

# The Statute of the International Court of Justice

*A Commentary*

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

Few provisions of treaty law, if any, have called for as much comment, debate, criticism, 1  
praise, warnings, passion, as Art. 38 of the Statute. There are many ways to consider this

\* 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; some of the main general studies on the sources of international law in general are listed in fn. 150.

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 worst a corset paralyzing the world's highest judicial body. It can also be analyzed 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.<sup>1</sup> 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 midpoint 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—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 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 At the end of the eighteenth century<sup>2</sup> and throughout the nineteenth 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, for example, 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

<sup>1</sup> 'Ni cet excès d'honneur, ni cette indignité' (Jean Racine, *Britannicus*, Act II, Scene 3).

<sup>2</sup> 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.*).

scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other.<sup>3</sup>

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.<sup>4</sup>

## b) Pre-Existing International Courts

### aa) *The Permanent Court of Arbitration*

Certainly, 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 to define precisely 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*.<sup>5</sup>

While this provision does not require the application of international law,<sup>6</sup> it nevertheless clearly provides for a decision in law, putting an end to the uncertain practice of previous arbitral tribunals.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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

<sup>3</sup> *RIAA*, vol. 9, pp. 408, 444.

<sup>4</sup> 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*, 1984, vol. 61, pp. 1128, 1135-1136.

<sup>5</sup> Emphasis added.

<sup>6</sup> 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*.

<sup>7</sup> *Cf. supra*, MN 4-5.

<sup>8</sup> *RIAA*, vol. 1, pp. 309, 331. <sup>9</sup> *Cf. infra*, fn. 76.



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.<sup>10</sup> Therefore, 80 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.<sup>11</sup>

*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.<sup>12</sup>

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

[I]t 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.<sup>13</sup>

- 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 a 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:

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.

<sup>10</sup> 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.

<sup>11</sup> 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'.

<sup>12</sup> Convention for the Establishment of a Central American Court of Justice, December 20, 1907, reproduced in *AJIL* 2 (1908), Supplement, pp. 239–240. 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'.

<sup>13</sup> Decision of 6 March 1909, *Dr. Pedro Andres Fornos Diaz v. The Government of the Republic of Guatemala*, *AJIL* 3 (1909), 737, 742.

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 12 in order to establish a clear guideline to the judges and the States concerned about the consistency of the international law of prizes and maritime war. The report of the Conference stated:

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.<sup>14</sup>

It thus appears that the specification of the sources of the law to be applied by the 13 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,<sup>15</sup> an objective which could not easily be achieved. In order to resolve this 'sérieuse difficulté'<sup>16</sup> 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 États'.<sup>17</sup> 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'.<sup>18</sup> It is essentially for this reason—such imprecise determination of the applicable rules—that the Convention did not receive sufficient ratification, notably with regard to the United Kingdom.<sup>19</sup> This being said, Art. 7 of Convention XII of the Hague made clear that the contemplated court was to apply international law.

## 2. *The Codification Endeavour*

The outcome of the 1907 Conference with respect to the International Prize Court 14 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 in advance 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.<sup>20</sup>

On the one hand international law and international relations had not reached a 15 sufficient degree of maturity to be codified. On the other hand, codification of the

<sup>14</sup> 1907 Conference, Report, vol. I, p. 190; quoted in von Stauffenberg, p. 273.

<sup>15</sup> Cf. Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 317 (Mr Hagerup), and, similarly, p. 307 (Mr. Root).

<sup>16</sup> 1907 Conference, Report, vol. I, p. 190; quoted in von Stauffenberg, p. 273.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Cf. the arguments of Mr Root, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 317 (Mr Hagerup), and, similarly, p. 307; and further Spiermann, *International Legal Argument*, p. 5.

<sup>20</sup> 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 of the Proceedings of the Advisory Committee of Jurists (1920), p. 293; cf. also Loder, *ibid.*, pp. 311–312). 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 '[I]es Juristes [of the 1920 Advisory Committee] ont abordé l'étude des sources du droit sous l'angle du droit matériel. Cette

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,<sup>21</sup> 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'.<sup>22</sup> 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.<sup>23</sup>

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 arbitration<sup>24</sup> which:

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*

position aurait dû les mener à la codification du droit 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).

<sup>21</sup> And the Court quite commonly leans on the ILC drafts as 'subsidiary means for the determination of rules of law'—*cf.* further *infra*, MN 225–226. On the relationship between the ICJ and the ILC, see Schwebel, S.M., 'The Interactive Influence of the International Court of Justice and the International Law Commission' in *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Barca, C.A.A., ed., 2000), pp. 479–505.

<sup>22</sup> Miller, D. H., *The Drafting of the Covenant*, vol. 1 (1928), p. 13.

<sup>23</sup> *Cf.* League of Nations, *The Permanent Court of International Justice*, Geneva, 1921, p. 6.

<sup>24</sup> *Cf. supra*, MN 4–5.

principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction.<sup>25</sup>

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.*<sup>26</sup>

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.<sup>27</sup>

## 2. *The Advisory Committee of Jurists*

It was on the basis of this understanding that the Advisory Committee of Jurists 21 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:

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.<sup>28</sup>

From this point of departure, the members of the Committee entered into a difficult 22 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.

### a) *Positions of the Committee*

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'.<sup>29</sup> Nevertheless, the majority of the jurists considered that:

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.<sup>30</sup>

Essentially, three positions crystallized during the discussion of the Committee on this 24 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,

<sup>25</sup> 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).

<sup>26</sup> Cf. Procès-verbal of the Session of the Council, 1920-5, p. 5 (emphasis added).

<sup>27</sup> Sørensen, p. 31.

<sup>28</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annexe No. 3, p. 306.

<sup>29</sup> Cf. the argument of Root, *ibid.*, p. 293.

<sup>30</sup> Loder, *ibid.*, p. 294.

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.'<sup>31</sup> He preferred a much shorter, and more vague, wording: 'the Court shall judge in accordance with law, justice, and equity',<sup>32</sup> which is indeed very close to the formula used in the 1899 and 1907 Hague Conventions concerning the Permanent Court of Arbitration.<sup>33</sup>
- 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, '[n]ations 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'.<sup>34</sup> 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 for the Court, when facing such a *lacuna*, to declare *non liquet* for the 'Court must not have the power to legislate'.<sup>35</sup>
- 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'.<sup>36</sup> 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:

[I]t 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 forced to reply on subjective opinions only; I allow him to consider the cases that come before him with both eyes open.<sup>37</sup>

<sup>31</sup> *Ibid.*, p. 295. In the same sense, *cf.* the argument of Lord Phillimore, *ibid.*, p. 315.

<sup>32</sup> *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). <sup>33</sup> *Cf. supra*, MIN 7.

<sup>34</sup> *Ibid.*, p. 287.

<sup>35</sup> *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).

<sup>36</sup> *Ibid.*, p. 294. Hagerup came to the same conclusion, *cf. ibid.*, pp. 296 and 307-308.

<sup>37</sup> *Ibid.*, p. 323.

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.<sup>38</sup> A solution needed to be found in order to avoid the lack of competence 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'.<sup>39</sup> 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.<sup>40</sup> 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'.<sup>41</sup>

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',<sup>42</sup> thus suggesting that the 'successive order of examination' in the President's initial proposal was not the most accurate solution.<sup>43</sup> This view was shared by several members of the Committee,<sup>44</sup> while others attached only little importance to the question.<sup>45</sup> However, Baron Descamps again defended his position in this regard,<sup>46</sup> considering the successive order as an 'order of natural *précellence*',<sup>47</sup> 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 recognized by civilised nations'<sup>48</sup> and 'the authority of judicial decisions and the opinions of writers as a means for the application and development of law'.<sup>49</sup> Ricci-Busatti also introduced a 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.

After some comments, notably by Lord Phillimore on the meaning of 'general principles of law',<sup>50</sup> the Committee very quickly reached general agreement on Root's proposal which was adopted with a few formal modifications. In particular, the fourth

<sup>38</sup> Hagerup, *ibid.*, pp. 296 and 317; Loder, *ibid.*, pp. 311–312; Lapradelle, *ibid.*, p. 312.

<sup>39</sup> *Ibid.*, p. 320. Cf. also Fernandes, *ibid.*, p. 345.

<sup>40</sup> Lapradelle suggested to refer these kind 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 '[d]isputes 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 even deemed it 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).

<sup>41</sup> *Ibid.*, pp. 314–135.

<sup>42</sup> *Ibid.*

<sup>43</sup> Cf. especially, *ibid.*, pp. 332 and 337.

<sup>44</sup> Cf. Lord Phillimore, *ibid.*, p. 338; Hagerup, *ibid.*

<sup>45</sup> 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).

<sup>46</sup> *Ibid.*, pp. 318 and 336.

<sup>47</sup> *Ibid.*, p. 337.

<sup>48</sup> See *ibid.*, Annex 1, p. 344.

<sup>49</sup> *Ibid.*

<sup>50</sup> 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).

paragraph concerning jurisprudence and doctrine was rephrased into '[t]he authority of judicial decisions and the doctrines of the best qualified writers of the various nations'.<sup>51</sup>

- 33 Only some other minor changes were adopted after the consideration of the provision by the Drafting Committee.<sup>52</sup> 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 of 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 57 *bis*...' This merely formal modification had been deemed necessary after the introduction, by the Council, of said Art. 57 *bis* 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 ...<sup>53</sup>

- 37 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'.<sup>54</sup> The amendments were then rejected without any further discussion.

- 38 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'—a rather minor and

Lapradelle also accepted this meaning of the 'general principles' formula, but suggested to delete the reference to 'civilised nations' which he considered superfluous 'because law implies civilisation' (*ibid.*, p. 335).

<sup>51</sup> *Ibid.*, p. 337.

<sup>52</sup> For a more detailed analysis see Kearney, pp. 610, 612.

<sup>53</sup> 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.

<sup>54</sup> *Ibid.*, p. 68.

immaterial modification—and the phrase ‘in the order following’<sup>55</sup>—which had already given rise to some criticism in the Committee of Jurists.<sup>56</sup>

Finally, the Assembly introduced a new and separate paragraph enabling the Court to decide *ex aequo et bono*: ‘These provisions shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties so agree thereto’.<sup>57</sup>

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’.<sup>58</sup>

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

### III. The ICJ Statute

During the elaboration of the ICJ Statute, Art. 38 did not give rise to much controversy, either in the Washington Committee of Jurists, or at the San Francisco Conference. It was reproduced in the Statute of the new Court with only minor modifications.

#### 1. Positions of the Committee

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

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.<sup>59</sup>

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.<sup>60</sup> Basdevant, the French delegate to the Committee pointed out:

... 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.<sup>61</sup>

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*.<sup>62</sup> 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

<sup>55</sup> *Ibid.*, p. 145. <sup>56</sup> *Cf. supra*, MN 30.

<sup>57</sup> 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. 157. <sup>58</sup> *Ibid.*; and *cf.* also Kearney, p. 614.

<sup>59</sup> 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, 653–654.

<sup>60</sup> 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.

