principles which seem to be generally accepted in regard to contracts’,⁷⁶² or in that of *Certain German Interests*, where it considered that ‘Whether this submission should be classified as an, “objection” or as a *fin de non-recevoir*, it is certain that nothing ... in the general principles of law, prevents the Court from dealing with it at once’;⁷⁶³ it might be daring to consider that the Court has alluded to the general principles of Art. 38, para. 1 (c). The current Court has, for its part, sometimes expressly mentioned the provision—but only to set its application aside in the case at hand.⁷⁶⁴ Moreover, in several cases, the Court has had recourse to general principles without expressly referring to Art. 38 or investigating their origin. This is particularly so in the advisory opinions given in the field of international civil service law. Thus, in *Fasla*, the Court referred to ‘the principles governing the judicial process’ and ‘the general principles governing the judicial process’,⁷⁶⁵ ‘general principles of law’⁷⁶⁶ or ‘the basic principle regarding the question of costs’.⁷⁶⁷ Many other examples can be given.⁷⁶⁸

However, the gap between the theory and the practice is even more striking than with respect to customary law:⁷⁶⁹ the Court asserts the existence of the general principles of law without ever taking pains to demonstrate it, let alone to compare the domestic laws of States, not even those of ‘the principal legal systems of the world’.⁷⁷⁰ Yet what the Court does not do overtly, or probably even deliberately, it might nevertheless do spontaneously and intuitively. As Judge Levi Carneiro wrote:

Treaties, supra, fn. 108, Diss. Op. Winiarski, ICJ Reports [1950], pp. 89, 92); ‘*utile non debet per inutile vitari*’ (*Certain Norwegian Loans case, supra*, fn. 128, Sep. Op. Lauterpacht, ICJ Reports [1957], pp. 34, 57); ‘*jus posterior derogat priori*’ (*Guardianship of Infants Convention, supra*, fn. 306, Sep. Op. Moreno Quitana, ICJ Reports [1958], pp. 102, 107); ‘*ex una causa nullitas*’ (*Namibia case, supra*, fn. 244, Sep. Op. de Castro, ICJ Reports [1971], pp. 170, 179); or ‘*nemo dare potest quam ipse non habet*’ (Diss. Op. Fitzmaurice, *ibid.*, pp. 220, 264).

⁷⁶¹ Cf. *supra*, MN 259; as well as *Mavrommatis case, supra*, fn. 239, PCIJ, Series A, No. 5, p. 30; *Certain German Interests, supra*, fn. 125, Preliminary Objections, PCIJ, Series A, No. 6, p. 19, and Merits, PCIJ, Series A, No. 7, p. 22; *Treaty of Lausanne, supra*, fn. 259, PCIJ, Series B, No. 12, p. 132; *Chorzów Factory case, supra*, fn. 307, Jurisdiction, PCIJ, Series A, No. 9, p. 31, and Merits, PCIJ, Series A, No. 17, p. 29; *Greco-Turkish Agreement case, supra*, fn. 501, PCIJ, Series B, No. 16, pp. 20 and 25.

⁷⁶² *Mavrommatis case, supra*, fn. 239, Merits, PCIJ, Series A, No. 5, p. 30.

⁷⁶³ *German Interests, supra*, fn. 125, Preliminary Objections, PCIJ, Series A, No. 6, p. 19.

⁷⁶⁴ Cf. *supra*, MN 253.

⁷⁶⁵ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, ICJ Reports (1973), pp. 166, 177 (paras. 29 and 30).

⁷⁶⁶ *Ibid.*, p. 181 (para. 36) (equality between the parties); cf. also *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, ICJ Reports (1982), pp. 325, 338 (para. 29).

⁷⁶⁷ *Ibid.*, p. 212 (para. 98): ‘each party shall bear its own [costs] in the absence of a specific decision of the tribunal.’

⁷⁶⁸ Cf. e.g. *Corfu Channel case, supra*, fn. 125, ICJ Reports (1949), pp. 4, 18 (‘This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions’); *Barcelona Traction case, supra*, fn. 296, ICJ Reports (1970), pp. 3, 37 (para. 50) (‘It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers’); *Cummaraswamy case, supra*, fn. 643, ICJ Reports (1999), pp. 62, 88 (para. 63) (It is a ‘generally recognized principle of procedural law’ that questions of immunity are preliminary issues which must be expeditiously decided in *limine litis*); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), ICJ Reports (2008), pp. 12, 31 (para. 45) and the jurisprudence cited (‘It is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact’).

⁷⁶⁹ Cf. *supra*, MN 235–240.

⁷⁷⁰ The *Diallo* Judgment provides for a recent example: ‘The Court observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders.’ (*Ahmadou Sadio Diallo case, supra*, fn. 328, para. 155).

It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of 'the main forms of civilization and of the principal legal systems of the world' (Statute, Article 9), and the Court is to apply 'the general principles of law recognized by civilized nations' (Statute, Article 38 (I) (c)).⁷⁷¹

And indeed, the composition of the Court⁷⁷² makes this intuitive process rather natural.

b) Transposability to International Law

- 267 The following question has been asked: 'wherein lies the magic of this philosopher's stone that transmutes municipal into international law?'⁷⁷³ This is a good question, but badly formulated. The issue is not to 'transmute' municipal law into international law, but to find in the various domestic legal systems, which are in many respects more complete than international law,⁷⁷⁴ general orientations which can avoid both a *non liquet* and the application of the appalling so-called 'principle' according to which all that is not forbidden would be permissible.⁷⁷⁵ From this perspective, the recognition of such principles in the domestic laws of States belonging to different systems or 'families' of law is a sign that these principles are seen as 'just', as reflecting a 'socially realizable morality'⁷⁷⁶ or as inherent to any legal system. As has been said, they are 'à l'état 'latent' dans le système [du droit international], mais n'ont pas encore eu l'occasion de se manifester dans la pratique internationale'.⁷⁷⁷ This, however, is not enough.

- 268 As superbly explained by McNair:

The way in which international law borrows from this source [i.e. general principles of law recognized by civilized nations] is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. ... [T]he true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.⁷⁷⁸

- 269 Therefore, once the Judge has found that a given principle is recognized by the 'principal legal systems of the world', he must then ascertain whether it is transposable to the international sphere, bearing in mind 'that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which this latter's conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level'.⁷⁷⁹ A clear example of such an impossible

⁷⁷¹ Diss. Op. appended to the judgment in *Anglo-Iranian Oilcase*, *supra*, fn. 507, ICJ Reports (1952), pp. 151, 161.

⁷⁷² In accordance with Art. 9 of the Statute, the Court as a whole is supposed to represent (and in fact decently represents) 'the main forms of civilization and ...the principal legal systems of the world ...'. Cf. Fassbender on Art. 9 MN 22–37.

⁷⁷³ Kearney, pp. 610, 701.

⁷⁷⁴ Cf. *supra*, MN 87 and 250.

⁷⁷⁵ For a clear rejection of this principle cf. *Barcelona Traction case*, *supra*, fn. 296, ICJ Reports (1970), pp. 3, 37 (para. 51).

⁷⁷⁶ Lauterpacht, H., *The Development of International Law by the International Court* (1958), p. 172. Cf. also *supra*, para. 256.

⁷⁷⁷ Quadri, R., 'Cours général de droit international public', *Rec. des Cours* 113 (1964-III), pp. 237–483, p. 350.

⁷⁷⁸ Separate opinion appended to the Court's advisory opinion of 11 July 1950 on the *International Status of South West Africa*, *supra*, fn. 288, ICJ Reports (1950), pp. 128, 148.

⁷⁷⁹ *Barcelona Traction case*, *supra*, fn. 296, Sep. Op. Fitzmaurice, ICJ Reports (1970), pp. 64, 66 (para. 5). Cf. also the pleadings of France in the case concerning *Phosphates in Morocco* (Italy/France), PCIJ, Series C, No. 85, pp. 1060–1.

transposition is given by the international principle of consent to jurisdiction: while, in the domestic sphere, the fundamental rule is that any dispute may be brought before a judge, in international law, in the absence of an express consent of the respondent State, the opposite principle prevails.⁷⁸⁰ Similarly, in the *Preah Vihear case*, the Court considered that, in contrast to private law where law can prescribe ‘as mandatory certain formalities’, generally, in international law, ‘parties are free to choose what form they please provided their intention clearly results from it.’⁷⁸¹

II. The Relationships between the Sources Listed in Art. 38

The relationship between the three main sources listed in Art. 38 is complex: while there is no formal hierarchy between conventions, custom and general principles of law, *de facto* the Court uses them in successive order and has organized a kind of complementarity between them. 270

1. Hierarchy?

a) Absence of Formal Hierarchy—A Successive Order of Consideration

In Baron Descamps’ initial proposal to the Committee of Jurists of 1920, the rules ‘to be applied by the judge in the solution of international disputes’ would have been ‘considered by him in the undermentioned order’, *i.e.* treaty law first, custom second, general principles of law,⁷⁸² then and lastly ‘international jurisprudence’.⁷⁸³ This was the object of quite harsh discussions inside the Committee: Ricci-Busatti, supported by Hagerup and Lapradelle,⁷⁸⁴ considered that ‘the judge should consider the various sources of law simultaneously in relation to one another’,⁷⁸⁵ while, with the support of Lord Phillimore and Altamira,⁷⁸⁶ Descamps remarked that: 271

there was a natural classification. If two States concluded a treaty in which the solution of the dispute could be found, the Court must not apply international custom and neglect the treaty. If a well known custom exists, there is no occasion to resort to a general principle of law. We shall indicate an order of natural *précellence*, without requiring in a given case the agreement of several sources.⁷⁸⁷

⁷⁸⁰ ‘It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement’ (*Eastern Carelia case*, *supra*, fn. 104, PCIJ, Series B, No. 5, p. 27; and *cf.* also the recapitulation of its case law on this point by the Court in *East Timor*, *supra*, fn. 237, ICJ Reports [1995], pp. 90, 101 [para. 26]); in the same vein, in the *Armed Activities case* the Court recalled that ‘Under the Court’s Statute ... jurisdiction is always based on the consent of the parties. (*Armed Activities (New Application) (DRC/Rwanda)*, *supra*, fn. 231, ICJ Reports 2006, pp. 6, 32 [para. 64]).

⁷⁸¹ *Preah Vihear case*, *supra*, fn. 115, ICJ Reports (1961), pp. 17, 31. There are other examples: as for the mandate *cf. supra*, fn. 342; with respect to the right of *actio popularis cf. South West Africa cases*, *supra*, fn. 115, ICJ Reports (1966), pp. 6, 47 (para. 88) (the Court seems to doubt that the notion exists in all municipal systems of law). In contrast, in its advisory opinion on the *Reservations to the Genocide Convention*, the Court acknowledged that the concept of the integrity of treaties ‘is directly inspired by the notion of contract’; however, it took into account ‘a variety of circumstances which would lead to a more flexible application of this principle’ (*[1951] Genocide case*, *supra*, fn. 365, ICJ Reports [1951], pp. 15, 21).

⁷⁸² At the time of the first drafting, this read: ‘the rules of international law as recognized by the legal conscience of civilised nations’.

⁷⁸³ Procès-Verbaux, *supra*, fn. 16, Annex No. 3, p. 306.

⁷⁸⁴ *Ibid.*, p. 338.

⁷⁸⁵ *Ibid.*, p. 332; *cf.* also p. 337.

⁷⁸⁶ *Ibid.*, pp. 333 and 338.

⁷⁸⁷ *Ibid.*, p. 337.

272 This view prevailed and the final Committee's draft included the expression 'in the order following', which was eventually deleted as being superfluous during the final discussion in the League of Nations.⁷⁸⁸ Descamps nevertheless had his revenge in the Court's practice: indeed, the order in which the three sources are listed in Art. 38 is not seen as introducing a formal hierarchy, but the usual approach of the Court is accurately reflected in the explanations he gave before the Washington Committee of Jurists⁷⁸⁹: it is a successive order of consideration.

273 Three main reasons have been put forward in order to show that the order, in which the sources of the law to be applied by the Court are listed in Art. 38, is 'natural':⁷⁹⁰

- first, it has been said that they are in a decreasing order of ease of proof;
- second, this enumeration goes from the most special to the most general which leads the way to applying the maxim *specialia generalibus derogant*; and
- third, this order coincides with the dominant consensualist approach of the sources of law apparent in the Statute and is in keeping with the consensual basis of the Court's jurisdiction.⁷⁹¹

None of these explanations is fully convincing if taken in isolation, but they certainly combine to explain the priority of consideration given to treaty rules (or, for that matter, rules issued from other sources based on the express consent of States and on decisions of international organizations) over customary rules, and of the latter over general principles of law in the strict sense implied by para. 1 (c).⁷⁹²

274 It is certainly only partly convincing in the abstract to consider that because a rule is based on the consent of States, it has—or must have—any pre-eminence over other norms.⁷⁹³ As very convincingly explained by Ago:

Le droit de formation spontanée n'est ni moins réellement existant, ni moins certain, ni moins valable, ni moins observé, ni moins efficacement garanti que celui qui est créé par des faits normatifs spécifiques; au contraire, justement la spontanéité de son origine est plutôt la cause d'une observation plus spontanée et, par conséquent, plus réelle.⁷⁹⁴

275 It cannot be excluded that, as a matter of 'judicial policy', the Court finds some advantage in giving priority to treaty rules over customary norms: by definition treaties are 'expressly recognized by the contesting States' while customs are 'accepted as law' only generally,⁷⁹⁵ as are general principles recognized by the national systems of law, without any precise method guaranteeing their acceptability in the international sphere.⁷⁹⁶ A judgment based on treaty rules is, therefore, likely to be more acceptable to the contesting States (which will be seen as being the authors of their own fate) than a

⁷⁸⁸ Cf. *supra*, MN 33 and 38.

⁷⁸⁹ Cf. *supra*, MN 46.

⁷⁹⁰ Cf. e.g. Lauterpacht, Sir H., *International Law: Collected Papers* (1970), p. 86.

⁷⁹¹ Cf. Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 381 and 388.

⁷⁹² For a similar view cf. Sørensen (1946), p. 249.

⁷⁹³ And there is no logic in linking this supposed pre-eminence to the voluntary basis of the Court's jurisdiction under Art. 36, paras. 1 and 2: cf. Dupuy, in *Collection of Essays by Legal Advisers*, pp. 377, 381. One may accept a mode of settlement which implies the application of legal (or non-legal) norms to which the parties have not consented. As a matter of definition, it will be so when the organ in charge of settling the dispute is authorized to decide *ex aequo et bono*.

⁷⁹⁴ Ago, R., 'Droit positif et droit international', *AFDI* 3 (1957), pp. 14–62, p. 62.

⁷⁹⁵ Cf. *supra*, MN 225.

⁷⁹⁶ Cf. *supra*, MN 250 *et seq.*

decision based on other considerations which usually imply a larger amount of judges' subjectivity. The fact that, when it applies a customary rule, the Court sometimes indicates that the States concerned have themselves accepted such rules as law is revealing of this state of mind.⁷⁹⁷ This being said, even when the dispute can be decided in accordance with treaty law, its application is never mechanical: the dispute brought to the Court is the sign that there is a 'disagreement on a point of law or fact, a conflict of legal views or interests' between the parties⁷⁹⁸ concerning either the very existence of the treaty, its entry into force, its interpretation or the way it is or is not applied, which, again, presupposes that there is no 'obvious solution'.

There can, however, be no doubt that the application of a treaty rule is easier than the search for a customary rule, intuitive though this process might be,⁷⁹⁹ and that, in turn, it is more practicable for an international judge to investigate international practice in order to find a customary rule than to 'discover' a general principle of law from an inevitably sensitive incursion into municipal laws.⁸⁰⁰ 276

Furthermore, it is certainly true that in the great majority of cases, treaty rules will appear 'special' in comparison to customary rules and general principles. As shown earlier, those two last sources generally result in quite fuzzy and imprecise normative propositions which then have to be applied in the concrete case, leaving to the judge a wide margin of appreciation.⁸⁰¹ Therefore, in most cases, treaty law will appear as a *lex specialis* and will enjoy priority as such: 277

- If the Court can base its decision on the provisions of the treaty, this will be the end of the question; the Court's practice is teeming with examples of this course of action; just to take an example, in the *Lighthouses* case between France and Greece, both parties had 'adduced the terms of the Conventions of 1899 and 1907 concerning the laws and customs of war on land, besides precedents, and the opinions of certain authors'; the Court did 'not think it necessary to express its opinion on this point. In the present case, it has before it a treaty clause, namely Art. 9 of Protocol XII of Lausanne'.⁸⁰² There is 'no doubt that the parties to a treaty can therein either agree that' a particular customary rule 'shall not apply to claims based on alleged breaches of that treaty'; however, when the treaty is silent, it cannot be accepted 'that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'.⁸⁰³

⁷⁹⁷ Cf. *supra*, MN 226.

⁷⁹⁸ *Mavrommatis case*, *supra*, fn. 239, PCIJ, Series A, No. 2, p. 11; cf. also, *inter alia*, *Northern Cameroons case*, *supra*, fn. 104, ICJ Reports (1963), pp. 15, 27; *Applicability of the Obligation to Arbitrate under the UN Headquarters Agreement case*, *supra*, fn. 306, ICJ Reports (1988), pp. 12, 27 (para. 35); *East Timor case*, *supra*, fn. 237, ICJ Reports (1995), pp. 90, 99–100 (para. 22); or *Certain Property case*, *supra*, fn. 326, ICJ Reports (2005), pp. 6, 18 (para. 24).

⁷⁹⁹ Cf. *supra*, MN 194 *et seq.*

⁸⁰⁰ Cf. *supra*, MN 130 and 263.

⁸⁰¹ Cf. *supra*, MN 242 and 265.

⁸⁰² *Lighthouses case between France and Greece*, *supra*, fn. 501, PCIJ, Series A/B, No. 62, p. 25. Cf. also *Treatment of Polish Nationals case*, *supra*, fn. 301, PCIJ, Series A/B, No. 44, pp. 23–4; or Diss. Op. Anzilotti appended to the *Eastern Greenland Judgment* of 5 April 1933, *supra*, fn. 218, PCIJ, Series A/B, No. 53, p. 76: 'It is consequently on the basis of that agreement which, as between the Parties, has precedence over general law, that the dispute ought to have been decided'. For the practice of the present Court cf. *supra*, MN 194–199.

⁸⁰³ *ELSI case*, *supra*, fn. 315, ICJ Reports (1989), pp. 15, 42 (para. 50) (with respect to the local remedies rule).

- If a treaty is invoked by one or the other party, the Court will first ascertain that the said treaty is applicable and only if this is not the case will it turn itself to other sources; thus in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Court first examined the relevance of a treaty provision invoked by Indonesia in support of its argument,⁸⁰⁴ and only after this lengthy examination turned to the other, and possibly more relevant, arguments made by the parties.
- Lastly, in the *Navigational and Related Rights* judgment, the Court recalled in clearest terms the priority of application of treaty provisions, as a *lex specialis*: ‘Indeed, even if categorization as an “international river” would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States on a specific river or a section of it.’⁸⁰⁵

278 Similarly, general principles of law within the meaning of Art. 38, para. 1 (c) will only be resorted to in the rather exceptional cases where the dispute can be settled neither on the basis of treaties nor custom.⁸⁰⁶ The practice of the Court is firmly established: it will usually consider the rules of law to be applied in a given case in the order indicated by para. 1 of Art. 38. This, however, does not mean that this practice amounts to recognizing a hierarchy between the sources listed in Art. 38;⁸⁰⁷ it only shows that, in particular cases, the Court will follow the order of priority indicated in this provision.

279 However, the absence of hierarchy between the ‘three main sources’ of international law is not free of difficulties and some issues have proven themselves not to be exclusively of a theoretical nature.⁸⁰⁸ Thus, *e.g.*, contrary to a frequent assumption, it is perfectly possible that a custom could be *lex posterior* vis-à-vis a treaty rule and supersede it as such.⁸⁰⁹

280 The *Nicaragua* case provides another example of the difficulty of combining treaty rules and customary rules. In that case, the Court which, because of the so-called ‘*Vandenberg* reservation’,⁸¹⁰ could not decide in accordance with multilateral treaties, including the Charter of the United Nations, made the correct statement that:

⁸⁰⁴ *Pulau Ligitan case*, *supra*, fn. 501, ICJ Reports (2002), pp. 625, 645–68.

⁸⁰⁵ *Navigational and Related Rights case*, *supra*, fn. 464, ICJ Reports (2009), pp. 213, 233, para. 35.

⁸⁰⁶ *Cf. infra*, MN 295–297.

⁸⁰⁷ ‘The Court has shown no inclination whatever to resort to rules on the priority or validity of treaties when determining the applicable law in international disputes, nor has any other tribunal approached the decision of any case from such a hierarchical perspective.’ (Boyle/Chinkin, *supra*, fn. 251, p. 211).

⁸⁰⁸ As alleged, *e.g.*, by Sørensen (1946), p. 245; but this learned scholar wrote in 1946: ‘at that time, the Court had not been confronted with concrete issues in this respect’.

⁸⁰⁹ *Cf.* the advisory opinion in the *Namibia case*, where the Court held that the procedure followed by the Security Council with respect to the adoption of resolutions ‘has been generally accepted by Members of the United Nations and evidences a general practice of that Organization’ (*supra*, fn. 244, ICJ Reports [1971], pp. 16, 22 [para. 22]). This ‘practice’ superseded the rule included in Art. 27, para. 3, of the Charter, which it clearly contradicted.

⁸¹⁰ By virtue of which the Court’s compulsory jurisdiction should not extend to ‘disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction’ (reproduced in the *Nicaragua case*, *supra*, fn. 115, Jurisdiction and Admissibility, ICJ Reports [1984], pp. 392, 421–2 [para. 67]).

there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter ‘supervenes’ the former, so that the customary international law has no further existence of its own.⁸¹¹

However, it considered that ‘in the field in question’ (the prohibition of the use of force): ‘The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.’⁸¹² If this is so, the question arises whether customary rules may apply without taking the Charter into consideration—at least if it constitutes a *lex specialis* in comparison with the correspondent customary rules; the Court has bypassed the issue.⁸¹³

This example confirms, if such confirmation were needed, that the Court enjoys (or recognizes itself as enjoying) a large measure of appreciation in the choice of the sources of the rules to be applied in a particular case. Article 38, then, appears as a toolbox from which the Court selects the rules it deems appropriate to settle the dispute submitted to it or to answer the questions submitted by way of advisory request. But this is not altogether a disadvantage: it allows the Court to adapt its decisions to the particular circumstances of the case and, as has been aptly noted, ‘the absence of priorities among the sources of law in Art. 38 (1) (a), (b), and (c) has afforded a valuable degree of flexibility in the preparation of judgments.’⁸¹⁴ 281

b) (Ir)Relevance of International *jus cogens*

The question of the hierarchy between the formal *sources* of law listed in Art. 38 is distinct from that of the combination of the legal *norms* flowing from these sources. As explained previously,⁸¹⁵ these are two different notions: while the sources are the formal processes at the origin of the norms, the latter form the very content of the applicable law and consist of the respective rights and obligations of the contesting States. In the absence of any hierarchy between the sources of the norms, the Court must use other methods to reach a solution when different rules are relevant to a given case but do not coincide. 282

In the great majority of cases, the Court will refer, explicitly or implicitly, to the well-known maxims: *lex posterior priori derogat* or *specialia generalibus derogant*, whether the norms in question derive from the same source or category of sources or pertain to different sources (*i.e.* mainly treaty or custom).⁸¹⁶ But, in these cases, there is no question of hierarchy between the formal sources concerned. 283

⁸¹¹ *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 14, 95 (para. 177); *cf.* also *ibid.*, pp. 95–6 (paras. 178–179), and *ibid.*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 424–5 (para. 73).

⁸¹² *Nicaragua case, supra*, fn. 115, ICJ Reports (1986), pp. 14, 94 (para. 176).

⁸¹³ The Court alleged that ‘The differences which may exist between the specific content of each are not, in the Court’s view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution’ (*Nicaragua case, supra*, fn. 115, ICJ Reports [1986], pp. 14, 97 [para. 181]). This is hardly a convincing answer: *Cf. e.g.* Judge Schwebel’s dissenting opinion, *ibid.*, pp. 79–99.

⁸¹⁴ Kearney, pp. 610, 697.

⁸¹⁵ MN 78 and 84–86. *Cf.* further Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 126–8.

⁸¹⁶ Regarding treaties, these rules are reflected in Arts. 30 and 41 of the 1969 VCLT. The application of these principles does not raise insurmountable problems when the States concerned are bound by both rules (general and special; prior in time and subsequent), but the law of treaties yields to the law of State responsibility when the parties are not the same. For an illustration *cf. Customs Régime between Germany and Austria, supra*, fn. 480, PCIJ, Series A/B, No. 41, pp. 45–53, *passim*; *cf.* also Conseil d’Etat (Assemblée), 23 December 2011, n° 303678, available at <<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rec hJuriAdmin&idTexte=CETATEXT000025115797&fastReqId=336504204&fastPos=7>>.

284 It has been suggested that the concept of *jus cogens* formed an exception to the absence of hierarchy between the sources of international law. This is not so: *jus cogens* is not a 'new'⁸¹⁷ category of formal *sources* of international law, but describes a particular quality of certain *norms*,⁸¹⁸ usually of a customary nature,⁸¹⁹ the existence of which is proven by an 'intensified *opinio juris*' which has to be established by following the same method as that relevant for demonstrating the existence of an 'ordinary' customary rule.⁸²⁰

It cannot be denied that those norms have special consequences for the existence or application of non-peremptory norms of international law.⁸²¹ In particular, 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law';⁸²² such a norm can only 'be modified by a subsequent norm of general international law having the same character';⁸²³ and serious breaches of obligations arising under those norms entail special consequences which come in addition to the usual obligations resulting from an internationally wrongful act.⁸²⁴ However, this does not contradict the principle that the various sources of international law are not in a hierarchical position with regard to one another—but rather means that some norms, parts of a still rudimentary international public order, are, intrinsically, because of their content, superior to all others (whatever their source). According to Sir Ian Brownlie's

⁸¹⁷ According to the present writer, *jus cogens* existed prior to the adoption of the 1969 Vienna Convention: cf. Daillier/Forteau/Pellet, *supra*, fn. 164, pp. 221–2.

⁸¹⁸ 'The question whether a norm is part of the *jus cogens* relates to the legal character of the norm' (*Nuclear Weapons*, *supra*, fn. 107, ICJ Reports [1996], pp. 226, 258 [para. 83]—however, the Court found 'no need to pronounce on this matter' [*ibid.*]).

⁸¹⁹ It is usually accepted that international *jus cogens* comprises the 'peremptory norms of general international law' (cf. Art. 53 VCLT). In *Barcelona Traction*, the Court seems to have accepted that obligations *erga omnes* (which, in this case, can be assimilated to peremptory obligations, cf. *supra*, fn. 651 and 652) could derive from 'international instruments of a universal or quasi-universal nature' (*supra*, fn. 296, ICJ Reports [1970], pp. 3, 32 [para. 34]).

⁸²⁰ Cf. *supra*, MN 232–234.

⁸²¹ From the impressive literature on *jus cogens* in general cf. Alexidze, L., 'Legal Nature of *Jus cogens* in Contemporary International Law', *Rec. des Cours* 172 (1982-III), pp. 219–70; Annacker, C., 'The Legal Régime of *Erga Omnes* Obligations in International Law', *Austrian J. Pub. & Int'l L.* 46 (1993), pp. 131–66; Cannizzaro, E., 'A Higher Law for Treaties?', in Cannizzaro, *supra*, fn. 250, pp. 425–42; Danilenko, G.M., 'International *Jus Cogens*. Issues of Law-Making', *EJIL* 2 (1991), pp. 42–65; Frowein, J.A., 'Die Verpflichtungen *erga omnes* in Völkerrecht und ihre Durchsetzung', in *Völkerrecht als Rechtsordnung—Internationale Gerichtsbarkeit—Menschenrechte. Festschrift für Hermann Mosler* (Bernhardt, R. *et al.*, eds., 1983), pp. 241–64; Gaja, G., 'Jus cogens beyond the Vienna Convention', *Rec. des Cours* 172 (1982-III), pp. 271–316; Gomez Robledo, A., 'Le *jus cogens* international: sa genèse, sa nature, ses fonctions', *Rec. des Cours* 172 (1982-III), pp. 9–217; Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law—Historical Development, Criteria, Present Statute* (1988); de Hoogh, A.J.J., 'Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective', *ÖZöRV* 42 (1991), pp. 183–214; Kolb, R., *Théorie du ius cogens international: essai de relecture du concept* (2001); Kolb, R., 'Théorie du *ius cogens* international', *RBDI* 36 (2003), pp. 5–55; Orakhelashvili, *supra*, fn. 654, p. 560; Picone, *supra*, fn. 652, pp. 411–24; Ragazzi, M., *The Concept of International Obligations Erga Omnes* (1997), p. 304; Shelton, D., 'Normative Hierarchy in International Law', *AJIL* 2006 p. 291–323; Tams, *supra*, fn. 652; Verdross, A., '*Jus Dispositivum* and *Jus Cogens* in International Law', *AJIL* 60 (1966), pp. 55–185; Virally, M., 'Réflexions sur le *jus cogens*' *AFDI* 12 (1966), p. 5–29; de Visscher, C., 'Positivism et *jus cogens*', *RGDIP* 75 (1971), pp. 5–11; Zemanek, K., 'The Metamorphosis of *Jus Cogens*: from an Institution of Treaty Law to the Bedrock of the International Legal Order?', in *Cannizzaro*, *supra*, fn. 250, pp. 381–410.