<sup>61</sup> *Ibid.*, p. 170. <sup>62</sup> *Cf. ibid.*, p. 436.



put it into operation, and has left it without change other than that which appears in the numbering of the provisions of this article.<sup>63</sup>

- 46 At the San Francisco Conference, the proposed amendments concerning Art. 38, especially those of Cuba<sup>64</sup> and Ecuador,<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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: . . .<sup>69</sup>

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 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'.<sup>70</sup>

- 48 This Chilean amendment was the only one adopted, unanimously, concerning Art. 38.<sup>71</sup> The Rapporteur of Committee 1 of Commission IV explained:

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.<sup>72</sup>

<sup>63</sup> *Ibid.*, p. 843.

<sup>64</sup> Cuba again proposed a modified formal presentation of Art. 38, as already submitted to the Washington Committee of Jurists (*cf. supra*, fn. 59).

<sup>65</sup> Ecuador wanted to add a new paragraph relating to regional international law after para. 3 of Art. 38; *cf.* UNCIO, vol III, p. 412.

<sup>66</sup> UNCIO, vol. XIII, p. 164.

<sup>67</sup> *Ibid.* p. 287.

<sup>68</sup> *Ibid.*, p. 164. *Cf.* also *infra*, MN 64 *et seq.*

<sup>69</sup> UNCIO, vol. XIII, p. 284.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, p. 392. *Cf.* also Hudson, *PCIJ*, p. 604, and *infra*, MN 64 *et seq.*

#### IV. An Impressive Posterity

Since its adoption in the 1920 PCIJ Statute, Art. 38 has had an unquestionable influence 49  
on the development of international law and the law of international adjudication.<sup>73</sup>  
Sørensen considers that 'la concordance prétendue entre cet article et le droit interna-  
tional commun s'est consolidée en vertu de l'existence même de l'article 38 et de son  
autorité inhérente'.<sup>74</sup>

Besides the influence of Art. 38 on the codification of the substantive rules of interna- 50  
tional law,<sup>75</sup> numerous arbitration agreements reproduce or refer expressly to this  
provision.<sup>76</sup> Thus, Art. 28 of the 1928 General Act on Pacific Settlement of Interna-  
tional Disputes 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 Article 38 of  
the Statute of the Permanent Court of International Justice...<sup>77</sup>

The reference to Art. 38 was kept in the Revised General Act of Arbitration, adopted by  
the General Assembly in 1948.<sup>78</sup> A comparable provision was introduced by the  
International Law Commission in its 1953 Draft Convention on Arbitral Procedure.<sup>79</sup>  
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

<sup>73</sup> Rousseau, Ch., *Droit international public*, tome 1 (1970), p. 59; Sørensen, p. 40.

<sup>74</sup> Sørensen, p. 40.

<sup>75</sup> As for the 1930 Codification Conference under the auspice of the League of Nations, see *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,  
*Precedent*, p. 71.

<sup>76</sup> See 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. Cf. also 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.

<sup>77</sup> LNTS, vol. 93, p. 355.

<sup>78</sup> UNTS, vol. 71, p. 116 (Art. 28).

<sup>79</sup> 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.
2. The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of  
international law or the *compromis* (ILC Yearbook 1953, vol. 11, p. 210).

reproduced it with only one slight modification in order to give the parties some choice with respect to the applicable law.<sup>80</sup>

51 Furthermore, quite often, arbitral tribunals that are not expressly instructed to do so, decide to refer to the principles of Art. 38 in order to accomplish their task. This has been the case of 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.<sup>81</sup> The same solution has been adopted by the arbitrator in the *David Goldenberg & Sons case* between Germany and Romania<sup>82</sup> or 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)*.<sup>83</sup>

52 Arbitral tribunals settling investment disputes under the auspices of the International Centre for the 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. 1<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup>

53 Furthermore, absent any dispute, Art. 38 may constitute a guidance for diplomatic negotiations between States. Thus, the 1982 UNCLOS 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

<sup>80</sup> 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.
  - (e) If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono* (ILC Yearbook 1958, vol. II, p. 84).

<sup>81</sup> *RIAA*, vol. 7, pp. 25–26.

<sup>82</sup> *RIAA*, vol. 2, pp. 901, 909–909.

<sup>83</sup> *RIAA*, vol. 2, pp. 1011, 1016.

<sup>84</sup> ‘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).

<sup>85</sup> *Cf.* para. 40 of the report; available on the website of ICSID <http://www.worldbank.org/icsid/basicdoc/partB-section06.htm#03>.

<sup>86</sup> *Cf. e.g.* the annulment decision in *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), *ILM* 41 (2002), 933, 941–942 (paras. 37–46); or the decision on jurisdiction in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), available at <http://www.state.gov/documents/organization/3921.pdf>, para. 57.

referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.<sup>87</sup>

### C. The Function of the Court

As explained above, the scope of Art. 38, in its 1945 wording, is twofold: in addition to 54 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 formulae 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*

Indeed, the function of the Court 'is to decide . . . such disputes that are submitted to it', 55 a formula which serves as a discreet reminder that it has no general competence but can only decide if the parties so agree.<sup>88</sup> 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 its law-making or, certainly, its 'law-ascertaining' role.<sup>89</sup>

As 'the principal judicial organ of the United Nations',<sup>90</sup> the Court is vested with two 56 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, the Security Council and other organs of the United Nations and specialized agencies authorized to this effect by the General Assembly.<sup>91</sup> And so too was the PCIJ, even though it was not an organ of the League of Nations.<sup>92</sup>

<sup>87</sup> Cf. Art. 74, para. 1, and Art. 83, para. 1 UNCLOS respectively. The ICJ has recalled these provisions in several judgments: cf. *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)*, 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). Cf. also the reference to these provisions in the *Continental Shelf case (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.

<sup>88</sup> For a detailed treatment of the means of establishing the Court's jurisdiction cf. Tomuschat on Art. 36 MN 33 *et seq.*

<sup>89</sup> Cf. *infra*, MN 313–319.

<sup>90</sup> 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 Mosler, H., and Oellers-Frahm, K. on Art. 92 UN Charter in Simma, *UN Charter*, pp. 1146–1149, Tomka, P., 'Article 92', in *La Charte des Nations Unies* (Cot, J.-P., Pellet, A. and Forteau, M., eds., 3rd edn., 2005) pp. 1945–1946; Pellet, A., 'Strengthening the Role of the International Court of Justice as the Principal Judicial Organ of United Nations', *LPICT* 3 (2004), pp. 159–180 (which is a translated and updated version of *id.*, '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., and Lee, R.S., eds., 1997, pp. 235–253).

<sup>91</sup> 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.

<sup>92</sup> 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

- 57 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 provision equivalent to Art. 38. During the preparation of its new Rules of 1936,<sup>93</sup> the PCIJ contemplated the formal inclusion of a reference to Art. 38, para. 1.<sup>94</sup> It finally gave up the idea of mentioning any specific article and contented itself with reproducing the new Art. 68 of its Statute<sup>95</sup> in its Rules, since 'il est presque impossible de prévoir tous les cas'.<sup>96</sup> However, there can be no doubt that, when giving advisory opinions, the Court must be guided by the directives embodied in Art. 38.<sup>97</sup>
- 58 According to Art. 68, '[i]n 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.<sup>98</sup>
- 59 On several occasions, the Court has recalled that '[t]he Court, being a Court of Justice, cannot, even in giving advisory opinion, depart from the essential rules guiding their activity as a Court'.<sup>99</sup> Thus, in its advisory opinion on the *Competence of the 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.<sup>100</sup>

- This clearly shows that only international law as defined in Art. 38 applies.<sup>101</sup>
- 60 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

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 58–59; as well as Frowein/Oellers-Frahm on Art. 65 MN 3–5; Cot on Art. 68 MN 2–9.

<sup>93</sup> The Rules were adopted on 11 March 1936; the 1929 Protocol entered into force on 1st February 1936.

<sup>94</sup> *Cf.* Rapport présenté par M. Negulesco, PCIJ, Series D, No. 2, 3rd Add., p. 801. On this episode *cf.* Sørensen, pp. 37–38; and Guyomar, pp. 647–648.

<sup>95</sup> *Cf. infra*, MN 58.

<sup>96</sup> 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.

<sup>97</sup> 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'.

<sup>98</sup> For a similar view *cf.* Mendelson, in *Fifty Years of the International Court of Justice* pp. 63, 64 (his fn. 4).

<sup>99</sup> *Status of Eastern Carelia*, PCIJ, Series B, No. 5, p. 29; and further ICJ, *Constitution of the Maritime Safety Committee of the IMCO*, ICJ Reports (1960), pp. 150, 153; *Northern Cameroons case*, 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)).

<sup>100</sup> PCIJ, Series B, No. 13, p. 23. *Cf.* also *Conditions of Admission of a State to Membership in the United Nations*, 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'.

<sup>101</sup> *Cf.* also Anzilotti's individual opinion appended to 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

consultés prennent place sur les sièges de la Cour ou qu'ils se constituent en simple comité d'experts.<sup>102</sup>

When the Court gives an advisory opinion, it exercises its judicial function<sup>103</sup> and, being an organ of international law,<sup>104</sup> that body of law is the only one applicable. Article 38 fully applies in such a circumstance.

## 2. A Useful Guide to the Court's Mission

Turning to the Court's contentious function, the present Court and its predecessor have 61 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.

### a) Judgments

As has been noted, '[e]xplicit references in the case-law to Article 38 of the Statute 62 are . . . rare'.<sup>105</sup> However, they are not non-existent. Errors or omissions excepted, the Permanent Court expressly mentioned it in only two judgments.<sup>106</sup> The present Court did cite this provision more often but nevertheless parsimoniously.<sup>107</sup> The Court expressly relied on Art. 38 for two main purposes.

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.

<sup>102</sup> Sørensen, 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. 279–281; 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. 202–203; and Weil, P., "The Court Cannot Conclude Definitely . . ."—*Non Liqueur Revisited* in *Politics, Values and Functions—International Law in the 21st Century; Essays in Honor of Professor Louis Henkin* (Charney, J., Anton, D. and O'Connell, M.E., eds., 1997), pp. 105–114, p. 111.

<sup>103</sup> See e.g. Rapport présenté par M. Negulesco, PCIJ, Series D, No. 2, 3rd Add., *passim*, in particular, pp. 782–783. For similar views cf. Rosenne, *Law and Procedure*, vol. I, pp. 171–172. However, '[t]he 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* (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' (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 236 (para. 15)).<sup>104</sup> Cf. *infra*, MN 66.

<sup>105</sup> Rosenne, *Law and Procedure*, vol. III, p. 1595; cf. also Sørensen, p. 38.

<sup>106</sup> Cf. the judgments of 22 July 1929 in *Serbian and Brazilian Loans*, PCIJ, Series A, Nos. 20/21, pp. 19–20. However, references to Art. 38 in the personal opinions of judges are less uncommon.

<sup>107</sup> Cf. *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 6, 37; *South-West Africa*, ICJ Reports (1966), pp. 6, 47 (para. 88) and p. 48 (para. 89); *Nuclear Tests*, ICJ Reports (1974), pp. 253, 271 (para. 57), and p. 457, 477 (para. 60); *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 37 (para. 23); *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (ICJ Reports 1984), pp. 246, 290–291 (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/Mali), ICJ Reports (1986), pp. 554, 575 (para. 42); *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Reports (1992), pp. 351, 390–391 (para. 47), 601 (para. 403); *Maritime Delimitation in the Area between Greenland and Jan Mayen*, 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*, ICJ Reports (2004), pp. 12, 61 (para. 127). 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), ICJ Reports (1969), pp. 3, 21 (para. 17). For other references to Art. 38, para. 2 cf. *infra*, MN 152–170. Just as in the case of the PCIJ, references to Art. 38 in the personal opinions of judges are much more frequent.