⁸²² Art. 53 VCLT.

⁸²³ *Ibid.*

⁸²⁴ Cf. e.g. Arts. 40, 41, 48 and 54 of the ILC 2001 Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res. 56/83, 12 December 2001, also reproduced with the corresponding commentaries in Crawford, *supra*, fn. 302, pp. 242–53, 276–80 and 302–5.

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often quoted formula, ‘The vehicle does not often leave the garage’⁸²⁵ and its legal statute is still partly uncertain.

Moreover, even accepting that other expressions are equivalent to *jus cogens*, the Court up to now has recognized the existence of such rules only on rare occasions⁸²⁶ and has drawn consequences from them even more rarely:⁸²⁷ its qualification of certain principles as ‘intransgressible’⁸²⁸ implies that they overcome any contrary rule; and in its advisory opinion of 2004 on the *Construction of a Wall in the Occupied Palestinian Territory*, the ICJ has accepted that ‘given the character and the importance of the rights and obligations involved’, special consequences resulted from their violation.⁸²⁹

There can be no doubt that, as the Court said in illuminating sentences in *Germany v. Italy*:

A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo (New Application: 2002)*, Judgment, I.C.J. Reports 2006, p. 6, paras. 64 and 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, paras. 58 and 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.⁸³⁰

Still in that case, the Court seemed to accept the principle reflected in Art. 41 of the ILC Articles on State Responsibility according to which all States must abstain from recognizing ‘as lawful a situation created by the breach of a *jus cogens* rule, or [to

⁸²⁵Brownlie, I., ‘New Normativity in the International Community’, in *Change and Stability in International Law-Making*, (Cassese, A./Weiler, E.W., eds., 1988), p. 110.


⁸²⁶Cf. *supra*, MN 233–234. For a clear recognition of the prohibition of genocide as pertaining to *jus cogens*, cf. (*Bosnian) Genocide case, supra*, fn. 93, ICJ Reports (2007), pp. 110–11 (para. 161).

⁸²⁷However, ‘negatively’, the Court, erroneously assimilating *jus cogens* and norms *erga omnes*, has rightly recalled that ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things (*East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 102, para. 29); ...it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute’ (*Armed Activities case (New Application) [DRC/Rwanda]*, *supra*, fn. 231, Provisional Measures, ICJ Reports [2002], pp. 219, 245 [para. 71]). Similarly, in *Jurisdictional Immunities case, supra*, fn. 115, the Court insisted upon the fact that a *jus cogens* norm, which is a substantial rule of interational law, plays on a different level from different procedural rules (cf. *infra*, MN 289).

⁸²⁸Cf. *supra*, fn. 651.

⁸²⁹*Wall case, supra*, fn. 104, ICJ Reports (2004), pp. 136, 200 (para. 159). Cf. also *Tehran Hostages case, supra*, fn. 132, ICJ Reports (1980), pp. 3, 41–43 (para. 90–92).

⁸³⁰*Jurisdictional Immunities case, supra*, fn. 115, para. 95; cf. also *ibid.*, para. 64 or 93. For a learned description of the stormy relations of the Court with the concept of *jus cogens*, cf. also *Armed Activities (New Application) (DRC/Rwanda)*, *supra*, fn. 231, Sep. Op. Judge *ad hoc* Dugard, ICJ Reports (2006), pp. 86, 87–88 (paras. 4–6). For an account of the Court’s treatment of arguments based on *jus cogens*, in advisory and contentious proceedings, cf. also Kawano (2009), *supra*, fn. 132, pp. 386–448.

render] aid and assistance in maintaining that situation'.⁸³¹ On the other hand in the (*Bosnian*) *Genocide case*, it left open the questions which arise 'about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations'.⁸³² 

2. Complementarity

288 Failing organization in a hierarchic order, the three sources listed in Art. 38 bear a close and complex relationship to one another. While treaty and custom quite frequently back up each other, general principles of law largely disappear behind the two other 'main sources' and appear to be transitory in nature.

a) The Complex Relationship between Conventions and Customs

289 It will be apparent from the previous presentations of the treaty-making and customary processes that their interactions are multiple and intricate.

290 Customary rules have a fundamental role in the implementation of treaty rules by the Court:

- the binding nature of treaties can only be explained by a fundamental customary rule (the origin of which can probably be found in a general principle of law): *pacta sunt servanda*, which the Court applies as a *datum*,⁸³³
- most of the rules applicable to treaties are themselves of customary origin, including those subsequently codified in the 1969 Vienna Convention, and the Court applies them either as an alternative to the Convention, when it is not in force between the parties,⁸³⁴ or as an expression of the applicable customary rules;⁸³⁵
- more generally, the Court will frequently interpret a treaty in the light of the customary law in the field.

291 Thus, in *Jan Mayen*, the Court observed:

The fact that it is the 1958 Convention which applies to the continental shelf delimitation in this case does not mean that Art. 6 thereof can be interpreted and applied either without reference to customary law on the subject.⁸³⁶

Similarly, in the *Oil Platforms case*, the Court decided that it had jurisdiction only 'to entertain the claims made by the Islamic Republic of Iran under Art. X, paragraph 1, of' the 1955 Treaty of Amity between Iran and the United States,⁸³⁷ other provisions of the treaty (including Art. XX, para. 1 (d) authorizing 'measures ... necessary to protect [the] essential security interests of either party') being 'only relevant in so far as they may affect the interpretation of that text'.⁸³⁸ It specified, however, that it could not:

⁸³¹ *Jurisdictional Immunities case*, *supra*, fn. 115, para. 93.

⁸³² (*Bosnian*) *Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 119 (para. 185).

⁸³³ *Cf. supra*, MN 194 *et seq.*

⁸³⁴ *Cf.* in particular *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 38 (para. 47); and further *supra*, MN 188.

⁸³⁵ *Cf. e.g. Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 95 (para. 178); and further *supra*, MN 198.

⁸³⁶ *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 58 (para. 46).

⁸³⁷ *Oil Platforms case*, *supra*, fn. 501, ICJ Reports (1996), pp. 803, 821 (para. 55 [2]); *cf.* also the Merits, ICJ Reports (2003), pp. 161, 178 (para. 31).

⁸³⁸ *Ibid.*, ICJ Reports (2003), pp. 161, 178 (para. 31).

accept that Art. XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court.⁸³⁹

Conversely, treaties are also present in the process of the formation of custom.⁸⁴⁰ They can: 292

- reflect an existing customary rule, in which case they appear as codification conventions in the strict sense;⁸⁴¹
- be 'regarded as ... crystallizing received or at least emergent rules of customary international law',⁸⁴² 'if the subsequent practice of a sufficiently widespread and representative selection of non parties conformed to the treaty',⁸⁴³ or
- be the point of departure for the formation of a new customary rule,⁸⁴⁴ provided that, again, they are supported by consistent and representative State practice; and
- be an important (and, quite often, the main) component of the practice accepted as law, that is the objective element of custom.⁸⁴⁵

More generally, quite often, the Court resorts to treaty rules to reinforce its reasoning based on the application of customs; as well as to customary rules to confirm a conclusion based on treaty law. The *Hostages case* is a good example of this second process: in that case, the jurisdiction of the Court was limited to the application of international conventions in force between Iran and the United States.⁸⁴⁶ In its judgment, the Court found that Iran had violated several provisions of the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations and it added that, in its view, 'the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law'.⁸⁴⁷ On the contrary, in *Nicaragua*, the Court, which had no jurisdiction to adjudicate on the alleged violations of multilateral conventions by the United States,⁸⁴⁸ 293

⁸³⁹ *Ibid.*, p. 182 (para. 41). Cf. also the *Pulp Mills case*, in which the Court, while recognizing that 'this article [Article 1 of the 1975 Statute] contains a reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties"', warned that: 'This reference, however, does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute.' (*supra*, fn. 239, Judgment of 20 April 2010, available at <<http://www.icj-cij.org>>, para. 59; cf. also para. 62 or 66).

⁸⁴⁰ Cf. Boyle/Chinkin, *supra*, fn. 251, pp. 234–8.

⁸⁴¹ Cf. *supra*, MN 217 and 229.

⁸⁴² *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 39 (para. 63).

⁸⁴³ Boyle/Chinkin, *supra*, fn. 251, p. 235.

⁸⁴⁴ *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 43 (para. 74), and cf. the references *supra*, MN 221.

⁸⁴⁵ Cf. the references *supra*, fn. 588.

⁸⁴⁶ Cf. *Tehran Hostages case*, *supra*, fn. 132, ICJ Reports (1980), pp. 3, 24–8 (paras. 45–55). Very curiously, in the dispositive part of its judgment, the Court decided that the conduct of Iran 'has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law' (p. 44 [para. 95(1)]; emphasis added).

⁸⁴⁷ *Ibid.*, p. 31 (para. 62). For the prohibition of torture and inhuman and degrading treatment: 'There is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.' (*Abmadou Sadio Diallo*, *supra*, fn. 328, para. 87).

⁸⁴⁸ Cf. *supra*, MN 280.

did not, in fact, hesitate to refer to the UN Charter to strengthen its argument based on the application of customary principles.⁸⁴⁹

- 294 This being said, ‘even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.’⁸⁵⁰ Therefore, ‘the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of *pacta sunt servanda*’.⁸⁵¹ For this reason, if a State makes a reservation to a provision of a treaty expressing a rule of customary international law, this rule does not apply as treaty law but the reserving State remains bound under general international law.⁸⁵²

b) The Subsidiary and Transitory Nature of General Principles

- 295 In spite of the clear complementarity between treaty law and customary law, it has to be accepted that, to a great extent, custom steps aside in favour of treaty law. When a treaty exists, even if it can happen that the Court resorts to customary rules in order to strengthen the reasoning founding its solution, the Court will, in most cases, focus on the treaty without any investigation of possible alternative grounds for its decision.⁸⁵³ This phenomenon is even more pronounced with respect to the general principles of law of Art. 38, para. 1 (c) which can be defined as ‘gap fillers’⁸⁵⁴ and a ‘transitory source’ of international law⁸⁵⁵—and indeed are treated as such by the Court. And it is a fact that ‘the Court has never yet founded an essential part of its decision’ on such a principle.⁸⁵⁶

- 296 A formal source distinct from both conventions and custom,⁸⁵⁷ general principles of law are, without any doubt, a subsidiary or additional source of international law. This does not mean that, like ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’ mentioned in para. 1 (d) of Art. 38, they are ‘subsidiary means for the determination of rules of law’: rather, they are direct sources of rights and obligations according to which the Court must decide while, on the contrary, both jurisprudence and doctrine are subsidiary means which must be used to determine, e.g., the general principles themselves. Yet they are subsidiary in the sense that the Court will usually only resort to them in order to fill a gap in the treaty or customary rules available to settle a particular dispute, and, what is even more apparent, will decline to invoke them when such other rules exist.

⁸⁴⁹ *Nicaragua case*, *supra*, fn. 115, ICJ Reports (1986), pp. 14, 97 (para. 181): ‘The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.’ *Cf.* also *ibid.*, pp. 97 (para. 183), 100 (para. 190); and the criticisms made by Sir Robert Jennings in his Diss. Op., *ibid.*, pp. 532–3.

⁸⁵⁰ *Ibid.*, p. 95 (para. 178).

⁸⁵¹ *Ibid.*, p. 96 (para. 180) (the argument was made by the United States but seems to have been accepted by the Court).

⁸⁵² *Cf. supra*, MN 207.

⁸⁵³ *Cf. supra*, MN 194–195.

⁸⁵⁴ Murphy, *supra*, fn. 180, p. 25 or Pauwelyn, *supra*, fn. 180, pp. 128–9. *Cf.* also Raimondo, *supra*, fn. 53, pp. 42–4.

⁸⁵⁵ Pellet (2007), *supra*, fn. 250, p. 26. *Cf. infra*, MN 301–302.

⁸⁵⁶ Thirlway, ‘Law and Procedure, Part One and Two’, *BYIL* 76 (2005), p. 109.

⁸⁵⁷ *Cf. supra*, MN 258–259.

Thus, in its first case, the PCIJ, having decided that Art. 380 of the Treaty of Versailles provided for the right of free passage of the S.S. *Wimbledon* through the Kiel Canal, considered that it was:

not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law.⁸⁵⁸

Similarly in the *Right of Passage case*, having reached the conclusion that such a right existed in favour of Portugal in respect of private persons, civil officials and goods,⁸⁵⁹ the present Court ‘does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result’.⁸⁶⁰

In *Kasikili/Sedudu*, the Court decided that in referring to the ‘rules and principles of international law’, the special agreement ‘does not preclude the Court from examining arguments relating to prescription put forward by Namibia’,⁸⁶¹ thus confirming that it could resort to what clearly appears as a general principle of law. However, it showed itself extremely cautious in not endorsing a final view on the existence of such a principle in international law:

For present purposes, the Court need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. It considers, for the reasons set out below, that the conditions cited by Namibia itself are not satisfied in this case and that Namibia’s argument on acquisitive prescription therefore cannot be accepted.⁸⁶²

It is not uncommon that individual Judges, for their part, resort to general principles in order either to interpret a customary or treaty rule or to strengthen an argument based on a rule from another origin. Thus, in his separate opinion in *Certain Norwegian Loans*, Sir Hersch Lauterpacht considered that:

International practice on the subject [of separability of an invalid condition from the rest of an instrument] is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law.⁸⁶³

For its part, the PCIJ itself restrictively interpreted Head III of the Germano-Polish Convention concerning Upper Silesia, concluded at Geneva on 15 May 1922 in the light of general principles of law:

Further, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of the foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting property, rights and interests of German subjects covered by Head III of the Convention,

⁸⁵⁸ *Wimbledon case*, *supra*, fn. 304, PCIJ, Series A, No. 1, p. 24.

⁸⁵⁹ *Cf. supra*, MN 237.

⁸⁶⁰ *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 6, 43.

⁸⁶¹ *Kasikili/Sedudu case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1103 (para. 93).