63 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 below.<sup>108</sup>

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

- '[f]rom 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'<sup>109</sup>
- 'the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties',<sup>110</sup> thus echoing its celebrated *dictum* in the case concerning the *Northern Cameroons*, according to which, '[t]here are inherent limitations on the exercise of the judicial function, which the Court, as a court of justice can never ignore'<sup>111</sup>
- '[a]s implied by the opening phrase of Article 38, para. 1, of its Statute, the Court is not a legislative body'<sup>112</sup> 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 Article 38 (I) of the Statute'.<sup>113</sup>

65 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.<sup>114</sup>

This is made even more apparent since 1945, with the addition of the new phrase explicitly describing the function of the Court.<sup>115</sup> 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.<sup>116</sup>

66 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.<sup>117</sup> Therefore, 'the Court, being a

<sup>108</sup> Cf. *infra*, MN 76. <sup>109</sup> *Serbian Loans*, PCIJ, Series A, Nos. 20/21, p. 19.

<sup>110</sup> *Nuclear Tests*, ICJ Reports (1974), pp. 253, 271 (para. 57), and pp. 457, 477 (para. 60).

<sup>111</sup> ICJ Reports (1963), pp. 15, 29. However, in that case, the Court did not expressly refer to Art. 38.

<sup>112</sup> *South-West Africa*, ICJ Reports (1966), p. 6, 48 (para. 89). On this question cf. further *infra*, MN 313 *et seq.*

<sup>113</sup> *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 6, 37. Cf. also *Haya de la Torre*, ICJ Reports (1951), pp. 71, 78–79; *Northern Cameroons*, ICJ Reports (1963), pp. 15, 30, pp. 33–34 or p. 38. However, in neither of these two judgments, did the Court mention Art. 38.

<sup>114</sup> Fachiri, A., *The Permanent Court of International Justice* (2nd edn., 1932), p. 101.

<sup>115</sup> Cf. *supra*, MN 47–48.

<sup>116</sup> Report of Mr. Al-Farsy, UNCIO, vol. XIII, p. 392. Cf. also Hudson, *PCIJ*, p. 603; Kearney, pp. 610, 654 and Shahabuddeen, *Precedent*, pp. 82–83.

<sup>117</sup> Cf. *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 6, 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 case*, 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

Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency'.<sup>118</sup> As such it 'is deemed itself to know what [international] law is'<sup>119</sup> and, consequently, 'in the fulfilment of its task of itself ascertaining 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.<sup>120</sup> As explained in the *Fisheries Jurisdiction 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 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.<sup>121</sup>

However, the Court, while strictly maintaining 'its judicial character',<sup>122</sup> has not been 67 prevented from including in its judgments<sup>123</sup> pure recommendations based on its perception of the situation and indicating the measures it considered useful to be taken by the parties.<sup>124</sup> These recommendations are included in the reasoning but do not, in

Albanian sovereignty'; Judge Novacovitch's dissenting opinion appended to the PCIJ's judgment in the *Serbian Loans case*, PCIJ, Series A, Nos. 20/21, 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, since, as 'expressly mandated by Article 38 of its Statute, it applies international law, it is an international court of justice, not only a court of appeal of national criminal proceedings' (ICJ Reports (2001), pp. 466, 486 (para. 52)).

<sup>118</sup> *Serbian Loans case*, PCIJ, Series A, Nos. 20/21, p. 15.

<sup>119</sup> *Brazilian Loans case*, PCIJ, Series A, No. 21, p. 124.

<sup>120</sup> *Lotus*, PCIJ, Series A, No. 10, p. 31. Cf. also Judge Basdevant's dissenting opinion appended to the judgment in the *Norwegian Loans*, ICJ Reports (1957), pp. 71, 74: '[T]he Court must, of itself, seek with all the means at its disposal to ascertain what is the law'.

<sup>121</sup> ICJ Reports (1974), pp. 3, 9 (para. 17) and pp. 175, 181 (para. 18) (emphasis added).

<sup>122</sup> *Northern Cameroons*, ICJ Reports (1963), pp. 15, 29; *Nuclear Tests*, ICJ Reports (1974), pp. 253, 259 (para. 23), and pp. 457, 463 (para. 23).

<sup>123</sup> 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 to respond negatively to the question 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 *Legality of the Threat or Use of Nuclear Weapons*, 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)); see 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 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* '[t]he 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)).

<sup>124</sup> These recommendations are often based on the political, social or economical background of the dispute. On these, cf. further *infra*, MN 109 et seq.



general, appear in the *dispositif*.<sup>125</sup> For example:

- in the *Free Zones case*, the PCIJ did ‘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’;<sup>126</sup>
- 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’<sup>127</sup>
- in the case of *Nationals of the United States 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;<sup>128</sup>
- in the *Hostages case*, ‘[b]efore 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’;<sup>129</sup>
- in its *Gabčíkovo-Nagymaros case* judgment, the Court did not only impose 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 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’<sup>130</sup>
- 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’;<sup>131</sup> and
- in the *Land and Maritime Boundary between Cameroon and Nigeria 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,

<sup>125</sup> Contrast however the reference in fn. 126 *infra*.

<sup>126</sup> 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).

<sup>127</sup> PCIJ, Series A/B, No. 78, p. 178.

<sup>128</sup> ICJ Reports (1952), pp. 176, 211–212; *cf.* also *Nottebohm* (Preliminary Objection), ICJ Reports (1953), pp. 111, 123, as interpreted by Sir Gerald Fitzmaurice, *Law and Procedure*, vol. II, p. 561.

<sup>129</sup> ICJ Reports (1980), pp. 3, 43, para. 93.

<sup>130</sup> ICJ Reports (1997), pp. 7, 79 (para. 143).

<sup>131</sup> ICJ Reports (2000), pp. 12, 34 (para. 55); *cf.* also *Fisheries Jurisdiction* (Spain/Canada), ICJ Reports (1998), pp. 432, 456 (para. 56).

with a view to the maintenance of security, during the withdrawal of the Nigerian administration and military and police forces'.<sup>132</sup>

#### b) Other Binding Decisions

Judgments are not the only binding decisions that the Court can adopt. It may also 'make orders for the conduct of the case'<sup>133</sup> and 'indicate...provisional measures',<sup>134</sup> which, as the Court observed in the *LaGrand case*, 'have a binding effect'.<sup>135</sup> While it is certainly true that those decisions only rarely give an opportunity for pronouncements on legal questions,<sup>136</sup> there are exceptions. And it is interesting to note that the relevant decisions call for the same remarks as the judgments themselves.

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,<sup>137</sup> 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'.<sup>138</sup> In that same case, Judge Hudson, 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'.<sup>139</sup>

The present Court has also underlined its 'judicial function' in several orders. Thus, quoting its judgment on jurisdiction and admissibility in *Nicaragua*, it reaffirmed its power to indicate provisional measures of protection even if the Security Council was simultaneously seized of the question. It considered that '[t]he 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'.<sup>140</sup>

Exactly like judgments,<sup>141</sup> 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 1999<sup>142</sup> 'was not a mere exhortation'<sup>143</sup>—*a contrario*, it *could* have been just that. And it is not unusual for interim orders to make recommendations to the parties which, by their own wording, clearly do not bind them.<sup>144</sup>

<sup>132</sup> ICJ Reports (2002), pp. 303, 452 (para. 316).

<sup>134</sup> Art. 41 of the Statute.

<sup>136</sup> Cf. Sørensen, p. 53.

<sup>137</sup> PCIJ, Series A, Nos. 20/21, p. 15.

<sup>138</sup> PCIJ, Series A, No. 24, p. 15; see 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.

<sup>139</sup> Series A, No. 24, p. 38; and cf. also p. 39.

<sup>140</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Order of 8 April 1993, ICJ Reports (1993), pp. 3, 19 (para. 33); and cf. also *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo/Uganda) (Provisional Measures), ICJ Reports (2000), pp. 111, 126 (para. 36).

<sup>142</sup> ICJ Reports (1999), pp. 9 *et seq.*

<sup>143</sup> ICJ Reports (2001), pp. 466, 506 (para. 110).

<sup>144</sup> 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 (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 (Yugoslavia/Spain, *ibid.*, pp. 761, 773 (paras. 37–38) and Yugoslavia/United States of America, *ibid.* pp. 916, 925 (paras. 31–32)).

## II. '... in accordance with international law'

- 72 According to the usual analysis,<sup>145</sup> 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.

### 1. The Principle: International Law as the Only Basis for the Court's Decision

- 73 One of the main criticisms of Art. 38 is its incompleteness.<sup>146</sup> 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 mention of international law in the opening sentence suffices to enable the Court to have recourse to other sources of international law whenever it deems it 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.

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

- 74 Scholars usually describe Art. 38, para. 1, as listing the 'sources' of international law<sup>147</sup> 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.

#### aa) A Guide to the 'Sources' of International Law

- 75 The Court has not been mistaken: what para. 1 of Art. 38 does is to list 'formal'<sup>148</sup> sources of international law, that is the manifestations<sup>149</sup> of the rights and obligations of States, on which it can base its decisions to settle the disputes submitted to it.<sup>150</sup>

<sup>145</sup> Cf. e.g. *Oppenheim's International Law* (Jennings, Sir. R.Y., Watts, Sir. A, 9th edn., 1992), vol. I/1, p. 44; Rousseau, *supra*, fn. 73, p. 59; Brownlie, I., *Principles of Public International Law* (6th edn., 2003), p. 25; Daillier, P., and Pellet, A., *Droit international public (Nguyen Quoc Dinh)* (7th edn., 2002), p. 905.

<sup>146</sup> Cf. *infra*, MN 78.

<sup>147</sup> As has been noted, '[w]hen discussing the problem of the "sources" of international law, most [international lawyers] begin their argument by referring to Article 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. 195–196 or 200).

<sup>148</sup> On the distinction between formal and material sources cf. *infra*, MN 109 et seq.

<sup>149</sup> 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; *id.*, 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 hand. For further discussion cf. *infra*, MN 81–83 and 277.

<sup>150</sup> The present article is not the right place to discuss in detail the notion of sources itself. For fruitful discussions cf. e.g. Abi-Saab, G., 'Les sources du droit international: Essai de déconstruction' in *Le droit international dans un monde en mutation—Liber Amicorum en hommage au Professeur Eduardo Jimenez de Aréchaga* (Fundación de cultura universitaria, 1994), pp. 29–49, pp. 30–32. While generally in agreement

As noted above,<sup>151</sup> on several occasions, both the present Court and its predecessor 76 have referred to Art. 38, para. 1, in order to show that they were bound to resort to the sources enumerated therein:

- In *Tunisia/Libya*, the ICJ recalled that '[w]hile the Court is, of course, bound to have regard to all the legal sources specified in Article 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 Article, to apply the provisions of the Special Agreement'.<sup>152</sup>
- In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 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 (Article 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'.<sup>153</sup>
- In *Jan Mayen*, it again turned to 'the sources listed in Article 38 of the Statute of the Court', which it 'must consider', as the basis of 'the law applicable to the fishery zone'.<sup>154</sup>
- In the *Serbian Loans case*, the PCIJ stated that 'Article 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',<sup>155</sup> while
- in the *South-West Africa (Second Phase) 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 Article 38, paragraph 1 (c), of its Statute'.<sup>156</sup>

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, 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* (Fundación de cultura universitaria, 1994), pp. 51–68, especially at pp. 52–58; Van Hoof, G.J.H., *Rethinking the Sources of International Law* (1983); 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; 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. 328–361; Scelle, G., 'Essai sur les sources formelles du droit international', *ibid.*, vol. III, pp. 400–430; Kopelmanas, L., 'Essai d'une théorie des sources formelles du droit international', *Revue de Droit international* 1938, pp. 101–150; Sørensen; Fitzmaurice, in *Symbolae Verzijl*, pp. 153–176; Guggenheim, P., 'Contribution à l'histoire des sources du droit des gens', *Rec. des Cours* 94 (1958-II), pp. 1–84; Parry, C., *The Sources and Evidences of International Law* (1963); or Verdross, A. von, *Die Quellen des Universellen Völkerrechts—Eine Einführung* (1973).

<sup>151</sup> MN 64.

<sup>152</sup> 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* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 575 (para. 42). Cf. also *Kasikili/Sechudu Island*, ICJ Reports (1999), pp. 1045, 1102 (para. 93).

<sup>153</sup> Chamber, Judgment, 12 October 1984, *ICJ Reports 1984*, pp. 290–291, para. 83.

<sup>154</sup> ICJ Reports (1993), pp. 38, 61 (para. 52).

<sup>155</sup> PCIJ, Series A, Nos. 20/21, p. 20.

<sup>156</sup> 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); 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

- In *Nicaragua*, it recalled that it is '[b]ound . . . by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law"'.<sup>157</sup>
- Lastly, 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 paragraph" of Article 38 [as obviously excluding] the possibility of any decision *ex aequo et bono*'.<sup>158</sup>

77 There is no doubt that the Court must abide by its Statute, of which Art. 38 forms part.<sup>159</sup> Indeed, 'Article 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'.<sup>160</sup> This provision is nevertheless 'authoritative generally because it reflects state practice'.<sup>161</sup> In this respect, it can be seen as 'déclaratoire [du droit international général] en matière de sources'.<sup>162</sup>

78 Such a view has been challenged on several grounds:

- the drafting of Art. 38 is defective;<sup>163</sup>
- the list of sources given in Art. 38 is 'truncated'<sup>164</sup> and/or outmoded;<sup>165</sup>
- it is abusively formalistic;<sup>166</sup> and
- ignores the gradual formation of the rules of law through a law-making process.<sup>167</sup>

79 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.<sup>168</sup> However, with all due respect, they are misplaced when Art. 38 is seen in its context and, in any case, in light of the flexible approach followed by the Court. As has been aptly explained, 'the pertinent inquiry [in 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'.<sup>169</sup> And further, '[u]nsatisfactory as the formulation may be thought, the the . . . Statute" of the Court'; ICJ Reports (2004), pp. 12, 61 (para. 127). For other references to Art. 38, para. 2 *cf. infra*, MN 152–170.

<sup>157</sup> ICJ Reports (1986), pp. 14, 98 (para. 187).

<sup>158</sup> ICJ Reports (1992), pp. 351, 390–391 (para. 47).

<sup>159</sup> For a similar view *cf. e.g.* Fitzmaurice, in *Symbolae Verzijl*, pp. 153, 161–168 and 175; Charney, pp. 171, 174; Dupuy, in *Collection of Essays by Legal Advisers and Practitioners*, pp. 377, 379; Mendelson, in *Fifty Years of the International Court of Justice*, pp. 63, 88; or Shahabuddeen, *Precedent*, p. 83.

<sup>160</sup> *Oppenheim's International Law, supra*, fn. 145, p. 24. *Cf.* also Fitzmaurice, in *Symbolae Verzijl*, pp. 153, 176: 'Article 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'.

<sup>161</sup> *Oppenheim's International Law, supra*, fn. 145, p. 24.

<sup>162</sup> Abi-Saab, in *Liber Amicorum Jiménez de Aréchaga, supra*, fn. 150, pp. 29–49, p. 36. *Cf.* also the rather confusing remark by Sir Gerald Fitzmaurice: 'Article 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' (in *Symbolae Verzijl*, pp. 153, 173—emphasis in the original text).

<sup>163</sup> *Cf.* in particular the harsh criticism by Sir Gerald Fitzmaurice, *ibid.*, pp. 153, 173–175; and further Kopelmanas, *supra*, fn. 20, *RGDIP* 43 (1936), pp. 285–308, p. 292.

<sup>164</sup> Dupuy, P.-M., in *Collection of Essays by Legal Advisers and Practitioners*, pp. 377, 379; *cf.* also *e.g.* Abi-Saab, in *Liber Amicorum Jiménez de Aréchaga, supra*, fn. 150, pp. 29–49, pp. 35–36; or Fitzmaurice, in *Symbolae Verzijl*, pp. 153, 161.

<sup>165</sup> *Cf. e.g.* Onuma, pp. 191–212, especially at pp. 201–203.

<sup>166</sup> *Cf. e.g.* McWhinney, *The World Court*, pp. 2–3; *id.*, in *Essays Roberto Ago, passim*.

<sup>167</sup> *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' (in *Liber Amicorum Jiménez de Aréchaga, supra*, fn. 150, pp. 29–49, pp. 47–48).

<sup>168</sup> For a general defence of the classical theory of sources as reflected in Art. 38 *cf.* Monaco, pp. 517–529; and also Thirlway, 'Law and Procedure, Part Two', *BYIL* 61 (1990), pp. 1, 3–5.

<sup>169</sup> Kearney, pp. 610, 697.

meaning is reasonably clear'.<sup>170</sup> Indeed, as Professor Jonathan Charney has written, 'article 38 is open to interpretation and evolution', but, in contrast to what he proceeds to allege, this is not a 'limitation'.<sup>171</sup> On the contrary, its openness shows the malleability and flexibility of this provision,<sup>172</sup> and the Court has met no difficulty in interpreting and applying Art. 38 in 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'.<sup>173</sup>

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'.<sup>174</sup> 80

*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, '[e]ven 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'.<sup>175</sup> 81

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)<sup>176</sup> may arise from 'general' as well as from 'particular' conventions, and the same holds true in respect to custom.<sup>177</sup> 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:<sup>178</sup> '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 82

<sup>170</sup> Shahabuddeen, *Precedent*, p. 80; and cf. also Judge de Castro's separate opinion appended to the Court's judgment in *Fisheries Jurisdiction*, ICJ Reports (1974), pp. 72, 100: '[I]t does appear possible to overcome the difficulty resulting from the unfortunate drafting of the Statute'.<sup>171</sup> Charney, pp. 171, 174.

<sup>172</sup> Professor Charney himself accepts that 'the meaning of Article 38 is not fixed, but it will continue to evolve as the international community changes its understanding of the doctrine of sources' (*ibid.*, pp. 175–176). Cf. also Dupuy, in *Collection of Essays by Legal Advisers and Practitioners*, pp. 377, 379. Ironically, the critics of Art. 38 themselves note the harmless nature of their criticisms.

<sup>173</sup> Cf. *supra*, MN 45.

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<sup>177</sup> Cf. *infra*, MN 198 *et seq.* and 238 *et seq.*

<sup>178</sup> Sir Gerald attributes the so-called mistake he denounces to a confusion between treaties and statutes (in *Symbolae Verzijl*, 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.

et être revendiqués juridiquement que grâce aux règles générales qui les fondent en droit'.<sup>179</sup>

- 83 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*):<sup>180</sup> 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.<sup>181</sup>

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

- 84 As has been stressed again and again, '[t]o a certain extent every legal system is "open-textured". This "fuzziness" of the law, however, is far more pronounced in the international legal system'.<sup>182</sup> Yet, even if it is 'fuzzy' this does not mean that international law is incomplete, since the two questions are distinct.
- 85 This commentary is not the proper place to re-examine the endless doctrinal debates about the *lacunae* of international law in general, usually coupled<sup>183</sup> with the question of *non liquet*.<sup>184</sup> For present purposes, suffice it to note that, while the Court, in the framework of its advisory function, has, very clearly at least in one occasion, observed that 'in view of the present state of international law viewed as a whole, . . . [it could] not reach a definitive conclusion'<sup>185</sup> in respect of one aspect of the question asked, it has never done so in a contentious case,<sup>186</sup> even though nothing in its Statute expressly

<sup>179</sup> Abi-Saab, in *Liber Amicorum Jiménez de Aréchaga*, *supra*, fn. 150, 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. 25–27; *id.*, *Rec. des Cours* 294 (2002), pp. 261, 321–334; Mendelson, M., 'Are Treaties Merely a Source of Obligation?' in *Perestroika and International Law* (Butler, W.E., ed., 1990), pp. 81 *et seq.*

<sup>180</sup> *Cf. e.g.* Onuma, pp. 191, 195–203.

<sup>181</sup> *Cf. supra*, MN 76; and further *infra*, MN 173 *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. 21–25).

<sup>182</sup> Weil, in *Essays Henkin*, *supra*, fn. 102, pp. 105–114, p. 113. *Cf.* also Anand, R.P., 'The International Court As a Legislator', *IJIL* 35 (1995), pp. 119–126, pp. 119–121.

<sup>183</sup> 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 in this paper (MN 156–167), inasmuch as it concerns the ICJ.

<sup>184</sup> Among a vast legal literature, see in particular: Stone, J., 'Non *Liquet* and the Function of Law in the International Community', *BYIL* 35 (1959), pp. 125–161 (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., ed., 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. 440–458; or Thirlway, 'Law and Procedure, Part One', *BYIL* 60 (1989), pp. 4, 77–84. For more recent discussions, mainly in light of the ICJ's 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ Reports (1996), pp. 226 *et seq.*), see *e.g.* Salmon, in *Mélanges Valticos*, *supra* fn. 102, pp. 197–214 or Weil, in *Essays Henkin*, *supra*, fn. 102, pp. 105–114.

<sup>185</sup> *Legality of the Threat or Use of Nuclear Weapons*, 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.

<sup>186</sup> For a similar view *cf.* Judge Higgins' dissenting opinion appended to the Court's advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 583, 591–592 (paras. 36–38). It is

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- 84 As has been stressed again and again, '[t]o a certain extent every legal system is "open-textured". This "fuzziness" of the law, however, is far more pronounced in the international legal system'.<sup>182</sup> Yet, even if it is 'fuzzy' this does not mean that international law is incomplete, since the two questions are distinct.

- 85 This commentary is not the proper place to re-examine the endless doctrinal debates about the *lacunae* of international law in general, usually coupled<sup>183</sup> with the question of *non liquet*.<sup>184</sup> For present purposes, suffice it to note that, while the Court, in the framework of its advisory function, has, very clearly at least in one occasion, observed that 'in view of the present state of international law viewed as a whole, . . . [it could] not reach a definitive conclusion'<sup>185</sup> in respect of one aspect of the question asked, it has never done so in a contentious case,<sup>186</sup> even though nothing in its Statute expressly

<sup>179</sup> Abi-Saab, in *Liber Amicorum Jiménez de Aréchaga*, *supra*, fn. 150, 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. 25–27; *id.*, *Rec. des Cours* 294 (2002), pp. 261, 321–334; Mendelson, M., 'Are Treaties Merely a Source of Obligation?' in *Perestroika and International Law* (Butler, W.E., ed., 1990), pp. 81 *et seq.*

<sup>180</sup> *Cf. e.g.* Onuma, pp. 191, 195–203.