⁸⁶² *Ibid.*, p. 1105 (para. 97). With respect to acquisitive prescription *cf.* also *European Commission of the Danube case*, *supra*, fn. 682, PCIJ, Series B, No. 14, pp. 36–7.

⁸⁶³ *Certain Norwegian Loans case*, *supra*, fn. 128, ICJ Reports (1957), pp. 34, 56. *Cf.* also Diss. Op. Fernandes, appended to the Court’s judgment in *Right of Passage case*, *supra*, fn. 115, ICJ Reports (1960), pp. 139–40.

which is not justified on special grounds taking precedence, is therefore incompatible with the regime established by the Convention.⁸⁶⁴

300 The indisputable reluctance of the Court to resort to general principles of law can be easily understood: they are difficult to handle⁸⁶⁵ and it is a fact that the provision of Art. 38, para. 1 (c) ‘conflicts with the voluntaristic point of view’,⁸⁶⁶ which certainly increases the risk that parties will be less inclined to accept the judgment.⁸⁶⁷ Whatever the positivist view on the matter, customary rules of course do not flow from the will of States either. However, there are two important differences:

- First, the practice to be taken into account in order to establish the existence of custom is to be sought in the *international* sphere and States are (or should be) aware that what they do in this sphere might form part of such a practice; this is not so concerning general principles of law which must be discovered in domestic rules, clearly not envisaged as possible material sources of international norms—even if they are.
- Second, more clearly than custom, general principles of law are ‘transitory’ in the sense that their repeated use at the international level transforms them into custom and therefore makes it unnecessary to have recourse to the underlying general principles of law.

301 As Sir Humphrey Waldock explained, ‘there will always be a tendency for a general principle of national law recognized in international law to crystallize into customary law’.⁸⁶⁸ There are numerous examples of this phenomenon of ‘transition’. To take a striking one: at the origin of modern arbitration, the *Kompetenz-Kompetenz* principle was but a general principle of law recognized by States *in foro domestico*; it was transposed into international law, not without difficulties, by the first arbitrators⁸⁶⁹ and was then considered as a general principle of *international* law, quite frequently expressly set out in treaties, including the Statute of the Court itself (Art. 36, para. 6). Indeed, there is no need for the Court to refer to this principle as a general principle of law—which, however, did not prevent it from acknowledging that such provisions ‘conform with rules generally laid down in statutes or laws issues for courts of justice’.⁸⁷⁰ Similar remarks can be made concerning the principle of *res judicata* which, through repeated invocation by arbitrators and recognition of their awards by States, must be considered a general rule of public international law,⁸⁷¹ even if, here again, the underlying principle is sometimes recalled *ex abundante cautela*.

⁸⁶⁴ *Certain German Interests case*, *supra*, fn. 125, PCIJ, Series A, No. 7, p. 22. For a similar reasoning cf. Judge Lauterpacht’s separate opinion appended to the Court’s advisory opinion on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, ICJ Reports (1955), pp. 90, 118.

⁸⁶⁵ *Cf. supra*, MN 250 *et seq.*

⁸⁶⁶ *North Sea Continental Shelf case*, *supra*, fn. 115, Sep.Op. Ammoun, ICJ Reports (1969), pp. 100, 134–5.

⁸⁶⁷ *Cf. supra*, MN 274–275.

⁸⁶⁸ ‘General Course on Public International Law’, *Rec. des Cours* 106 (1962-II), pp. 1–251, p. 62.

⁸⁶⁹ *Cf. e.g.* the *Betsey case* (Jay Treaty Arbitration, 19 November 1794, reproduced in Moore, *supra*, fn. 305, p. 179) or the *Alabama* arbitration (14 September 1872, reproduced *ibid.*, and also in de Lapradelle, A./ Politis, N., *Recueil des arbitrages internationaux* (1932), vol. II, p. 910).

⁸⁷⁰ *Effect of Awards case*, *supra*, fn. 136, ICJ Reports (1954), pp. 47, 52.

⁸⁷¹ *Cf. e.g.* Nemer Caldeira Brant, L., *L’Autorité de la chose jugée en droit international public* (2003), pp. 15–44. The Court characterized it as a principle of ‘fundamental character’: *cf.* (*Bosnian*) *Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 90 (para. 115). In the judgment concerning the application to intervene of Honduras in the case concerning the *Territorial and Maritime Dispute case* (Nicaragual

Anzilotti's dissent appended to the PCIJ judgment of 16 December 1927 in the *Chorzów Factory* case is a good illustration:⁸⁷² 302

As I have already observed, the Court's Statute, in Art. 59, clearly refers to a traditional and generally accepted theory in regard to the material limits of *res judicata*; it was only natural therefore to keep to the essential factors and fundamental data of that theory, failing any indication to the contrary, which I find nowhere, either in the Statute itself or in international law.

In the second place, it appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognized by civilized nations', mentioned in N° 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was the binding effect of *res judicata* expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the above-mentioned article (Minutes, p. 335).⁸⁷³

It is an interesting demonstration: the general principle lying 'behind' Art. 59 is invoked in order to reinforce a treaty law argument which could be perfectly self-sufficient. But this way of reasoning—which is not at all an isolated incident⁸⁷⁴—shows that general principles are well anchored in the 'legal conscience' of jurists and that, even when not a direct source of the rights and obligations at stake, they serve as a confirming element in the persuasiveness of legal reasoning. Moreover, there is no doubt that, when eclipsed by a customary or treaty norm flowing from them, they explain the particular strength of the said norm, which will be described as 'basic' or 'fundamental' or 'essential'.⁸⁷⁵ 303

E. The Subsidiary Means for the Determination of Rules of Law

The positions taken by the members of the Committee of Jurists of 1920 on the 'subsidiary means for the determination of rules of law', now appearing under Art. 38, para. 1 (d) were extremely confusing.⁸⁷⁶ It may, however, be inferred from the—sometimes passionate—discussions among the members that the intention behind the final wording of this provision was that jurisprudence and doctrine were supposed to elucidate what the rules to be applied by the Court were, not to create them.⁸⁷⁷ 304

Colombia), the Court recalled: 'It is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, p. 53).' (*supra*, fn. 508, Application by Honduras for Permission to Intervene, Judgment of 4 May 2011, available at <<http://www.icj-cij.org>>, para. 67).

⁸⁷² All the more so given that the rigid positivist views of Anzilotti did not predispose him to invoke general principles of law lightly.

⁸⁷³ *Chorzów Factory case, supra*, fn. 307, PCIJ, Series A, No. 13, p. 27.

⁸⁷⁴ Cf. the examples given in MN 299.

⁸⁷⁵ Cf. *supra*, MN 259.

⁸⁷⁶ Cf. the clear summary of these unclear discussions in von Stauffenberg, p. 277. The most troubling aspect is the contrast between the members of the Committee who insisted that doctrine and jurisprudence were purely subsidiary (such as Ricci-Busatti, Procès-Verbaux, *supra*, fn. 16, p. 332, or, but much less reluctant, Descamps, *ibid.*, p. 334 or p. 336) on the one hand, and those who peremptorily considered them as sources of law (Phillimore, *ibid.*, p. 333). The expression 'as subsidiary means for the determination of rules of law' was added *in extremis* by the Committee following a proposal by Descamps (*ibid.*, p. 605).

⁸⁷⁷ For a concurring view cf. Shahabuddeen, p. 77.

305 Be that as it may, in itself, para. 1 (d) as finally adopted deserves less criticism than usually alleged—at least if read in French and in isolation from the introductory phrase of Art. 38. As noted by Manley Hudson, while the expression ‘subsidiary means’ could be ‘thought to mean that these sources [*sic*] are to be subordinated to others mentioned in the article, *i.e.*, to be regarded only when sufficient guidance cannot be found in international conventions, international customs and general principles of law[,] the French word *auxiliaire* seems, however, to indicate that confirmation of rules found to exist may be sought by referring to jurisprudence and doctrine’.⁸⁷⁸ In the fortunate words of Shabtai Rosenne,⁸⁷⁹ the ‘subsidiary means’ of para. 1 (d) are ‘the store-house from which the rules of heads (a), (b) and (c) can be extracted’: in marked contrast to the sources listed in the previous sub-paragraphs, jurisprudence and doctrine are not sources *of law*—or, for that matter, of rights and obligations for the contesting States; they are *documentary* ‘sources’ indicating where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the three other sub-paragraphs. Therefore, the phrasing of the *chapeau* of para. 1 is unfortunate: strictly speaking, the Court does not ‘apply’ those ‘means’, which are only tools which it is invited to use in order to investigate the three sources listed previously.

The appropriateness of placing doctrine and jurisprudence on the same footing has also been criticized.⁸⁸⁰ Intellectually, this criticism is misplaced: in the abstract, both perform the same function; they are means of ascertaining that a given rule is of a legal character because it pertains to a formal source of law. However, concretely, they can certainly not be assimilated; while the doctrine has a discreet (but probably efficient) role to that end, the use of the jurisprudence by the Court goes, in fact, far beyond what the expression ‘auxiliary means’ implies.⁸⁸¹

I. Judicial Decisions

306 The role of jurisprudence in the development of international law would deserve a book-length treatment⁸⁸² rather than the cursory analysis it will necessarily receive here. The

⁸⁷⁸ Hudson, p. 603, *Cf.* also Shahabuddeen, p. 80.

⁸⁷⁹ Rosenne, *Law and Practice*, vol. III, p. 1551.

⁸⁸⁰ *Cf. e.g.* Fitzmaurice, in *Symbolaw Verzijl*, pp. 153, 174–5.

⁸⁸¹ Jurisprudence and doctrine have rarely been studied together, but *cf.* Roucouas, E., ‘Rapport entre “moyens auxiliaires” de détermination du droit international’, *Thesaurus Acroasium* XIX (1992), pp. 259–86; as well as the general literature on the sources of international law, *supra*, fn. 460.

⁸⁸² Among the numerous studies devoted to the role of jurisprudence (and more specifically of the World Court) in international law *cf. e.g.* Abi-Saab, G., ‘De la jurisprudence, quelques réflexions sur son rôle dans le développement du droit international’ in *Mélanges Manuel Diez de Velasco* (1993), pp. 2–8; Cahier, P., ‘Le rôle du juge dans l’élaboration du droit international’, in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Makarczyk, J., ed., 1996), pp. 353–66; Condorelli, L., ‘L’autorité de la décision des juridictions internationales permanentes’ in *Les juridictions internationales permanentes. Colloque de Lyon* (Société française de droit international ed., 1987), pp. 277–313; Guillaume, G., in *Justice et juridictions internationales: IVe Rencontre internationale de la Faculté des Sciences juridiques, politiques et sociales de Tunis*, (Zbidi *et al.*, eds., 2000), pp. 175–92; Guillaume, G., ‘The Use of Precedent by International Judges and Arbitrators’, *Journal of International Dispute Settlement* 2 (2011), pp. 5–23 and in French in *JDI* 137 (3) (2010), pp. 685–703; Lauterpacht (1958), *supra*, fn. 776; Miller, N., ‘An International Jurisprudence? The Operation of “Precedent” Across International Tribunals’, *Leiden JIL* 15 (2002), pp. 483–501; Roeben, V., ‘Le précédent dans la jurisprudence de la C.I.J.’, *GYIL* 32 (1989), pp. 382–407; Salerno, F. (ed.), *Il ruolo del giudice internazionale nell’evoluzione del diritto internazionale e comunitario* (1995); Sereni, A.P., ‘Opinions individuelles et dissidentes des juges des tribunaux internationaux’, *RGDIP* 68 (1964), pp. 819–57; Shahabuddeen.

present contribution will only very lightly touch upon two main questions: what are the ‘judicial decisions’ ‘applied’ by the Court? And what part do they play in the development of international law?

1. *Jurisprudence, Not Particular Decisions*

The reference to Art. 59 of the Statute in para. 1 (d) of Art. 38 sounds like a warning: the Court is not bound by the common law rule of *stare decisis*, even if some judges of Anglo-Saxon origin seem to have somewhat ignored this guideline.⁸⁸³ At the same time this reference clearly encourages the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case. 307

In effect, the judicial decisions to which the Court refers first and foremost are, by far, its own (and, concerning the present Court, those of its predecessor)—without making any distinction between its judgments and its advisory opinions which are clearly placed on an equal footing even though the latter do not qualify as ‘decisions’ properly speaking. The record of the PCIJ in this respect is quite impressive;⁸⁸⁴ that of the ICJ no less so: already in its second judgment, in 1949, the Court referred ‘to the views expressed by the Permanent Court of International Justice with regard to similar questions of interpretation’ and quoted extracts of an advisory opinion and an order of the PCIJ.⁸⁸⁵ It has, since then, constantly followed this practice, sometimes quoting extracts of its previous decisions, sometimes only citing them. It can be noted that, as its case law expands, the list of previous cases gets longer without discouraging the Court from expressly referring to all or many of them. Thus, just to give two recent examples, in *Kasikili/Sedudu*, it cited seven previous cases in order to make the rather obvious point that the subsequent practice of the parties is relevant to interpreting treaties,⁸⁸⁶ and in only three printed pages of its 2004 *Wall* advisory opinion, the Court made no less than 28 cross-references to its previous decisions.⁸⁸⁷ 308

It might be doubted whether this method adds much to the authority of the Court’s decisions,⁸⁸⁸ but it certainly shows that, at least in some fields, the case law of the Court is fully documented and firmly established. The observation made more than 60 years ago with respect to the case law of the Permanent Court proves even more convincing today: ‘Without exaggeration, the cumulation may be said to point toward “the harmonious development of the law” which was a desideratum with the draftsmen of the Statute in 1920’.⁸⁸⁹ The persuasive force of the Court’s case law is all the greater in that it is globally consistent. As the Court itself stressed, the justice it is called to render ‘is not abstract justice but justice according to the rule of law; which is to say that its application 309

⁸⁸³ Cf. in particular *Anglo-Iranian Oil case*, Diss. Op. Read, ICJ Reports (1952), pp. 142, 143; as well as the advisory opinion of the PCIJ on the *Greco-Turkish Agreement case*, in which the Court decided ‘following the precedent afforded by its Advisory Opinion No. 3’. However, the French authoritative text (‘en s’inspirant du précédent fourni par son Avis no. 3’) clarifies that the Court did not feel bound by said precedent (*supra*, fn. 501, PCIJ, Series B, No. 16, p. 15).

⁸⁸⁴ Cf. the recollection of the relevant judgments and advisory opinions in Hudson, *PCIJ*, p. 627.

⁸⁸⁵ *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 24.

⁸⁸⁶ *Kasikili/Sedudu case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1076 (para. 50).