<sup>181</sup> *Cf. supra*, MN 76; and further *infra*, MN 173 *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. 21–25).

<sup>182</sup> Weil, in *Essays Henkin*, *supra*, fn. 102, pp. 105–114, p. 113. *Cf.* also Anand, R.P., 'The International Court As a Legislator', *IJIL* 35 (1995), pp. 119–126, pp. 119–121.

<sup>183</sup> 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 in this paper (MN 156–167), inasmuch as it concerns the ICJ.

<sup>184</sup> Among a vast legal literature, see in particular: Stone, J., 'Non *Liquet* and the Function of Law in the International Community', *BYIL* 35 (1959), pp. 125–161 (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. 440–458; or Thirlway, 'Law and Procedure, Part One', *BYIL* 60 (1989), pp. 4, 77–84. For more recent discussions, mainly in light of the ICJ's 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ Reports (1996), pp. 226 *et seq.*), see *e.g.* Salmon, in *Mélanges Valticos*, *supra* fn. 102, pp. 197–214 or Weil, in *Essays Henkin*, *supra*, fn. 102, pp. 105–114.

<sup>185</sup> *Legality of the Threat or Use of Nuclear Weapons*, 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.

<sup>186</sup> For a similar view *cf.* Judge Higgins' dissenting opinion appended to the Court's advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 583, 591–592 (paras. 36–38). It is

precludes it from pronouncing a *non liquet*.<sup>187</sup> A contrary attitude would hardly be compatible with the Court's judicial character.

In order to avoid a finding of *non liquet*, the Court has several means at its disposal.<sup>188</sup> 86  
It can:

- decide *ex aequo et bono*, under the very strict condition imposed by para. 2 of Art. 38;<sup>189</sup>
- shape the required (but missing) rules itself—something the Court does, but never avowedly;<sup>190</sup>
- bring to its limits the 'productivity' of the sources listed in Art. 38,<sup>191</sup> in particular by applying the general principles of law mentioned under para. 1 (c);<sup>192</sup> or
- have recourse to other sources.

If one accepts the simplest—and the most operational, at least for the purpose of the 87  
Court's function—definition of a source of law,<sup>193</sup> 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';<sup>194</sup> nor would this fact prevent the Court having recourse to them since they are part of international law that the Court is bound to apply.<sup>195</sup> 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.

#### aa) *Unilateral Acts of States*

In its famous (or infamous) judgments of 1974 in the *Nuclear Tests cases*, the Court, in 88  
an unambiguous (if not devoid of difficulties) *dictum*, stated:

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

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 *Northern Cameroons* (ICJ Reports (1963), pp. 15 *et seq.*). 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' (ICJ Reports (1951), pp. 71, 78–79).

<sup>187</sup> 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. 79.

<sup>188</sup> For another inventory of these means *cf.* Weil, in *Essays Henkin*, *supra*, fn. 102, pp. 105–114, pp. 106–109; and also Lauterpacht, in *Symbolae Verzijl*, *supra*, fn. 184, *passim*. <sup>189</sup> *Cf. infra*, MN 152–170.

<sup>190</sup> *Cf. infra*, MN 313–319.

<sup>191</sup> *Cf.* Anzilotti, D., *Cours de droit international* (trad. Gidel (1929), re-edited 1999), p. 117.

<sup>192</sup> *Cf. infra*, MN 245–264. <sup>193</sup> MN 75.

<sup>194</sup> Abi-Saab, in *Liber Amicorum Jiménez de Aréchaga*, *supra*, fn. 150, pp. 29–49, p. 36.

<sup>195</sup> *Cf. supra*, MN 76.

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.<sup>196</sup>

- 89 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.<sup>197</sup>

Although the PCIJ had declared that it was 'unable to regard the Ihlen declaration of 22nd July, 1919, otherwise than as unconditional and definitive',<sup>198</sup> 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.<sup>199</sup>

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.<sup>200</sup> 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.<sup>201</sup>

- 90 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.*<sup>202</sup>

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*

<sup>196</sup> ICJ Reports (1974), pp. 253, 267 (para. 43), and pp. 457, 472 (para. 46). For a previous similar statement cf. Judge Ammoun's separate opinion appended to the judgment of 20 February 1969 in the *North Sea Continental Shelf cases*, 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).

<sup>197</sup> PCIJ, Series A/B No. 53, p. 73. <sup>198</sup> *Ibid.*, p. 71. <sup>199</sup> *Ibid.* (emphasis added).

<sup>200</sup> Cf. *ibid.*, pp. 69–70.

<sup>201</sup> 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 '[t]he 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' (*ibid.*, p. 91). For a similar view cf. Bastid, S., *Les traités dans la vie internationale* (1985), p. 115, Seidl-Hohenveldern, I. and 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. 253–255; and cf. also Rousseau, *supra*, fn. 73, p. 419.

<sup>202</sup> 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.

*Situation*.<sup>203</sup> We clearly have here ‘a *servandum* . . . without a *pactum*’,<sup>204</sup> and the Court 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.<sup>205</sup>

‘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.<sup>206</sup>

On this basis, in various cases, the Court has had some opportunities to distinguish: 92

- 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 hand.

Only declarations belonging to the first category can be seen as ‘sources’ of the law to be applied by the Court<sup>207</sup>—and as a source distinct from the ‘international conventions’ mentioned in Art. 38, para. 1 (a).

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’.<sup>208</sup> 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’ to bind themselves ‘by the normal method: a formal agreement on the basis of reciprocity’.<sup>209</sup> 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.

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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 94

<sup>203</sup> ICJ Reports (1995), pp. 288, 304–306 (paras. 55–66).

<sup>204</sup> Thirlway, *supra*, fn. 179, *Rec. des Cours* 294 (2002), pp. 261, 340; and also *id.*, ‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 16.

<sup>205</sup> 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; and Zoller, E., *La bonne foi en droit international public* (1977), pp. 340 *et seq.*; but *cf.* also the convincing refutation of these criticisms by Sicault, J.-D., ‘Du caractère obligatoire des engagements unilatéraux en droit international public’, *RGDIP* 85 (1977), pp. 633–688, especially at pp. 677–686.

<sup>206</sup> ICJ Reports (1974), pp. 253, 267 (para. 44), and pp. 457, 472–473 (para. 47).

<sup>207</sup> For an example *cf. infra*, MN 101. In its advisory opinion of 8 July 1996 on the *Legality of the Threat or the Use of Nuclear Weapons*, 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 (ICJ Reports (1996), pp. 226, 251 (para. 59)).

<sup>208</sup> 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)).

<sup>209</sup> ICJ Reports (1986), pp. 554, 574 (para. 40).

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,<sup>210</sup> or which are themselves taken by virtue of rights or obligations deriving therefrom.<sup>211</sup> 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.<sup>212</sup> Equally, the consideration of municipal laws<sup>213</sup> also has certain similarities with the question of unilateral acts.

95 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 contents itself to 'take note' of such declarations<sup>214</sup> which does not amount to much more than an indication of the perception of the factual situation.<sup>215</sup> 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.<sup>216</sup> Only in this last situation

<sup>210</sup> 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 case*, (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. 20–21. As for reservations to treaties cf. Pellet, A., 'Third Report on Reservations to Treaties', UN Doc. A/CN.4/491/Add.4, p. 3 (para. 124); 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*, ICJ Reports (1974), pp. 312, 350 (para. 83). For acts relating to the termination or repudiation of a given treaty cf. *Gabčíkovo-Nagymaros case*, 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* ICJ Reports (1959), pp. 6, 27; *Lotus*, PCIJ, Series A, No. 10, pp. 28–29.

<sup>211</sup> This would, for example, 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' (ICJ Reports (1951), pp. 116, 132); cf. also the judgment of 16 March 2001 on *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports (2001), pp. 40, 103–104 (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*, ICJ Reports (1960), pp. 192, 210–213; *Temple of Preah Vihear*, ICJ Reports (1962), pp. 6, 24 and 30–31) or judicial decisions (cf. e.g. the advisory opinion of 9 July 2004 on *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 176–177 (para.100)).

<sup>212</sup> 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 considerations' (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 Procedure*, vol. II, pp. 825–828; and further Tomuschat on Art. 36 MN 64; Fitzmaurice, M., 'The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice', *Australian YIL* 20 (1999), pp. 127–159). For a more detailed treatment of the various issues raised by optional clause declarations cf. Tomuschat on Art 36 MN 61 et seq.

<sup>214</sup> Cf. e.g. *East Timor*, ICJ Reports (1995), pp. 90, 105–106 (para. 38); or *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002), pp. 303, 452 (para. 317).

<sup>215</sup> To be compared with the recommendations to parties included in some judgments or advisory opinions: cf. *supra*, MN 67.

<sup>216</sup> In the case of the *Mavrommatis Jerusalem Concessions*, 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

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 their binding force.<sup>217</sup> 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'.<sup>218</sup> 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 Arts. 41 or 42 of the Charter, cannot be deemed to have 'agreed' to that measure.

According to *Oppenheim (9th edn)*:

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.<sup>219</sup>

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.<sup>220</sup>

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

expropriation of M. Mavrommatis' Jerusalem concession' (PCIJ, Series A, No. 5, p. 27). *Cf.* also the judgment of 25 May 1926 on *Certain German Interests in Polish Upper Silesia* (Merits), 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 (PCIJ, Series A/B, No. 46, pp. 170 and 172). *Cf.* also *LaGrand, 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'. Similarly, in *Kasikili/Sedudu Island (ICJ Reports (1999))*, pp. 1045, 1106–1108 (paras. 102–103) and 1108 (para. 104–3), the Court, on the basis of a joint communiqué of the parties, as explained by Botswana 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 the 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 Proceedings in France* (ICJ Reports 2003, pp. 102, 109–110, para. 33).

<sup>217</sup> For such a view *cf.* *e.g.* Suy, E., *Les actes juridiques unilatéraux en droit international public* (1962), pp. 30–32.

<sup>218</sup> 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 case* (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* (IUHEL, ed., 1968), pp. 508–520, p. 519; and Jacqué, *Éléments, supra*, fn. 201, pp. 322–325.

<sup>219</sup> *Supra*, fn. 145, p. 46.

<sup>220</sup> *Cf. supra*, MN 88 and 90–91.

the Charter, are 'binding on all States Members of the United Nations, which are under obligation to accept and carry them out'.<sup>221</sup> As the Court observed:

when the Security Council adopts a decision under Article 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.<sup>222</sup>

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 Article 25 of the Charter [...] and that, in accordance with Article 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.<sup>223</sup>

99 As for the General Assembly, there is no doubt that it is vested either explicitly or implicitly<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup> 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.

100 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

<sup>221</sup> *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) (*Namibia*). Cf. also *Certain Expenses of the United Nations*, ICJ Reports (1962), pp. 151, 163: '[I]t 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 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 148 (para. 26)).

<sup>222</sup> ICJ Reports (1971), pp. 16, 54 (para. 116).

<sup>223</sup> 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 resolutions 748 (1992)' (which was a decision adopted under Chapter VII of the Charter) (*ibid.*, p. 15 (para. 40) and p. 126 (para. 43)). The substantive question was not examined following the orders of the President of the ICJ of 10 September 2003 removing the cases from the list after the parties' agreement to discontinue the proceedings (ICJ Reports (2003), pp. 149 *et seq.* and pp. 153 *et seq.*). 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, Th. M., 'The Powers of Appreciation: Who Is The Ultimate Guardian of U.N. Legality?', *AJIL* 86 (1992), pp. 519–523; 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. 221–238; 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.

<sup>224</sup> Cf. the advisory opinion of 13 July 1954 in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954), pp. 47, 56–58.

<sup>225</sup> *Ibid.*, pp. 56–62.

<sup>226</sup> ICJ Reports (1962), pp. 151 *et seq.*; in particular at pp. 175 and 177.

which make determinations or have operative design'.<sup>227</sup> This finding is not as obscure as sometimes said, 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'.<sup>228</sup> 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.<sup>229</sup> 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.

The same holds true for resolutions which, by themselves, are devoid of binding force,<sup>101</sup> 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.<sup>230</sup>

This may happen in 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 '[t]he 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'.<sup>231</sup> 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 '[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect'.<sup>232</sup> As for the latter, 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,<sup>233</sup> 'it plainly did not regard them as an independent source of law'.<sup>234</sup><sup>102</sup>

<sup>227</sup> 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 précédant d'une intention d'exécution' (emphasis added); *contra* Abi-Saab, in *Liber Amicorum Jiménez de Aréchaga*, *supra*, fn. 150, pp. 29–49, p. 37 (his fn. 16).

<sup>228</sup> ICJ Reports (1971), pp. 16, 47 (para. 95).

<sup>229</sup> *Cf.* Art. 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties; and ICJ Reports (1971), pp. 16, 47 (para. 94) for the Court's treatment.

<sup>230</sup> Article 3, Paragraph 2, of the Treaty of Lausanne, PCIJ, Series B, No. 12, p. 27.

<sup>231</sup> *Corfu Channel case* (Preliminary Objections), ICJ Reports (1947–1948), pp. 15, 26 (emphasis added).

<sup>232</sup> ICJ Reports (1971), pp. 16, 53 (para. 114). *Cf.* also *East Timor case*, ICJ Reports (1995), pp. 90, 103–104 (paras. 31–32).

<sup>233</sup> *Cf. infra*, MN 222.

<sup>234</sup> Mendelson, in *Fifty Years of the International Court of Justice*, pp. 63, 88.



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

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.<sup>235</sup>

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.<sup>236</sup>

- 104 However, it is suggested that recommendations made by organs of international organizations *vis-à-vis* their members can be analyzed as 'quasi-formal sources of law'. This expression was used by Fitzmaurice in respect of the decisions of international tribunals.<sup>237</sup> As explained by Professor Kearney, '[l]ike "constructive", "quasi" is a part of the legal legerdemain that justifies treating one thing as something else, usually for laudable reasons',<sup>238</sup> and there is certainly a case for considering recommendations of international organizations as 'quasi-sources': by definition, they are not binding,<sup>239</sup> 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.<sup>240</sup>

- 105 And, indeed, as part of 'international *soft law*',<sup>241</sup> recommendations produce legal effects, not only as part of the customary process, but also in and by themselves. First, as

<sup>235</sup> ICJ Reports (1996), pp. 226, 254–255 (para. 70).

<sup>236</sup> Cf. *infra*, MN 207 *et seq.*

<sup>237</sup> Fitzmaurice, in *Symbolae Verzijl*, pp. 153, 172–173.

<sup>238</sup> Kearney, pp. 610, 699.

<sup>239</sup> 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* (Preliminary Objections), ICJ Reports (1947–1948), pp. 15, 31–32; as well as Fitzmaurice, *Law and Procedure*, vol. I, pp. 100–101. In *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, 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)).

<sup>240</sup> ICJ Reports (1955), pp. 90, 118.

<sup>241</sup> Cf. e.g. Baxter, R.R., 'International Law in "Her Infinite Variety"', *ICLQ* 29 (1980), pp. 549–566; 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. 465–493; *id.*, 'The Normative Dilemma: Will and Consent in International Law-Making', *Australian YIL* 12 (1992), pp. 22–53; 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; 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. 843–862; Weil, P., 'Towards Normative Relativity in International Law?', *AJIL* 77 (1983), pp. 413–442. For further references cf. *infra*, fn. 245.

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'.<sup>242</sup> 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'.<sup>243</sup>

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'.<sup>244</sup> They, too, while not being legally binding, do produce legal effects.<sup>245</sup> The ICJ has recognized their existence in some cases, but it has been careful to distinguish them from treaties properly so called.<sup>246</sup> Thus, in the case concerning the *Aegean Continental Shelf case*, the ICJ observed 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'<sup>247</sup> 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.<sup>248</sup>

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.<sup>249</sup>

<sup>242</sup> 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.

<sup>243</sup> ICJ Reports (1955), pp. 90, 115.

<sup>244</sup> McNair, Lord A.D., *The Law of Treaties* (1961), p. 6.

<sup>245</sup> 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* BAND (1979), pp. 326–348; Aust, A., 'The Theory and Practice of Informal International Instruments', *ICLQ* 35 (1986), pp. 787–812; Daillier and Pellet, *supra*, fn. 145, pp. 384–392.

<sup>246</sup> 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 (PCIJ, Series B, No. 8, pp. 29–30; and cf. Sørensen, pp. 68–69, for comment).

<sup>247</sup> ICJ Reports (1978), pp. 39 (para. 96).

<sup>248</sup> *Ibid.*, p. 44 (para. 107). On the basis of a similar reasoning, the Court came to a similar conclusion in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*: cf. its provisional measures orders of 8 April and 13 September 1993 ICJ Reports (1993), pp. 3, 16–18 (paras. 27–32) and pp. 325, 340–341 (para. 32), and the judgment of 11 July 1996 (Preliminary Objections), ICJ Reports (1996), pp. 595, 618–619 (para. 37). In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, it reached the opposite conclusion with respect to the minutes of a meeting between the foreign ministries of the parties, which it considered as constituting 'an international agreement creating rights and obligations for the Parties' (Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 122 (para. 30)).

<sup>249</sup> ICJ Reports (1978), pp. 3, 44 (para. 108).

107 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*.<sup>250</sup> 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'.<sup>251</sup>

108 It does not come as a surprise that the 'quasi-sources' briefly studied in this subsection have not been as such 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, 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 caselaw 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 law<sup>252</sup> 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

109 Clearly, the sources listed in Art. 38, para. 1, are 'formal sources' of international law, that is processes through which international law rules become legally relevant.<sup>253</sup> 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;<sup>254</sup> '[t]he

<sup>250</sup> Rousseau, *supra*, fn. 73, pp. 420–422; 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 dantzaïkois*, 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. 101–102).

<sup>251</sup> Cf. ICJ Reports (1950), pp. 4, 8; and cf. also pp. 9–10.

<sup>252</sup> 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 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 176 (para. 98)). Cf. also *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, 31 (referring to GA Res. 1514 (XV) of 14 December 1960 as part of the 'subsequent development of international law' concerning self-determination) *Western Sahara*, 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 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 (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 (ICJ Reports (1996), pp. 226, 264 (para. 102)).

<sup>253</sup> Cf. *supra*, MN 75.  
<sup>254</sup> Cf. e.g. Daillier and Pellet, *supra*, fn. 145, p. 112; 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. 73, p. 58; Sørensen, p. 13–14.

former . . . is the source from which the legal rules derives its legal validity, while the later denotes the provenance of the substantive content of that rule'.<sup>255</sup>

As Professor (now Judge) Rosalyn Higgins put it, 'law and politics are not necessarily inimical'.<sup>256</sup> More than that: the law-making process is largely, if not exclusively, political.<sup>257</sup> But politics as well as other material sources of the rules of international law precede law; they are upstream.

This has been acknowledged by the World Court in respect to morality.<sup>258</sup> As 'a court of law', the ICJ:

. . . 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.<sup>259</sup>

The same holds true with respect to economic or geographical considerations which 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';<sup>260</sup> these 'basic considerations' can be based on geographical factors,<sup>261</sup> but extend beyond them and also include 'certain economic interests peculiar to a region'.<sup>262</sup> Thus presented, economic or geographical considerations found and explain the applicable legal rules, but do not constitute the rules in question by themselves.<sup>263</sup> This is particularly clear in regard to the institution of

<sup>255</sup> Oppenheim's *International Law*, *op. cit.* fn. 145, p. 23.

<sup>256</sup> Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p. 9.

<sup>257</sup> 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).

<sup>258</sup> 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 135–151). However, morality can be seen as more divorced from law than equity, in that it conveys a more individual, less 'social' or collective, connotation.

<sup>259</sup> *South West Africa*, ICJ Reports (1966), pp. 6, 34 (paras. 49–50). This judgment has been strongly criticized—and for some good reasons—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.

<sup>260</sup> *Fisheries*, ICJ Reports (1951), pp. 116, 133.

<sup>261</sup> 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.*).

<sup>262</sup> *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 doubtful position as to the relevance of economic factors in the delimitation process *cf.* however the *Continental Shelf case* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 77 (para. 106).

<sup>263</sup> *Cf. e.g.* Fitzmaurice, *Law and Procedure*, vol. I, pp. 199–200. For his part, Rosenne analyzes these pronouncements as an application of equity *intra legem* (*Law and Practice*, vol. III, p. 1596). 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' (*Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 278 (para. 59)), it considers the said data as pure factual circumstances, not

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'.<sup>264</sup>

- 113 The Court has also referred to 'new scientific insights and to a growing awareness of the risks for mankind'<sup>265</sup> which has brought about the development of new norms and standards concerning the protection of the environment.<sup>266</sup> However, it has made 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, in 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.<sup>267</sup>

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

- 114 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 v. Municipal Law*

- 115 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.<sup>268</sup> It will limit itself to clarifying the use made by the Court of domestic law<sup>269</sup> in view of its Statute's clear indication that it must decide in accordance with *international law*.

- 116 Notwithstanding Art. 38, it will be apparent that domestic law is omnipresent in the case law of the World Court. However, contrary to views exposed by some scholars<sup>270</sup>

as the 'material sources' of the law to be applied. Cf. also, *ibid.*, p. 342 (paras. 236–237); or *Maritime Delimitation in the Area Between Greenland and Jan Mayen*, ICJ Reports (1993), pp. 38, 71 (para. 75).

<sup>264</sup> *North Sea Continental Shelf case*, ICJ Reports (1969), pp. 3, 51 (para. 95); or *Aegean Sea Continental Shelf*, 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 made by the Chamber of the Court in the *Gulf of Maine case* (ICJ Reports (1984), pp. 246, 293 (para. 91)).

<sup>265</sup> *Gabčíkovo-Nagymaros case*, ICJ Reports (1997), p. 7, 78 (para. 140). Cf. also the judgment in the *Kasikili/Sedudu Island case*, ICJ Reports 1999, pp. 1045, 1060 (para. 20).