⁸⁸⁷ *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 135, 154–6.

⁸⁸⁸ Even if it is indeed extremely useful to students of international law ...

⁸⁸⁹ Hudson, *PCIJ*, p. 630. The author refers to the Records of the First Assembly of the League of Nations, Committees, I, p. 477. This passage concludes a concise and persuasive description of the ‘cumulation of case law’ by the Permanent Court (*ibid.*, pp. 628–9). Cf. also Lauterpacht (1958), *supra*, fn. 776, p. 18.

should display consistency and a degree of predictability'.⁸⁹⁰ Even though it is not bound to apply the precedents, the Court is usually careful to avoid self-contradiction.

- 310 'Precedent plays an important, but not a controlling role.'⁸⁹¹ The judgment of 11 June 1998 on the preliminary objections of Nigeria in the *Land and Maritime Boundary case* faithfully reflects the Court's position in this respect:

It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.⁸⁹²

In that case, the Court found that there was not such cause. Similarly, in the (*Croatian*) *Genocide case*, the Court noted:

While some of the facts and the legal issues dealt with in those cases arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.⁸⁹³

- 311 However, exactly as 'there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths',⁸⁹⁴ there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning:

As it is evident from Articles 38 and 59 of the ICJ Statute, the international legal order does not recognize a legal obligation to abide by the essential reasoning by previously decided cases, dissimilar from what is considered one of the hallmarks of the common law. The law-making effect of a judicial decision, in particular its general and abstract dimension, hence rests not only on its *voluntas*, but also on its *ratio*: legal scholars, advisers, other courts, and certainly not least the deciding court itself at a later point in time must be convinced of the soundness—broadly defined—of a prior decision.⁸⁹⁵

- 312 Generally speaking: 'The Court very rarely finds it necessary to make generalizations, least of all in its decisions. Applying the law to the concrete case before it, the full import of its dicta can be ascertained only in the light of all the circumstances.'⁸⁹⁶ Consequently, it should be a rather easy task to explain different solutions by reference to the different

⁸⁹⁰ *Continental Shelf case* (Libya/Malta), *supra*, fn. 92, ICJ Reports (1985), pp. 13, 39 (para. 45). *Cf.* also *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 64 (para. 58), but contrast Judge Schwebel's separate opinion, which puts into doubt the 'principled consistency' of the Court's decision with its earlier case law: 'the Court jettisons what its case-law, and the accepted customary law of the question, have provided' (*ibid.*, p. 118).

⁸⁹¹ Lauterpacht, Sir E., 'The Role of the International Judge', in *Liber amicorum Jean-Pierre Cot—Le procès international* (2010), p. 187.

⁸⁹² *Land and Maritime Boundary case*, *supra*, fn. 92, Preliminary Objections, ICJ Reports (1998), pp. 275, 292 (para. 28).

⁸⁹³ (*Croatian*) *Genocide case*, *supra*, fn. 496, ICJ Reports (2008), pp. 412, 428 (para. 53); *cf.* also para. 54: 'It would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions.'

⁸⁹⁴ Paulsson, *supra*, fn. 192, p. 881.

⁸⁹⁵ von Bogdandy, A.M., 'The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the *Kosovo Opinion*', in Fastenrath, *supra*, fn. 564, p. 822.

⁸⁹⁶ Rosenne, *Law and Practice*, vol. III, p. 1555.

circumstances of a case compared with a precedent which could be seen *prima facie* as rather similar or had been presented as such by the parties—and sometimes it is. However, in other cases it proves less obvious.

Thus, *e.g.*, in the separate opinion he appended to the Court's judgment on the preliminary objections of Spain in *Barcelona Traction*, Judge Tanaka convincingly showed that the continuity of the Court's jurisprudence in that case, in the 1961 judgment on preliminary objections in the *Preah Vihear case* and the 1959 judgment in the *Case Concerning the Aerial Incident of 27th July, 1955* (Israel/Bulgaria) was nothing less than obvious.⁸⁹⁷ More recently, the Court squarely assumed a clear contradiction in judgments concerning one and the same State, in one case as a defendant, in the others as the claimant: after having clearly recognized its jurisdiction in a case brought before it by Bosnia and Herzegovina against the former Yugoslavia on the basis of Art. IX of the Genocide Convention and reconfirmed this decision following the application for revision of Serbia and Montenegro,⁸⁹⁸ the Court in eight similar judgments of 15 December 2004 found that it had 'no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999' against eight States Members of NATO on the basis of this same provision of the 1948 Convention.⁸⁹⁹

In support of its decision, the Court asserted that 'it cannot decline to entertain a case simply ... because its judgment may have implications in another case'.⁹⁰⁰ In a robustly argued joint declaration, seven judges strongly criticized this unusual position:

The choice of the Court [between several possible grounds for its decision] has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options. First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.

In that sense, we believe that paragraph 40 of the Judgment does not adequately reflect the proper role of the Court as a judicial institution. The Judgment thus goes back on decisions previously adopted by the Court.⁹⁰¹

⁸⁹⁷ *Barcelona Traction case*, *supra*, fn. 296, Preliminary Objections, Sep. Op. Tanaka, ICJ Reports (1964), pp. 65, 66–72. The Court may face the problem, as it did in the *Preah Vihear case* (*supra*, fn. 234, Preliminary Objections, ICJ Reports [1961], pp. 6, 27–8), or it can deal with it by paralipsis, as it did in its advisory opinion of 30 March 1950 (*Interpretation of Peace Treaties*, *supra*, fn. 108, ICJ Reports [1950], pp. 65 *et seq.*) where it did not take pains at explaining the consistency of the solution it gave to the issue of jurisdiction by comparison with that retained in *Eastern Carelia* (*cf.* Judge Azevedo's Sep. Op., *ibid.*, p. 81 and Judge Winiarski, Zoričić and Krylov's Diss. Ops., respectively pp. 89–91, 102–4 and 108–11).

⁸⁹⁸ (*Bosnian*) *Genocide case*, *supra*, fn. 93, Preliminary Objections, ICJ Reports (1996), pp. 595, 623 (para. 47 [2] [a]); and the application for revision of that decision, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections* (Yugoslavia/Bosnia and Herzegovina), ICJ Reports (2003), pp. 3, 31 (paras. 70–71).

⁸⁹⁹ *Legality of Use of Force* (Serbia and Montenegro/Belgium), *supra*, fn. 163, Preliminary Objections, ICJ Reports (2004), pp. 279, 328 (para. 129). The seven other judgments contain identical statements.

⁹⁰⁰ *Ibid.*, para. 40.

⁹⁰¹ Joint Declaration, *ibid.*, paras. 3 and 13. *Cf.* also the embarrassed developments in the 2008 ICJ Judgment on the (*Croatian*) *Genocide case*, *supra*, fn. 496, ICJ Reports (2008), pp. 412, 428–9 (paras. 52–54).

315 It must, however, be admitted that this most unfortunate judgment is an isolated case. As a whole, the Court's case law is consistent and authoritative, notwithstanding the criticisms that one or another decision may call for. Its exceptional authority is the result of multiple factors:

- even if now competed with by numerous other judicial bodies,⁹⁰² the Court remains the most prestigious of all and the only one having a general competence for all legal disputes (subject to the consent of the parties);
- its status as the principal judicial organ of the United Nations enhances its authority as does its composition, both wide (15 judges, usually sitting together in the full Court) and diversified (since the judges are supposed to represent, and, in fact, rather satisfactorily represent, 'as a whole ... the main form of civilization and ... the principal legal systems of the world');⁹⁰³
- its organic permanence and precedence in time has enabled the Court to elaborate an impressive case law⁹⁰⁴ without equal in general international law.

316 This explains in large part the Court's primary reliance on its own case law: 'The Court has established itself as a unique source of international law over the years by concentrated development and application of its own jurisprudence',⁹⁰⁵ which it 'considers as having a different status than that of any other tribunal, however exalted'.⁹⁰⁶ Another consideration should probably be added to the objective reasons indicated previously: 'that of prestige: even though there are other international courts in existence today, the ICJ is regarded, and probably regards itself, as the supreme public international law tribunal, and as such would not wish to be seen to rely too heavily on the jurisprudence of other bodies'.⁹⁰⁷ But there is another, more convincing reason; which is made apparent in the 1970 judgment in the *Barcelona Traction case*:

The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case.⁹⁰⁸

317 However, the Court is less unconcerned by the decisions of other courts and tribunals than usually alleged.⁹⁰⁹ Leaving aside the cases where it is a decision of another tribunal which is at issue,⁹¹⁰ as a matter of fact, the Court has long been extremely parsimonious

⁹⁰² On the (limited) 'proliferation' of international courts and tribunals, *cf. infra*, MN 320.

⁹⁰³ Art. 9 of the Statute; *cf. also supra*, MN 266.

⁹⁰⁴ *Cf. supra*, MN 309.

⁹⁰⁵ Kearney, pp. 610, 699.

⁹⁰⁶ *Ibid.*, p. 698.

⁹⁰⁷ Mendelson (1996), pp. 63, 83.

⁹⁰⁸ *Barcelona Traction case, supra*, fn. 296, ICJ Reports (1970), pp. 3, 40 (para. 63). *Cf. also Certain German Interests case, supra*, fn. 125, Preliminary Objections, PCIJ, Series. A, No. 6, p. 20: 'the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character'.

⁹⁰⁹ Hugh Thirlway reveals 'the existence, at the time [he] entered the service of the Court (1968), of an unwritten rule of drafting that the Court only referred specifically to its own jurisprudence' ('Law and Procedure, Part Two', *BYIL* 61 [1990], pp. 1, 128, fn. 471).

⁹¹⁰ *Cf. e.g.* the cases relating to judgments of the UN or ILO Administrative Tribunals, or those concerning the *Arbitral Award Made by the King of Spain* (*supra*, fn. 234, ICJ Reports [1960], pp. 192 *et seq.*) or that of the *Arbitral Award of 31 July 1989* (*supra*, fn. 406, ICJ Reports [1989], pp. 53 *et seq.*). *Cf.* further the treatment of the judgment of the Central American Court of Justice of 9 March 1917 in the Chamber

in citing arbitral awards: in some cases it referred to ‘precedents’,⁹¹¹ ‘decisions of arbitral tribunals’,⁹¹² ‘international decisions’⁹¹³ or ‘international jurisprudence’⁹¹⁴ in general and, in some other cases, both the PCIJ⁹¹⁵ and the present Court have mentioned specific arbitral awards,⁹¹⁶ two of which having apparently enjoyed the special favour of the Court for a long time: the *Alabama* arbitration⁹¹⁷ and the Franco-British Arbitration of 1977 concerning the *Delimitation of the Continental Shelf*.⁹¹⁸

However, since the 1990s, the Court has certainly been more inclined to refer more systematically to a relatively diversified pattern of arbitral cases.⁹¹⁹ 318

It is also interesting to note that, in its advisory opinion of 2004 in the *Wall case*, the Court did not hesitate to refer to ‘The constant practice’ of the Human Rights Committee of which it cited several reports.⁹²⁰ And, in *Diallo*, the Court noted that:

judgment of 11 September 1992 in the *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 589–601 (paras. 387–404) (at p. 601 [para. 403], the Chamber expressly notes that it ‘should take the 1917 Judgement into account ... as, in the words of Art. 38 of the Court’s Statute, “a subsidiary means for the determination of rules of law”’); *cf.* also *Navigational and Related Right*, *supra*, fn. 464, ICJ Reports (2009), pp. 213, 235, (para. 41). *Cf.* Reisman, W.M., ‘The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication’, *Rec. des Cours* 258 (1996), pp. 9–394.

⁹¹¹ *Lotus*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 26.

⁹¹² *Chorzów Factory*, *supra*, fn. 307, PCIJ, Series A, No. 17, p. 47. *Cf.* also *Arrest Warrant*, *supra*, fn. 325, ICJ Reports (2002), pp. 3, 31–2 (para. 76).

⁹¹³ *Corfu Channel case*, *supra*, fn. 125, ICJ Reports (1949), pp. 4, 18; and also *Nottebohm*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 21–2.

⁹¹⁴ *Maritime Safety Committee case*, *supra*, fn. 104, ICJ Reports (1960), pp. 150, 169.

⁹¹⁵ *Cf. Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 26 (Award, 1897, *Costa Rica Packet*); *Polish Postal Service in Danzig*, *supra*, fn. 658, PCIJ, Series B, No. 11, p. 30 (PCA, 1902, *Pious Funds of the Californias*).

⁹¹⁶ *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 309 (para. 146) (PCA, 1909, *Grisbadarna*).

⁹¹⁷ Arbitral Award of 14 September 1872, cited, *e.g.*, in *Nottebohm*, *supra*, fn. 141, ICJ Reports (1953), pp. 111, 119; or *Obligation to Arbitrate under the UN Headquarters Agreement case*, *supra*, fn. 306, ICJ Reports (1988), pp. 12, 34 (para. 57).

⁹¹⁸ *Cf. Continental Shelf case* (Tunisia/Libya), *supra*, fn. 92, ICJ Reports (1982), pp. 18, 57 (para. 66) and p. 79 (para. 109); *Gulf of Maine case*, *supra*, fn. 92, ICJ Reports (1984), pp. 246, 293 (para. 92), pp. 302–3 (para. 123) and p. 324 (para. 187); *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 58 (para. 46), pp. 51–52 (para. 51), p. 62 (para. 55) and p. 67 (para. 66); *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (2001), pp. 40, 114–15 (para. 247); *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 432 (para. 270); *Maritime Delimitation in the Black Sea*, *supra*, fn. 92, ICJ Reports (2009), pp. 61, 129 (para. 210).