<sup>266</sup> ICJ Reports (1997), p. 7, 78 (para. 140) and 41 (para. 38). Cf. also *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 241–242 (para. 29).

<sup>267</sup> ICJ Reports (1970), pp. 3, 46–47 (para. 89).

<sup>268</sup> 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. 103–117.

<sup>269</sup> In the present article, 'municipal law', 'national law' and 'domestic law' will be treated as synonyms.

<sup>270</sup> 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', *Pol. Yb Int'l L* 59 (1983), pp. 153–164; 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

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.

In a *dictum* that has been celebrated or subjected to public obloquy, the PCIJ 117 declared that:

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.<sup>271</sup>

As a consequence, a State cannot invoke its own domestic law or that of another State 118 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...<sup>272</sup>

In its commentaries on Art. 3 of its Articles on Responsibility of States for Internationally Wrongful Acts,<sup>273</sup> the ILC considered that these formulae represent the clearest formulation of the basic principles in this matter.<sup>274</sup>

This has led the Court vigorously to affirm the 'superiority' of international law 119 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.<sup>275</sup>

This principle, which had already been applied in the *Alabama* arbitration,<sup>276</sup> has been the constant position of both Courts since then.<sup>277</sup> It has also been applied

à la lumière de la jurisprudence de la Cour permanente de Justice internationale', *RGDIP* 66 (1962), pp. 260–298; 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. 133–162. Cf. also the more general study by Santulli, C., *Le statut international de l'ordre juridique étatique : Étude du traitement du droit interne par le droit international* (2001).

<sup>271</sup> *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 7, p. 19.

<sup>272</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, Series A/B, No. 44, pp. 24–25. Cf. also the judgment in the *Lotus case* (PCIJ, Series A, No. 10, p. 24).

<sup>273</sup> 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).

<sup>274</sup> Para. 2 of the commentary to Art. 3, reproduced in Crawford, *supra*, fn. 273, 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. <sup>275</sup> PCIJ, Series A, No. 1, p. 29.

<sup>276</sup> 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. 1456–1457.

<sup>277</sup> Cf. e.g. *Exchange of Greek and Turkish Populations*, PCIJ, Series B, No. 10, p. 20; *Jurisdiction of the Courts of Danzig*, PCIJ, Series B, No. 15, pp. 26–27; *Greco Bulgarian Communities*, PCIJ, Series B, No. 17, p. 32; the order and judgment in *Free Zones of Upper Savoy and the District of Gex*, PCIJ, Series A, No. 24, p. 12; and PCIJ, Series A/B, No. 46, p. 167 respectively; and further *Treatment of Polish Nationals*, PCIJ,

where a judgment of a national court was at stake<sup>278</sup> as well as in relation to federal States.<sup>279</sup>

120 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, '[a]dmettre qu'une règle de droit interne peut être conforme—ou non conforme—au droit international, c'est admettre l'unité des deux ordres'.<sup>280</sup> 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 pragmatic<sup>281</sup> 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.

121 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, for all that:

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.<sup>282</sup>

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

Series A/B, No. 44, p. 24. Cf. also the observations of Lord Finlay appended to the advisory opinion on the *Acquisition of Polish Nationality*, PCIJ, Series B, No. 7, p. 26; the ICJ's advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), pp. 174, 180; the judgments in *Fisheries*, ICJ Reports (1951), pp. 116, 132; *Nottebohm* (Preliminary Objection), ICJ Reports (1953), pp. 111, 123; *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Reports (1958), pp. 55, 67; and the advisory opinion 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, 34–35 (para. 57).

<sup>278</sup> *Factory at Chorzów* (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 and other Mexican Nationals*, 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.

<sup>279</sup> Cf. e.g. the order of 9 April 1999 in the *LaGrand case*, 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 497–498 (paras. 90–91); similarly the judgment in *Avena and other Mexican Nationals*, ICJ Reports (2004), pp. 12, 56–57 (paras. 112–113).

<sup>280</sup> Marek, *supra*, fn. 270, *RGDIP* 66 (1962), pp. 260, 268.

<sup>281</sup> Sorel, in *Droit international et droits internes*, *supra*, fn. 270, pp. 133, 160.

<sup>282</sup> *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 7, p. 19, and also p. 42. In its judgment of 26 March 1925 in the *Mavrommatis Jerusalem Concessions case*, the Court had already clarified that '[t]he 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 case*, PCIJ, Series A/B, No. 76, p. 18.

reference to German law is *necessary* in the examination of the nature and extent of the rights and obligations arising under these contracts',<sup>283</sup> and extensively discussed the relevant German legal rules and its meaning.<sup>284</sup>

Similarly, the present Court has never hesitated to resort to national laws when it deemed it 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'.<sup>285</sup> 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.<sup>286</sup>

Such a use of domestic law is particular 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.<sup>287</sup>

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 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'.<sup>288</sup> 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.<sup>289</sup>

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

<sup>283</sup> *Certain Questions relating to Settlers of German Origin in the Territory ceded by Germany to Poland*, PCIJ, Series B, No. 6, p. 29.

<sup>284</sup> *Ibid.*, pp. 30–34.

<sup>285</sup> ICJ Reports (1970), pp. 3, 33 (para. 38).

<sup>286</sup> *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).

<sup>287</sup> ICJ Reports (1986), pp. 554, 568 (para. 30). See also para. 28 of the Chamber judgment of 12 July 2005 in the *Frontier Dispute* (Benin/Niger) (available at <http://www.icj-cij.org>), and contrast the Chamber judgment in the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Reports (1992), pp. 351, 559 (para. 333).

<sup>288</sup> Virally, *Le droit international en devenir, supra*, fn. 268, pp. 103, 109.

<sup>289</sup> Santulli, *supra*, fn. 270, pp. 261–262.



circumstance that the dispute relates to a question of municipal law rather than to a pure matter of fact.<sup>290</sup>

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

- (i) 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.
- (ii) 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,<sup>291</sup> 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 negative insofar as such a *renvoi* would impose upon the Court the duty to decide according to rules which are not international in nature<sup>292</sup> (except if recourse is had to Art. 38, para. 2).<sup>293</sup>
- (iii) However, in any case, 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 international 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',<sup>294</sup> as the substantive matter of the solution, and to international law.<sup>295</sup>

127 In fact, in these cases as in any others where domestic law issues were relevant, the PCIJ and 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 non-legal acts does not matter; they must comply with international law; if they do not, they are international wrongful acts

<sup>290</sup> PCIJ, Series A, No. 20/21, p. 19 (emphasis added). Cf. also the advisory opinion on the *Consistency of Certain Legislative Decrees with the Constitution of the Free City*, where the Court, without any discussion, accepted to answer a question clearly (and exclusively) relating to domestic law (PCIJ, Series A/B, No. 65; for the text of the question cf. p. 42). Very logically, in his separate opinion, Judge Anzilotti objected on the ground that '[t]he 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).

<sup>291</sup> And the fact is that the paragraph quoted above 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. 270, *RGDIP* 66 (1962), pp. 260, 295–298. It can be noted that Art. 38 itself is included in Chapter II of the Statute, entitled 'Competence of the Court'.  
<sup>292</sup> Cf. *infra*, MN 196–197.

<sup>293</sup> Cf. *infra*, MN 152–170.

<sup>294</sup> To use the much more satisfactory expression of a Chamber of the present Court in the *ELSI case* (ICJ Reports (1989), pp. 15, 47 (para. 62)).

<sup>295</sup> 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').

entailing the responsibility of the State.<sup>296</sup> 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 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.<sup>297</sup>

And, in the *LaGrand case* the Court, after recalling that, '[i]f 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.<sup>298</sup>

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: 128

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.<sup>299</sup>

<sup>296</sup> Cf. e.g. the Court's order of 3 March 1999 in *LaGrand*, ICJ Reports (1999), pp. 9, 16 (para. 28). More generally, cf. also Art. 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (*supra*, fn. 273) and the corresponding commentary (reproduced in Crawford, *supra*, fn. 273, at pp. 94–99); as well as *supra* MN 118.

<sup>297</sup> 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. 277.

<sup>298</sup> ICJ Reports (2001), pp. 466, 513 (para. 125). Cf. also para. 51 of the judgment of 10 February 2005 in the *Certain Property case*, 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' (available at <http://www.icj-cij.org>).

<sup>299</sup> *Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124. Once again, this formulation is awkward even though the underlying principle is entirely acceptable (cf. already *supra*, MN 126). Cf. further, e.g., *Serbian Loans*, PCIJ, Series A, Nos. 20/21, p. 46; and the ICJ's judgments in *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Reports (1958), pp. 65 or *Eletronica Sicula S.p.A. (ELSI)*, ICJ Reports (1989), pp. 15, 47 (para. 62).

129 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.<sup>300</sup>

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'.<sup>301</sup>

130 It can, nevertheless, happen that, without taking 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'.<sup>302</sup> 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';<sup>303</sup> therefore, Liechtenstein could not 'rely upon' it against Guatemala.<sup>304</sup>

131 Domestic law has even greater resonance in international law when the latter expressly 'falls back on' ('renvoie au')<sup>305</sup> domestic law.<sup>306</sup> In these cases, the Court is called upon to 'apply' municipal law, not as such, but as being incorporated into international law. This is so, for example, when a party raises an objection as to the admissibility of a case of diplomatic protection based on the failure to exhaust local remedies.<sup>307</sup>

132 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 analogy;<sup>308</sup> 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 both hypotheses.

133 Analogy is just that: a '[r]essemblance établie par une opération intellectuelle entre deux ou plusieurs actes ou situations juridiques'.<sup>309</sup> When the Court or, more frequently,

<sup>300</sup> PCIJ, Series A/B, No. 76, p. 19.

<sup>301</sup> *Case concerning the Vienna Convention on Consular Relations* Order of 9 April 1998, 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 and other Mexican Nationals*, ICJ Reports (2003), pp. 12, 34 (para. 37).

<sup>302</sup> *Nottebohm*, ICJ Reports 1955, pp. 4, 21.

<sup>303</sup> *Ibid.*, p. 26.  
<sup>304</sup> *Ibid.*, p. 20. The French original text is more revealing: 'il s'agit de rechercher si cet acte... est opposable au Guatemala' (emphasis added).

<sup>305</sup> As noted by Hugh Thirlway, the term '*renvoi*' does not exist in English ('Law and Procedure, Part One', *BYIL* 60 (1989), pp. 4, 124-125).

<sup>306</sup> As happened, according to the present writer, in the *Serbian and Brazilian Loans cases*: cf. *supra*, MN 127.

<sup>307</sup> Cf. *Interhandel*, ICJ Reports (1959), pp. 6, 27-28. 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*).

<sup>308</sup> Cf. principally Hersch Lauterpacht's chef d'oeuvre, *Private Law Sources and Analogies in International Law* (1927); and Thirlway, *Rec. des Cours* 294 (2002), pp. 264-405.

<sup>309</sup> *Dictionnaire de droit international public* (Salmon, J., ed., 2001), p. 63.

individual judges<sup>310</sup> resort to municipal law rules or institutions as a source of analogy, they simply implement a *method* of interpretation of the (international) rules they have to apply and can conclude either that the international institution is distinct from the apparently corresponding domestic one—and they will draw the consequences accordingly<sup>311</sup>—or they will conclude that the similarities are such that they 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’,<sup>312</sup> not to a particular national law.