⁹¹⁹ *Cf. e.g. Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, ICJ Reports (1992), pp. 351, 380 (para. 28) (Award of 1933, *Border between Guatemala and Honduras*), p. 387 (para. 42) (Award of the Swiss Federal Council, 1922, on *Certain Boundary Questions between Colombia and Venezuela*) and pp. 591–2 (para. 391) (PCA, 1910, *North Atlantic Fisheries*); *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 58 (para. 46), pp. 60–1 (para. 51) and pp. 62–3 (para. 56) (Award of 1977, *Anglo-French Continental Shelf*); *Gabčikovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports (1997), pp. 7, 55 (para. 83) (Award of 1946, *Air Service Agreement of 27 March 1946*); *Kasikili/Sedudu Island case*, *supra*, fn. 115, ICJ Reports (1999), pp. 1045, 1060 (para. 20) (1994 award on *Laguna del Desierto*), p. 1064 (para. 30) (Award of 1966, *Palena*), and p. 1066 (para. 33) (Award of 1933, *Border between Guatemala and Honduras*); *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (2001), pp. 40, 70 (para. 100) (Award of 1928, *Island of Palmas*), p. 77 (paras. 112–113) and p. 78 (para. 117) (Award of 1981, *Dubai/Sharjah Border Arbitration*); *Pulau Ligitan case*, *supra*, fn. 501, ICJ Reports (2002), pp. 625, 665 (para. 82) (Award of 1928, *Island of Palmas*), p. 682 (para. 135) (Award of 1966, *Palena*); *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 346 (para. 58) (Award of 1966, *Palena*), p. 405 (para. 205) (Award of 1928, *Island of Palmas*), p. 415 (para. 223) (Awards of 1968, *Rann of Kutch* and 1977, *Beagle Channel*), p. 417 (para. 228) (Award of 1999, *Eritrea/Yemen* [Second Phase]), p. 433 (paras. 272–273) (Award of 1986, *Delimitation of the*

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.⁹²¹

- 319 Moreover, in the *Genocide case*, the Court took two quite distinct positions depending on whether it was dealing with the facts or the law applied by the ICTY. In so doing, the Court seems to have been anxious to affirm a kind of pre-eminence over the other international tribunals at least when the definition and application of the rules applicable at the general level is at stake:

the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.⁹²²

- 320 It is certainly the case that the 'proliferation' of international courts and tribunals⁹²³ has put an end to the long-lasting quasi-monopoly of the World Court' in the matter

Maritime Boundary between Guinea and Guinea-Bissau; *Territorial and Maritime Dispute case* (Nicaragua/Honduras), *supra*, fn. 147, ICJ Reports (2007), pp. 659, 701 (para. 133) (Award of the Swiss Federal Council, 1922, on *Certain Boundary Questions between Colombia and Venezuela*), pp. 701–2 (para. 134), p. 710 (para. 165) and pp. 722–3 (para. 213) (Award of 1933, *Border between Guatemala and Honduras*), p. 723 (para. 214) (Award of 1928, *Island of Palmas*); *Pedra Branca case*, *supra*, fn.768, ICJ Reports (2008), pp. 12, 36–7 (para. 67), pp. 50–51 (para. 121) and p. 97 (para. 280) (Award of 1928, *Island of Palmas*) and p. 80 (para. 222) (Award of 1998, *Eritrea/Yemen [Territorial Sovereignty]*); *Maritime Delimitation in the Black Sea*, *supra*, fn. 92, ICJ Reports (2009), pp. 61, 109–11 (para. 149) (Award of 1999, *Eritrea/Yemen [Second Phase]*), pp. 125–6 (para. 198) (Award of 2006, *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*), p. 129 (para. 210) (Award of 1977, *Anglo-French Continental Shelf*) and (para. 211) (Award of 1986, *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*); *Interim Accord of 13 September 1995*, *supra*, fn. 133, para. 132 (Awards of 1925, *Tacna-Arica question (Chile/Peru)* and 1957, *Lake Lanoux Arbitration*).

⁹²⁰ *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 136, 179 (para. 109).

⁹²¹ *Ahmadou Sadio Diallo*, *supra*, fn. 328, para. 66; in that judgment, the Court also takes due account of the interpretation of the African Charter of Human and Peoples' Rights by the African Commission on Human and Peoples' Rights established by Art. 30 of the said Charter (of which it quoted some case law) and also notes the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, of similar provisions in other regional Human Rights Conventions (paras. 66–68); *Interim Accord of 13 September 1995*, *supra*, fn. 133, paras. 109 (referring to the ECJ) and 132 (referring to several *ad hoc* arbitral tribunals).

⁹²² (*Bosnian Genocide case*, *supra*, fn. 93, ICJ Reports (2007), pp. 43, 209 (para. 403). As noted by Dupuy, 'the *Genocide case* appears as a noticeable exception to past practice of the Court' not to openly contradict other international courts and tribunals (Dupuy, P.-M., 'Competition among International Tribunals and the Authority of the International Court of Justice', in Fastenrath, *supra*, fn. 564, p. 869); *cf.* also Treves, T. 'Cross-fertilization between Different International Courts and Tribunals: the Mangouras Case' in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (2011), p. 1793.

⁹²³ Among the very abundant literature on the question, *cf.* Alford, R.P., 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance', *ASIL Proc.* 94 (2000), pp. 160–5; Aust, A. 'Peaceful Settlement of Disputes: a Proliferation Problem?', in *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), pp. 131–41; Bedjaoui, M., 'La multiplication des tribunaux internationaux ou La bonne fortune du droit des gens', in *La juridictionnalisation du droit international. Colloque de Lille* (Société française de droit international, ed., 2003), pp. 529–45; Boisson de Chazournes, L., 'Multiplication des instances de règlement des différends: vers la promotion de la règle de

of international judicial law-making. However, the ‘serious risks of conflicting jurisprudence’, sometimes denounced,⁹²⁴ have not materialized in spite of some limited divergences⁹²⁵ and the deference shown by specialized courts towards the ICJ jurisprudence in general international law limits these risks. Moreover:

droit’, *Forum du droit International* (1998), pp. 14–15; Brown, C., *A Common Law of International Adjudication* (2007), p. 303; Buergenthal, T., ‘Proliferation of International Courts and Tribunals: Is It Good or Is It Bad?’, *Leiden JIL* (2001), pp. 267–75; Charney, I.J., ‘Is International Law Threatened by Multiple International Tribunals?’, *Rec. des cours* 271 (1998), pp. 101–382; Delas, O./Leuprecht, P./Crépeau, T.F. (eds.), *Les juridictions internationales, complémentarité ou concurrence?* (2005), p. 208; Dupuy, P.-M., ‘Multiplication des juridictions internationales et dangers de fragmentation de l’ordre juridique international’, *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1999), pp. 259–81; ‘Competition among International Tribunals and the Authority of the International Court of Justice’, in Fastenrath, *supra*, fn. 564, pp. 862–76; Gattini, A., ‘Un regard procédural sur la fragmentation du droit international’, *RGDIP* 110 (2006), pp. 303–36; Higgins, R., ‘A Babel of Judicial Voices?: Ruminations from the Bench’, *ICLQ* 55 (2006), pp. 791–804; Karagiannis, S., ‘La multiplication des juridictions internationales: un système anarchique?’, in *Société française de droit international*, pp. 7–161; Kawano, M., ‘L’affaire du thon à nageoire bleue et les chevauchements de juridictions internationales’, *AFDI* 49 (2004), pp. 516–41; Oellers-Frahm, K., ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Solutions’, *Max Planck UNYB* (2001), pp. 67–104; Petersmann, E.-U., ‘Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade’, *U. Penn. J. Int’l Eco. L.* (2006), pp. 273–366; Reed, L., ‘Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?’, *ASIL Proc.* 96 (2002), pp. 219–31; Shany, S.Y., *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 348; Symposium, ‘The Proliferation of International Tribunals: Piecing Together the Puzzle’, *NYU JIL & Pol.* (1999), pp. 679–993; Schwebel, S.M., ‘The Proliferation of International Tribunals: Threat or Promise?’ in *Judicial Review in International Perspective* (Andenas, M., ed., 2000), pp. 3–8; Slaughter, A.M., ‘A Global Community of Courts’, *Harv. ILJ* (2003), pp. 191–219; Spelliscy, S., ‘The Proliferation of International Tribunals: A Chink in the Armor’, *Columb. J. of Transnat’l L.* 40 (2001), pp. 143–75; Stephens, T., ‘Multiple International Courts and the “Fragmentation” of International Environmental Law’, *Australian YIL* 25 (2006), pp. 227–71; Treves, T., ‘Fragmentation of International Law: the Judicial Perspective’, *Comun. e Stud.* (2007), pp. 821–75; Treves, T., ‘Le Tribunal international du droit de la mer et la multiplication des juridictions internationales’, *RDI* (2000), pp. 726–46; Treves, T., ‘Judicial Lawmaking in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?’ in *Developments of International Law in Treaty Making*, (Wolfrüm, R./Röben, V., eds. 2005), pp. 587–620; Treves (2011), *supra*, fn. 922, pp. 1787–96.

⁹²⁴ Gilbert Guillaume for instance considers that: ‘First, [the proliferation of tribunals] increases the risk of overlapping jurisdiction between competing courts’, thus ‘opening the way for forum shopping’; second, it increases ‘the risk of conflicting decisions when a case may be brought before two courts simultaneously ... thus undermining the unity of international law, or even its certainty’, and concludes that: ‘the growing specialization of international courts involves the serious risk of losing sight of the global perspective’ (Guillaume, G., ‘Editorial Comments on the Proliferation of International Courts—Advantages and Risks of Proliferation: A Blueprint for Action’, *JICJ* 2 [2004], pp. 301–2). Two other former Presidents of the World Court do not share these views. Thus President Bedjaoui considers that ‘la multiplication des instances juridictionnelles doit être regardée comme autant d’occasions fécondes de faire reculer le domaine fauve de la jungle internationale’ (‘Conclusions générales—La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens’, in *La juridictionnalisation du droit international*, *supra*, fn. 923, pp. 534–5). President Rosalyn Higgins seems largely to share these views as shown, e.g., by her speech to the UN General Assembly on 26 October 2006 where she affirmed that the concerns concerning the ‘growth in the number of new courts and tribunals ... have not proved significant’ and, she added: ‘The authoritative nature of ICJ judgments is widely acknowledged. It has been gratifying for the International Court to see that these newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure. Just in the past five years, the judgments and advisory opinions of the ICJ have been expressly cited with approval’ by a great number of international courts and arbitral bodies (26 October 2006, Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations, available at <<http://www.icj-cij.org/court/index.php?pr=1874&pt=3&p1=1&p2=3&p3=1>>; cf. also: 29 September 2006, Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the Tenth Anniversary of the International Tribunal for the law of the Sea, available at <<http://www.icj-cij.org/court/index.php?pr=1880&pt=3&p1=1&p2=3&p3=1>>).

⁹²⁵ Cf. *supra*, MN 318.

- on the one hand the few conflicts that have occurred can be explained by ‘fundamental difference[s] in the role and purpose of the respective tribunals’⁹²⁶ and therefore be justified on the ground of *lex specialis*;
- on the other hand, the ‘judges’ dialogue’⁹²⁷ as appearing, *inter alia*, in the more careful attention given to the case law of other international courts and tribunals (including by the ICJ) should contribute to a fairly unified application and development of international law under the global ‘leadership’ of the ICJ.⁹²⁸

All in all, there is little doubt that the growing number of international courts and tribunals positively contributes to the firmer establishment and development of international law than sombre predictions on the ‘fragmentation’ of international law might lead us to believe.

- 321 It has sometimes been asked whether judicial decisions of domestic courts were to be included among the jurisprudence as envisaged by Art. 38, para. 1 (d). While eminent commentators sometimes answer in the affirmative,⁹²⁹ the present writer tends to share the view that these decisions should better be treated as elements of State practice in the customary process⁹³⁰ or, maybe, as being at the crossroads between evidence of practice and *opinio juris*.

2. Law-Making by the International Court.⁹³¹

- 322 While the original formula of Baron Descamps, the President of the 1920 Committee of Jurists, defining ‘international jurisprudence’ ‘as a means for the application and development of law’⁹³² had been considerably amended with the result that any allusion to the ‘development of law’ had disappeared from the final text of Art. 38, para. 4 (now para. 1 (d)) there is no doubt that, in reality, the international jurisprudence and, primarily, the case law of the Court has been a powerful tool of consolidation and of evolution of international law.

- 323 As rightly pointed out by Sir Gerald Fitzmaurice:

There are broadly two main possible approaches to the task of a judge ... There is the approach which conceives it to be the primary, if not the sole duty of a judge to decide the case in hand,

⁹²⁶ ECHR, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 February 1995, Case No. 15318/89, para. 85.

⁹²⁷ Cf. e.g. Burgorgue-Larsen, L., ‘De l’internationalisation du dialogue des juges. Missive doctrinale à l’attention de Bruno Genevois’, in *Le dialogue des juges. Mélanges en l’honneur du président Bruno Genevois*, 2009, pp. 95–130; Forteau, M., ‘La Cour internationale de Justice et les systèmes régionaux. Plaidoyer pour le pluralisme désordonné’, in *Les droits fondamentaux: charnières entre ordres et systèmes juridiques* (Dubout, E./Touzé, S., eds., 2010), pp. 37–62; Hennebel, L., ‘Les références croisées entre les juridictions internationales des droits de l’homme’, in *Le dialogue des juges: Colloque Les Cahiers de l’Institut d’études sur la justice* (Allard, J./Frydman, B./Hennebel L., eds., 2007), pp. 31–76; Treves (2005), *supra*, fn. 923, pp. 609–18.

⁹²⁸ Cf. *infra*, MN 335.

⁹²⁹ Cf. e.g. Jennings/Watts, *supra*, fn. 164, pp. 41–2; or Thirlway, ‘Law and Procedure, Part Two’ *BYIL* 61 (1990), pp. 1, 128.

⁹³⁰ Mendelson (1996), pp. 63, 81.

⁹³¹ On law-making by the ICJ, Cf. e.g. Charney, J.I., ‘International Lawmaking—Art. 38 of the ICJ Statute Reconsidered’, in *New Trends in International Lawmaking—International ‘Legislation’ in the Public Interest* (Delbrück, J., ed. 1997), pp. 171–91; Guillaume, G., ‘Transformations du droit international et jurisprudence de la Cour internationale de Justice’, in *Les nouveaux aspects du droit international. Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis, Colloque des 14, 15 et 16 avril 1994* (Ben Achour, R./Laghmani, S., eds., 1994), pp. 175–92; Pellet, in *Looking to the Future, supra*, fn. 464, pp. 1066–74.

⁹³² Cf. *supra*, MN 21.

with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.⁹³³

Even though the opposition between these views sometimes turns into a religious war,⁹³⁴ the Court as a body, usually stays midway from both extremes.⁹³⁵ It performs 'the classic functions of a court in determining and clarifying what it conceived to be the existing law. In doing so, however, it threw fresh light on the considerations and the principles on which the law was based in a manner to suggest the path for future development ...'.⁹³⁶ For its part, 'Judicial activism is the luxury of the individual Member of the Court'⁹³⁷ and some judges have, in effect, largely resorted to it by multiplying lengthy personal opinions in which they expose their views of what the law is or ... should be.⁹³⁸

After receiving the Draft Statute of the Permanent Court in 1920, Balfour declared that 'the decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law'.⁹³⁹ Although limited by the scarcity of cases brought to the Court, this prediction has, without any doubt, become reality, at least in certain fields of general international law on the development of which the Court has had an important, sometimes decisive, influence.

In conformity with the clear intentions of its founders,⁹⁴⁰ the Court has always denied that it could act as a legislator:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the

⁹³³Fitzmaurice, G., 'Hersch Lauterpacht—The Scholar as Judge', *BYIL* 37 (1961), pp. 14–15 (reprinted in *The Law and Procedure*, pp. 647–8). For two remarkable presentations of these questions, see Thirlway, H., 'Judicial Activism and the International Court of Justice', in *Liber Amicorum Judge Shigeru Oda* (2002), pp. 75–105; or Cahin, G., 'La motivation des décisions de la Cour internationale de Justice' in *La motivation des décisions des juridictions internationales* (Ruiz Fabri, H./Sorel, J.-M., eds., 2008), pp. 9–90 (with comments by Guillaume, G.), pp. 91–5.

⁹³⁴For very strict pleas in favour of 'judicial economy', *Cf. e.g.* Sir Gerald Fitzmaurice, Sep. Op., *Northern Cameroons*, *supra*, fn. 104, ICJ Reports (1963), pp. 98–9; Guillaume (2000), *supra*, fn. 882, p. 686; or, in English *supra*, fn. 882, p. 5; Thirlway (2002), *supra*, fn. 933, pp. 96–8; or for more flexible approaches: Boyle/Chinkin, *supra*, fn. 251, pp. 266–9; Higgins, R., *Problems and Process: International Law and How We Use It* (1994), p. 202; Jennings, R., 'The Role of the International Court of Justice', *BYIL* 68 (1997), p. 41; *Barcelona Traction*, *supra*, fn. 296, Sep. Op. Jessup, ICJ Reports (1970), p. 161; Kooijmans, P., 'The ICJ in The 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', *ICLQ* 56 (2007), pp. 741–54; Lauterpacht (1958), *supra*, fn. 776, p. 37; Pellet (2007), *supra*, fn. 250, pp. 43–6, or Pellet, in *Arsanjani/et al.*, *supra*, fn. 464, pp. 1066–74.

⁹³⁵Probably guided by influential judges, the Court has sometimes proclaimed its commitment to judicial economy, *Cf. e.g. Continental Shelf case* (Libya/Malta), *supra*, fn. 92, Application to Intervene, ICJ Reports (1984), pp. 3, 18 (para. 28); or *Territorial Dispute* (Libya/Chad), *supra*, fn. 422, ICJ Reports (1994), pp. 6, 40, (para. 76).

⁹³⁶Waldock, H., 'The International Court of Justice as Seen from the Bar and Bench', *BYIL* 54 (1983), p. 4.

⁹³⁷Thirlway (2002), *supra*, fn. 933, p. 104.

⁹³⁸Some names come very naturally to the mind in this respect: Alvarez during the very first years of the ICJ, or more recently, Judges Oda, Weeramantry or Cançado Trindade.

⁹³⁹League of Nations, *Documents*, *supra*, fn. 54, p. 38. *Cf.* Shahabuddeen, p. 78.

⁹⁴⁰*Cf. supra, e.g.* MN 27 and 250.

Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.⁹⁴¹

327 However, it is precisely when specifying the scope of the applicable law that the Court has an opportunity to play a part in the shaping—or reshaping—of international law.⁹⁴² Indeed, it must decide the disputes submitted to it, but the often uncertain content or scope of the applicable law leaves it wide latitude in its determination—less when it only has to apply and interpret a treaty,⁹⁴³ more when, in the absence of treaty law, it must find evidence of a customary rule⁹⁴⁴ or of general principles of law.⁹⁴⁵ In both cases, it plays a fundamental role in legitimizing the rules it enunciates, defines and applies⁹⁴⁶ and, quite often, the Court's pronouncement on the existence (and content) of a particular rule of customary law is seen as the final proof for it.⁹⁴⁷ The interpretation the Court gave of Art. 41 of its Statute when it considered (rather surprisingly) that the provisional measures it indicates are binding,⁹⁴⁸ is a remarkable example of this legitimizing role of the positions on the law taken by the ICJ: this interpretation of the Court's own Statute generated 'a jurisprudential evolution that also affected other jurisdictions that have sometimes [endorsed] the decision of the Courts while governing texts were quite different'.⁹⁴⁹

⁹⁴¹ *Nuclear Weapons case*, *supra*, fn. 107, ICJ Reports (1996), pp. 226, 236 (para. 18). In the same vein, the ICJ declared that 'It is the duty of the Court to interpret the Treaties, not to revise them' (*Interpretation of Peace Treaties*, *supra*, fn. 108, Second Phase, ICJ Reports [1950], pp. 221, 229 also quoted in *Rights of US Nationals in Morocco case*, *supra*, fn. 141, ICJ Reports [1952], pp. 176, 198 and in *South West Africa cases*, *supra*, fn. 115, ICJ Reports [1966], pp. 6, 48 [para. 91]). *Cf.* also *Icelandic Fisheries cases*, *supra*, fn. 129, ICJ Reports (1974), pp. 3, 23–4 (para. 53), and pp. 175, 192 (para. 45); or *Armed Activities case (DRC/Uganda)*, *supra*, fn. 132, ICJ Reports (2005), pp. 168, 190 (para. 26). *Cf.* also the firm statement in Sep. Op. Guillaume: 'I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator' (*ibid.*, p. 293 [para. 14]); and further *supra*, MN 65 and 147.

⁹⁴² As noted by Judge Guillaume, 'si la Cour, dans le dispositif de ses jugements, ne peut statuer que sur les conclusions des parties, elle demeure libre de développer au soutien de ce dispositif une motivation plus ou moins détaillée' ([2000], *supra*, fn. 882, pp. 175, 176). In spite of appearances, a brief reasoning is not inevitably incompatible with the pronouncements of important *dicta*, which exercise a deep influence on the evolution of international law—*cf.* *e.g.* the *dictum* of the Court with respect to the consequences of obligations *erga omnes* in *Barcelona Traction* (*supra*, fn. 296, ICJ Reports [1970], pp. 3, 32 [para. 33]).

⁹⁴³ *Cf. supra*, MN 194.

⁹⁴⁴ *Cf. supra*, MN 222 and 235–242.

⁹⁴⁵ *Cf. supra*, MN 265–269.

⁹⁴⁶ *Cf. e.g.* Franck (1990), *supra*, fn. 166, pp. 60–1.

⁹⁴⁷ *Cf.*, Alvarez-Jiménez, *supra*, fn. 571, pp. 683–5. For such an example, *cf.* for instance ECJ, Grand Chamber, Judgment of 21 December 2011, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, case C-366/10 (para. 104); or *Herbert Weber and Universal Ogden Services Ltd*, 27 February 2002, ECJ Reports (2002), p. I-2043 (para. 34), both cases relating to States' rights in maritime areas under their jurisdiction or on the high seas. According to Judge Guillaume, regarding *ius cogens*, 'it is interesting to note that from awards to judgments, arbitrators and judges have essentially always relied on the jurisdictional precedents that they enumerate, without even questioning the opinion of the States as to the preemptory nature, or even the customary nature of the applied norms' ([2011], *supra*, fn. 882, p. 23).

⁹⁴⁸ *LaGrand*, *supra*, fn. 115, ICJ Reports (2001), pp. 466, 506 (para. 109).

⁹⁴⁹ Guillaume (2011), *supra*, fn. 882, p. 22. *Cf.* ECHR, *Mamatkulov v. Turkey*, Judgment of 4 February 2005, Case No. 46827/99; 46951/99, paras. 103–107; ICSID, *Maffezini v. Spain*, Case No. ARB/97/17, Procedural Order no. 2, 28 October 1999, 16 *ICSID Rev.-FILJ* 207 (2001), para. 9; ICSID, *Victor Pey Casado v. Chile*, Case No. ARB/98/2, Procedural Order, 25 September 2001, 6 *ICSID Reports* 375 (2004), paras. 17–26; ICSID, *Tokio Tokelés v. Ukraine*, Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003, para. 4; ICSID, *Occidental v. Ecuador*, Case No. ARB/06/11, Procedural Order, 17 August 2007, para. 58.

As has been observed, ‘The malleability of the law in the hands of the Court has converted it into a powerful instrument for progress⁹⁵⁰—or, sometimes, of regress.⁹⁵¹ In that respect, Paulsson is right to consider that instead of viewing jurisprudence as ‘a poor cousin’ of the three main sources: 328

it is perhaps more accurate to recognise its in-built limitations are a tribute to its potential potency. Treaties do not affect non-signatories, and ‘customs’ and ‘general principles’ evolve with glacial speed and, in most cases, at a level of considerable generality. The first three paragraphs of Art. 38(1) are therefore relatively unthreatening. Precedents, on the other hand, may provide immediate and bold answers to highly specific questions. That is why, no doubt, they are regarded with circumspection.⁹⁵²

The law of the delimitation of maritime spaces is a fascinating example of the use 329 by the Court of this *de facto* legislative power.⁹⁵³ For the first time, the Court has set aside the principle of equidistance (combined with special circumstances), which was the obvious candidate as the leading principle in this matter⁹⁵⁴ and was at the origin of the adoption of the very vague guideline according to which ‘the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as maybe appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at’,⁹⁵⁵ a solution which was endorsed in Arts. 74 and 83 of the United Nations Convention on the Law of the Sea. However, this ‘rule’ proved unreasonably uncertain and, progressively, the Court defined a method which now makes maritime delimitation more predictable. The solution adopted in 1969 was thus abandoned and the law of maritime delimitation was unified and specified, by ‘successive strokes, without [the Court explicitly] recognizing its original mistake.’⁹⁵⁶

At the end of 40 years of evolution,⁹⁵⁷ the method of delimitation of the continental 330 shelf and the EEZ is now firmly settled. It has been clearly and authoritatively stated by the ICJ in the unanimous judgment it gave in 2009:

When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Judgment, I.C.J. Reports 1985*, p. 46, para. 60), have in recent decades been

⁹⁵⁰ Rosenne, *Law and Practice*, vol. III, p. 1545.

⁹⁵¹ When the law is rapidly evolving, it is certainly advisable for the Court not to block the evolution by taking abusive conservative positions—as it did in the *Arrest Warrant case* with respect to diplomatic immunities. However, in that same case, ‘the Court has shown wisdom in refraining from taking a definitive stance [with regard to another delicate issue also at stake, that of universal jurisdiction] as the law is not sufficiently developed’ (*supra*, fn. 325, Diss. Op. Oda, ICJ Reports [2002], pp. 46, 51 [para. 12]).

⁹⁵² Paulsson, *supra*, fn. 192, p. 880.

⁹⁵³ For a similar opinion, *cf.* Kolb (2006), *supra*, fn. 168, pp. 10–11. *Cf.* also the decisive influence exercised by the jurisprudence of the Court with respect to the fixation of straight baselines (*cf.* in particular, *Fisheries case*, *supra*, fn. 234, ICJ Reports [1951], pp. 116 *et seq.*).

⁹⁵⁴ *Cf.* in particular, *North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 22–3 (para. 23) and p. 24 (para. 25).

⁹⁵⁵ *Ibid.*, p. 49 (para. 90).

⁹⁵⁶ Guillaume (2011), *supra*, fn. 882, p. 12.

⁹⁵⁷ *Cf. e.g.* *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 60–1 (para. 51); *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (1994), pp. 40, 110–11 (paras. 227–231); *Territorial and Maritime Dispute case* (Nicaragua/Honduras), *supra*, fn. 147, ICJ Reports (2007), pp. 659, 741 (para. 272); *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 441 (para. 288); *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the*

specified with precision. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 745, para. 281).⁹⁵⁸

331 It can be accepted that ‘the Court is moving in the direction of the mandate that the UN gave to the ILC’⁹⁵⁹ in that the ICJ is participating to the ‘progressive development’ of international law, which confirms the difficulty met by the ILC in making a clear-cut distinction between the two parts of its mandate.⁹⁶⁰ This is why it can also be sustained that the Court and, to a lesser degree, the other international tribunals, ‘sont les législateurs ou, en tout cas, les “adaptateurs de droit” les plus efficaces de l’ordre juridique international.’⁹⁶¹

332 The present commentary is not the appropriate place to elaborate on this aspect.⁹⁶² However, some examples of the deep influence that the Court has exercised over the evolution of international law can be given:

- by way of striking formulas going right to the point, the Permanent Court has greatly contributed to clarifying the crucial principles of the law of State responsibility;⁹⁶³
- the 1949 advisory opinion of the present Court on *Reparation for Injuries Suffered in the Service of the United Nations*⁹⁶⁴ has put a final (happy) end to the erroneous notion of international law conceived as being purely inter-States;
- the remarkable 1951 advisory opinion on *Reservations to the Genocide Convention*⁹⁶⁵ has led, in spite of the reluctance of the ILC, to a re-appreciation of the rules applicable to reservations to treaties, the consequences of which are not yet completely stabilized

exclusive economic zone and the continental shelf between them, vol. XXVII, pp. 147, 230 (para. 306); *Guyana and Surinam*, ILM 47 (2008), pp. 212–13 (paras. 335 and 342).

⁹⁵⁸ *Maritime Delimitation in the Black Sea*, *supra*, fn. 92, ICJ Reports (2009), pp. 61, 101 (paras. 115–116).

⁹⁵⁹ Alvarez-Jiménez, *supra*, fn. 566, p. 709.

⁹⁶⁰ Art. 15 of the ILC Statute provides that: ‘In the following Articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.’ (GA Res. 174 (II), 21 November 1947). But the distinction is less clear-cut than this provision suggests: cf. Lauterpacht, H., ‘Codification and Development in International Law’, *AJIL* 49 (1) (1955), pp. 16–43; Mahiou, A., *Rapport général—Les objectifs de la codification*, in *La codification du droit international. Colloque d’Aix-en-Provence* (Société Française de droit international, ed., 1999), pp. 11, 17–18; Pellet, A., ‘Responding to New Needs through Codification and Progressive Development’ (Keynote Address), in *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in International Legislative Process* (Gowlland-Debbas, V., ed., 2000), pp. 13–23.

⁹⁶¹ Pellet (2007), *supra*, fn. 250, p. 21. Cf. also Pellet (2011), *supra*, fn. 640, pp. 1074–83.

⁹⁶² Cf. also Pellet (2011), *supra*, fn. 640, pp. 1066–74.

⁹⁶³ Cf. e.g. *Mavrommatis case*: ‘By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.’ (*supra*, fn. 239, PCIJ, Series A, No. 2, p. 12); *Chorzów Factory*: ‘it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation’ (*supra*, fn. 307, PCIJ, Series A, No. 17, p. 29); and further, *ibid.*, p. 47: ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’.

⁹⁶⁴ *Reparation for Injuries case*, *supra*, fn. 206, ICJ Reports (1949), pp. 174 *et seq.*

⁹⁶⁵ (1951) *Genocide case*, *supra*, fn. 365, ICJ Reports (1951), p. 15 *et seq.*

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today; and

- as has been written, the pronouncement of the Court on the customary legal status of the state of necessity in *Gabčíkovo-Nagymaros*,⁹⁶⁶ ‘has prompted one of the most complex and still not fully resolved issues in foreign investment law during the last decade’;⁹⁶⁷ but generally speaking, the arbitral tribunals content themselves with invoking the Court’s Judgment on this point.⁹⁶⁸

Moreover, particularly during the last decade, ‘the Court [has relied] on its own past decisions or on others’ as part of the justification for the declaration of existence or absence of a customary rule⁹⁶⁹ Thus, in the *Wall* opinion, the Court largely based itself on its previous jurisprudence to declare the existence of the right to self-determination of the people within non-self governing territories⁹⁷⁰ or the customary nature of the rules included in the Fourth Hague Convention of 1907.⁹⁷¹ It is also ‘in accord with precedents’⁹⁷² that the Court has affirmed the existence of the basic rules it applied in the matter of sea delimitation.⁹⁷³ On the contrary, in the *Land and Maritime Boundary case*, the Court, basing itself on its own case law and several arbitral awards, came to the conclusion that ‘overall, it follows from the jurisprudence that ... oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line ...’⁹⁷⁴ Similarly, the Court, referring to its findings in the *Maritime Delimitation and Territorial Questions case*,⁹⁷⁵ noted in the case concerning *Pedra Branca*, that ‘it is not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory’.⁹⁷⁶

Sometimes the Court’s formulas have been included in formal treaties, as is the case, e.g., of the criterion of the ‘object and purpose’ with respect to the validity of reservations to treaties⁹⁷⁷ or—much less fortunately—of the ‘equitable principle’ applicable to

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⁹⁶⁶ Cf. *Gabčíkovo-Nagymaros case*, *supra*, fn. 143, ICJ Reports 1997, pp. 7, 40 (para. 51).

⁹⁶⁷ Alvarez-Jiménez, *supra*, fn. 566, p. 684.

⁹⁶⁸ Cf. e.g. ICSID, 12 May 2005, *GMS Gas Transmission Co. v. Argentina*, case no. ARB/01/8, (para. 315); 22 May 2007, *Enron Corporation and Ponderosa Assets v. Argentina*, case no. ARB/01/3, IIC 292 (paras. 265–268 and 275–277); 28 September 2007, *Sempra Energy International v. The Argentine Republic*, case no. ARB/02/16 (paras. 344 and 354), available at <<http://italaw.com/documents/SempraAward.pdf>>; or 5 September 2008, *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (paras. 165–166), available at <<http://italaw.com/documents/ContinentalCasualtyAward.pdf>>. Cf. Reinisch, A., ‘Necessity in Investment Arbitration’, *NYIL* 41 (2010) pp. 137–58. The ITLOS too invoked the Court’s position on the state of necessity in the *M/V Saiga (no. 2)* case (St Vincent and the Grenadines v. Guinea), 1 July 1999, paras. 133–134.

⁹⁶⁹ Alvarez-Jiménez, *supra*, fn. 566, p. 698.

⁹⁷⁰ *Wall case*, *supra*, fn. 104, ICJ Reports (2004), pp. 136, 172 (para. 88).

⁹⁷¹ *Ibid.*, pp. 136, 172 (para. 89).

⁹⁷² *Jan Mayen case*, *supra*, fn. 92, ICJ Reports (1993), pp. 38, 61 (para. 51). Cf. also *Kosovo Declaration of Independence*, *supra*, fn. 244, para. 30; *Obligation to Prosecute or Extradite case*, *supra*, fn. 239, ICJ Reports (2009), pp. 139, 148 (para. 46); *CERD case*, *supra*, fn. 144, para. 160.

⁹⁷³ Cf. *supra*, MN 329.

⁹⁷⁴ *Land and Maritime Boundary case*, *supra*, fn. 92, ICJ Reports (2002), pp. 303, 447–8 (para. 304).

⁹⁷⁵ *Maritime Delimitation and Territorial Questions case*, *supra*, fn. 207, ICJ Reports (2001), pp. 40, 101, para. 204.

⁹⁷⁶ *Pedra Branca case*, *supra*, fn. 768, ICJ Reports (2008), pp. 12, 100–1 (paras. 295–296). Cf. also *Territorial and Maritime Dispute case* (Nicaragua/Honduras), *supra*, fn. 147, ICJ Reports (2007), pp. 659, 703 (para. 131).

⁹⁷⁷ Directly copied into Art. 19 (c) VCLT from the 1951 advisory opinion, ICJ Reports (1951), pp. 15 *et seq.*

the delimitation of continental shelf or exclusive economic zones.⁹⁷⁸ In other cases, treaty law has, so to speak, disavowed the Court's position as exemplified by the 1952 Brussels Convention for the unification of certain rules relating to civil jurisdiction in matters of collision, which takes an approach that is diametrically opposed to the decision of the Permanent Court in the *Lotus case*.⁹⁷⁹

- 334 This last example shows that the Court has not had the last word in the adaptation, formulation and, probably, on occasion, elaboration (or 'invention') of the rules of international law if and when States agree on other solutions. It remains that, in the absence of a world legislator, there is no exaggeration in thinking that the Court, limited as it is by the hazards of its seising, is one of the most efficient, if not the most efficient, vehicle for adaptation of general international law norms to the changing conditions of international relations.⁹⁸⁰

II. 'The Teachings of the Most Highly Qualified Publicists of the Various Nations'

- 335 Not mentioned in the initial proposal of Baron Descamps, which is at the origin of Art. 38,⁹⁸¹ the 'opinions of writers' were introduced in the works of the 1920 Committee of Jurists by the Root-Phillimore draft.⁹⁸² The description of the teachings of publicists (including when 'highly qualified') as a 'subsidiary means for the determination of rules of law', certainly describes their role more accurately than when the formula is applied to the 'judicial decisions'.⁹⁸³
- 336 If the influence of the doctrinal views on the Court's decisions were to be evaluated according to the number of citations in the judgments and advisory opinions, it would be very proximate to nil: with the exception of one formal reference to the

⁹⁷⁸ Transposed from the 1969 judgment (*North Sea Continental Shelf cases*, *supra*, fn. 115, ICJ Reports [1969], pp. 3 *et seq.*) into Arts. 74, para. 1, and 83, para. 1 UNCLoS; *cf. supra*, fn. 92.

⁹⁷⁹ Contrast PCIJ, Series A, No. 10, and UNTS 493, pp. 233 *et seq.*

⁹⁸⁰ However, it can happen that, far from being a vehicle for progress of international law, the Court slows down a promising evolution or puts to an end a trend not yet crystallized. In the present writer's view, the *Lotus case* (with the absolute notion of sovereignty it conveyed; *cf. supra*, fn. 489 and MN 226), the 1969 Judgment in the *North Sea Continental Shelf cases*, *supra*, fn. 115 (which 'invented' the far too subjective 'equitable principle' for delimitation of maritime areas; *cf. supra*, fns. 395 and 396), and the 2002 Judgment in the *Arrest Warrant case* (which brutally stopped a trend, not yet stabilized, towards the end of impunity for the most heinous crimes committed by those in powers—without any legal necessity since other grounds could have led to the same decision), are among those unfortunate examples. As any legislator, the Court is open to criticism...

⁹⁸¹ *Cf. supra*, MN 21.

⁹⁸² *Cf. supra*, MN 31. At the request of Baron Descamps, it was envisaged to specify that their opinions were to be 'concording' (Procès-Verbaux, *supra*, fn. 16, p. 331), but, as was wisely noted by some members, concurrence among lawyers is not that frequent—a remark which gave rise to the actual formula after a discussion between Descamps, Lapradelle and Politis (*ibid.*, p. 337).

⁹⁸³ The literature on doctrine in international law is inversely proportional to the use made of it in the Court's decisions—a means for scholars to take their revenge: they speak for themselves since the judges do not speak of them! *Cf. e.g.* Cheng, B. (ed.), *International Law: Teaching and Practice* (1982); François, J.P.A., 'L'influence des publicistes sur le développement du droit international', *Mélanges en l'honneur de G. Gidel* (1961), pp. 275–81; Lachs, M., 'Teachings and Teaching of International Law', *Rec. des Cours* 151 (1976-II), pp. 151–252; Oraison, A., 'Réflexions sur la "doctrine des publicistes les plus qualifiés des différentes nations". Flux et reflux des forces doctrinales académiques et finalisées', *RBDI* 24 (1991), pp. 507–80; Schwarzenberger, G., 'The Province of the Doctrine of International Law', *Current Legal Problems* (1956), pp. 235–65; Schwebel, S.M., 'The Inter-active Influence of the International Court of Justice and the International Law Commission', in Barea, *supra*, fn. 564, pp. 479–505.

positions of ‘the successive editors of Oppenheim’s *International Law*, from the first edition of Oppenheim himself (1905) to the eighth edition by Hersch Lauterpacht (1955)’ and of ‘G. Gidel, *Le droit international de la mer* (1934), Vol. 3, pp. 626–627’ in the 1992 Chamber’s Judgment in *Land, Island and Maritime Frontier Dispute*,⁹⁸⁴ the Court seems to have only referred (and rarely) to ‘the teachings of legal authorities’,⁹⁸⁵ ‘legal doctrine’,⁹⁸⁶ ‘the opinions of writers’⁹⁸⁷ or ‘legal thinking’⁹⁸⁸ in general. In the *Lotus* case, the Permanent Court referred to the ‘teachings of publicists’ leaving expressly apart ‘the question as to what their value may be from the point of view of establishing the existence of a rule of customary law’.⁹⁸⁹

It is not illogical that the weight of the legal doctrine, so eminently influential in laying the foundations of international law, decreases with the growth of international judicial activity, the development of the case law of the Court and the new means to gain knowledge of State practice.⁹⁹⁰ However, the scarce avowed use of the ‘teachings of publicists’ in the Court’s case law probably does not accurately reflect the influence these ‘teachings’ still have. A sign of this is given by the fairly abundant references to the opinions of writers in the opinions of the individual judges:⁹⁹¹ this suggests that these views have probably been discussed during the deliberation.⁹⁹²

Be this as it may, there is no doubt that the practice of the Court not to refer expressly to particular authors is wise and appropriate. The intrinsic scientific value and reliability of the doctrine is extremely variable, probably as much as is the exploitability of the works of scholars who, quite often, take delight in abstract discussions which can only be of little help in the adjudicating process. International law is a ‘small world’ not exempt from jealousy and envy and the Court is certainly well-advised not to distribute good or bad marks. Moreover, one must admit that, as unfortunate as it is, the main doctrinal ‘production’ still comes from the North and more particularly from a handful of countries where international law has gained a rather high degree of sophistication; too much emphasis on the ‘teachings of publicists’ by the Court would unavoidably throw light on this unfortunate situation while, at the same time, showing that ‘the different nations’, in principle required by the text of Art. 38, para. 1 (d), are not so ‘different’.

⁹⁸⁴ ICJ Reports (1992), pp. 351, 593 (para. 394). It deserves to be noted that the Chamber took care to cite a book in English and one in French ... (together with a study of the UN Secretariat).

⁹⁸⁵ In which case they were placed on the same footing as ‘the jurisprudence of the principal countries’: cf. *Certain German Interests*, *supra*, fn. 125, Preliminary Objections, PCIJ, Series A, No. 6, p. 20 (concerning litispence). In the advisory opinion on *Jaworzina*, the French authoritative text ‘doctrine constante’ was translated into English by ‘established principle’! (cf. *supra*, fn. 275, PCIJ, Series, B, No. 8, p. 37).

⁹⁸⁶ *Customs Régime between Germany and Austria*, *supra*, fn. 480, PCIJ, Series A/B, No. 41, p. 45 (definition of ‘independence of States’).

⁹⁸⁷ *Nottebohm case*, *supra*, fn. 141, ICJ Reports (1955), pp. 4, 23.

⁹⁸⁸ *North Sea Continental Shelf case*, *supra*, fn. 115, ICJ Reports (1969), pp. 3, 35 (para. 55).

⁹⁸⁹ *Lotus case*, *supra*, fn. 128, PCIJ, Series A, No. 10, p. 26.

⁹⁹⁰ For similar views cf. e.g. Jennings/Watts, *supra*, fn. 164, p. 42; or Roucouas, *supra*, fn. 881, pp. 259–86, p. 271.

⁹⁹¹ For a striking example (noted by Oraison, *supra*, fn. 468, pp. 223–84, pp. 233–4) cf. Judge Shahabudden’s extremely well-argued dissenting opinion appended to Court’s order of 28 February 1990 in the *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 115, Application for Permission to Intervene, ICJ Reports (1990), pp. 18–62.

⁹⁹² It can be noted that the individual opinions of the judges themselves can be seen as part of the doctrine—and *not* of the judicial decisions (even if they are a privileged means for analysing them). However, they form a very special part of the legal doctrine in that, sitting on the bench, their authors have had the benefit of listening to the contrary arguments of the parties. Of course, so have counsel, but, representing a

339 However, there is one exception to the apparent disregard of the Court for the legal doctrine: the Courts's judgments and advisory opinions resort increasingly to the work of the International Law Commission, in order to interpret the codification conventions that the Commission has prepared, or to give evidence of the existence of customary rules by quoting the Commission's Draft Articles. This practice was described earlier⁹⁹³ and there is no need to return to the topic; suffice it to say that there might be some paradox in the World Court paying increasing attention to the ILC's work at a time when the Commission itself gives the impression of suffering an identity crisis and thus losing part of its prestige.⁹⁹⁴ However, it is also true that the ILC 'products' are the result of a long process based on intense discussions, among the members of the Commission, the composition of which reflects an appropriate geographical balance, and between the ILC and the States which present the great advantage of mitigating the lawyers' tendency to idealism and/or abstraction with the lack of 'legal creativity' of the States' representatives ... and reciprocally.

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party, their views are questionable. For his part, the present writer has always refrained from writing on the particular cases where he had acted as counsel.

⁹⁹³ MN 230.

⁹⁹⁴ Cf. e.g. Pellet, A., 'The ILC Adfrit? Some Reflexions from Inside', in *Challenges of Contemporary International Law and International Relations, Liber Amicorum in Honour of Ernest Petric* (Evropska Prvana Fakulteta, ed., 2011), pp. 299–312. For a more optimistic view cf. Schwebel, in Barea, *supra*, fn. 983.

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