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.<sup>313</sup> 134

*cc) Equity*

As has been rightly noted, the word ‘equity’ is ambiguous and takes on various meanings in the context of the sources of international law.<sup>314</sup> It can either: 135

- 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*;<sup>315</sup> or
- be used as a means for filling the *lacunae* of international law—equity *praeter legem*; or
- 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*;
- not to speak of equity in the technical meaning it has in domestic common law systems, in particular in England.

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’.<sup>316</sup> Indeed, 136

<sup>310</sup> Hugh Thirlway rightly notes that ‘[i]ndividual judges are often in a good position to draw analogies from the specific national systems of law with which they are most familiar’ (‘Law and Procedure, Part One’, *BYIL* 60 (1989), pp. 4, 127).

<sup>311</sup> *Cf. International Status of South West Africa*, 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 of the United Nations*, ICJ Reports (1962), pp. 151, 168.

<sup>312</sup> *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Reports (1970), pp. 3, 37 (para. 37).

<sup>313</sup> *Cf. infra*, MN 248–264.

<sup>314</sup> *Cf. e.g. Oppenheim’s International Law*, *supra*, fn. 145, pp. 43–44; Sørensen, 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., and Fitzmaurice, M., eds., 1996), pp. 121–144, 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. 509–535; Degan, D., *L’équité et le droit international* (1970); *id.* ‘La justice, l’équité et le droit international’, in *Mélanges en l’honneur de Nicolas Valiticos—Droit et Justice* (Dupuy, R.-J., ed., 1999), pp. 89–100; Jennings, Sir R., ‘Equity and Equitable Principles’, *Schweiz. JB Internat. Recht* 42 (1986), pp. 27–38; Lauterpacht, E., *Aspects of the Administration of International Justice* (1991), pp. 117–152; or De Visscher, Ch., *De l’équité dans le règlement arbitral ou judiciaire des litiges en droit international public* (1972); for further references *cf. infra*, fn. 357 and 384. <sup>315</sup> On this aspect *cf. infra*, MN 152–170.

<sup>316</sup> The expression is borrowed from Sir Arnold McNair’s separate opinion appended to the ICJ advisory opinion on the *International Status of South-West Africa*, warning against importing domestic law institutions into international law (ICJ Reports (1950), pp. 146, 148). On this aspect *cf.* further *infra*, MN 263. During the discussions in the Committee of Jurists of 1920 on Art. 38, Lord Phillimore, explained the common law understanding of ‘equity’ (Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 333); but it is not clear whether or not he suggested that equity (in this sense) should be applied by the Court (Sørensen, p. 195).

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.<sup>317</sup>

- 137 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',<sup>318</sup> 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'.<sup>319</sup> 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* in the international legal system, it can be seen as having used it this way in a disguised manner.

- 138 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'État 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.<sup>320</sup>

- 139 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:

- (i) In its first judgment, in the *Wimbledon* case, the PCIJ took several decisions on the sole basis of social convenience.<sup>321</sup>
- (ii) 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.'<sup>322</sup>

<sup>317</sup> Cf. *infra*, MN 250–261. For an illustration of such a use cf. e.g. Judge Hudson's separate opinion appended to the PCIJ's judgment of 28 June 1937 on the *Diversion of Water from the Meuse* (Series A/B, No. 70, pp. 76–77).

<sup>318</sup> ICJ Reports (1970), pp. 64, 85 (para. 36).  
<sup>319</sup> *Ibid.*, p. 86, quoting *Snell's Principles of Equity* (26th edn. by R.L. Megarry and F.W. Baker, 1966), pp. 5–6. Cf. also Hudson, *PCIJ*, p. 617; Jennings, *supra*, fn. 314, *Schweiz. JB Internat. Recht* 42 (1986), pp. 27–38, p. 32; or Thirlway, 'Law and Procedure, Part One', pp. 4, 56. Contrast however *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982), pp. 18, 60 (para. 71).

<sup>320</sup> Sørensen, p. 201. This clearly raises the delicate question of law-making by the Court, which is briefly treated *infra*, MN 313–319.

<sup>321</sup> These decisions concerned the rate of interest, costs and delays of payment (PCIJ, Series A, No. 1, pp. 31–32). Cf. also the judgment of 30 August 1924 in *Mavrommatis Palestine Concessions*, 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, pp. 201–205.

<sup>322</sup> PCIJ, Series A, No. 10, p. 30 (emphasis added).

- (iii) 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',<sup>323</sup> which implies *a contrario* that these considerations could have had this result.
- (iv) Lastly, in its advisory opinion on the *Interpretation of the WHO Headquarter Agreement*, the Court, discussing the period of time involved in the observance of the duty to consult and 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';<sup>324</sup> 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'.<sup>325</sup>

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' method<sup>326</sup> and that it is neither univocal nor always consistent:<sup>327</sup>

- (i) The expression was first used by the Court in the *Corfu Channel* case where the obligations incumbent upon Albania to notify the existence of a minefield in the 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'.<sup>328</sup> 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';<sup>329</sup> thus they appear to have been considered general principles of international law of a customary nature.
- (ii) In *Nicaragua*, the Court considered that '[t]here 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 humanity"'.<sup>330</sup> 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'.<sup>331</sup>

<sup>323</sup> 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 separate opinion, Sir Gerald Fitzmaurice explained that '[i]n 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)).

<sup>324</sup> ICJ Reports (1980), pp. 96 (para. 49).

<sup>325</sup> *Ibid.*, p. 97 (para. 51 (2c)) (emphasis added).

<sup>326</sup> Weil, in *Fifty Years of the International Court of Justice*, *supra*, fn. 314, pp. 121–144, p. 123.

<sup>327</sup> See generally Dupuy, P.-M., 'Les "considérations élémentaires d'humanité" dans la jurisprudence de la Cour internationale de Justice' in *Mélanges en l'honneur de Nicolas Valiticos—Droit et Justice* (Dupuy, R.-J., ed., 1999), pp. 117–130.

<sup>328</sup> ICJ Reports (1949), pp. 4, 22; also quoted in *Military Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 112 (para. 215).

<sup>329</sup> ICJ Reports (1949), pp. 4, 22.

<sup>330</sup> ICJ Reports (1986), p. 14, 114 (para. 218).

<sup>331</sup> *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*

- (iii) 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',<sup>332</sup> 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.<sup>333</sup>

- 141 In all these cases, considerations based on equity can either be analyzed as the material source of customary (and treaty<sup>334</sup>) rules,<sup>335</sup> or as a description of the content of the rule itself,<sup>336</sup> *i.e.* neither as a distinct source of law nor as stemming from such a distinct source. As has been noted, thus considered, they are 'un instrument approprié de l'élucidation du droit'<sup>337</sup> 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*.
- 142 In the words of Sir Hersch Lauterpacht, '[t]he fact that a Tribunal is bound to apply the law does not necessarily mean that it must apply it uncritically'.<sup>338</sup> The Court has on occasion expressed doubts as to the legitimacy of certain rules of law<sup>339</sup> or recognized that they were in a process of change,<sup>340</sup> but it has always been careful in making a clear distinction between the *lex lata* and the *lex ferenda*.<sup>341</sup> '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'.<sup>342</sup>

*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 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1996), pp. 595, 612 (para. 22).

<sup>332</sup> ICJ Reports (1996), pp. 226, 257 (para. 78).

<sup>333</sup> *Ibid.* (para. 79). *Cf.* also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 199 (para. 157).

<sup>334</sup> As rightly noted by P.-M. Dupuy (in *Mélanges Valticos*, *supra*, fn. 327, pp. 117, 126) '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 États concernés n'aient pas ratifié la ou les conventions en cause.'

<sup>335</sup> '[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' (*Oppenheim's International Law*, *supra*, fn. 145, p. 44.). *Cf.* also *supra*, MN 109 *et seq.*

<sup>336</sup> *Cf. infra*, MN 148-149.

<sup>337</sup> Dupuy, in *Mélanges Valticos*, *supra*, fn. 327, pp. 117, 130.

<sup>338</sup> Lauterpacht, in *Symbolae Verzijl*, *supra*, fn. 184, pp. 196-221, p. 219.

<sup>339</sup> *Cf. e.g. Barcelona Traction, Light and Power Company, Limited*, ICJ Reports (1970); pp. 3, 46-47 (para. 89). In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 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' (ICJ Reports (1996), p. 226, 263 (para. 98)).

<sup>340</sup> *Cf. e.g. Fisheries Jurisdiction*, ICJ Reports (1974), pp. 3, 23-24 (para. 53) and pp. 175, 192 (para. 45); *cf.* also *ibid.* pp. 3, 19 (para. 40).

<sup>341</sup> On this fundamental distinction *cf.* in particular Thirlway, H., 'Reflections 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. 519-533.

<sup>342</sup> *Fisheries Jurisdiction*, ICJ Reports (1974), pp. 3, 23-24 (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. Legality of the Threat or*

This conclusion, however, can be qualified. In *Tunisia/Libya*, the parties had 143 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'.<sup>343</sup> Using rather obscure formulae, the Court, after recalling its statement in the *Fisheries Jurisdiction cases*,<sup>344</sup> made three rather different points:

- in the *Tunisia/Libya case*, 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'.<sup>345</sup>

Here again, in spite of what could be seen as an express authorization to escape from 144 strict legal rules,<sup>346</sup> the Court took great care in relating 'the new accepted trends' mentioned in the special agreement to 'the legal sources specified in Article 38, paragraph 1' of its Statute to which it 'is bound to have regard'.<sup>347</sup> 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'.<sup>348</sup> 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 they do not constitute such a prohibition by themselves',<sup>349</sup> 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'.<sup>350</sup> 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.<sup>351</sup>

However, when the relevant 'trend' has crystallized in a new rule or imposes a new 145 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

*Use of Nuclear Weapons*, Sep.Op. Guillaume, ICJ Reports (1996), pp. 287; Diss.Op. Schwebel, *ibid.* pp. 311; or Shahabuddeen, *Precedent*, pp. 75-76.

<sup>343</sup> Special agreement of 10 June 1977 (Art. 1), reproduced in ICJ Reports (1982), pp. 18, 21.

<sup>344</sup> ICJ Reports (1982), pp. 18, 37 (para. 23). On the *Fisheries Jurisdiction case* cf. *supra*, fn. 340.

<sup>345</sup> ICJ Reports (1982), pp. 18, 38 (para. 24).

<sup>346</sup> On this point cf. *infra*, MN 156-167.

<sup>347</sup> ICJ Reports (1982), pp. 18, 37 (para. 23); and cf. already *supra*, MN 76-77.

<sup>348</sup> ICJ Reports (1969), pp. 3, 41 (para. 69), and also p. 38 (para. 62).

<sup>349</sup> ICJ Reports (1996), pp. 226, 253 (para. 62).

<sup>350</sup> *Ibid.*, p. 255 (para. 71).

<sup>351</sup> For another example of such a process which has not resulted in a new legal rule cf. *supra*, MN 113.



functions, may not ignore'.<sup>352</sup> A comparable position had been adopted by the Court in the *Aegean Sea Continental Shelf* 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'.<sup>353</sup> 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'.<sup>354</sup>

146 As the Court has consistently recalled, '[w]hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable'.<sup>355</sup>

147 If, indeed, '[t]he Court has not been expressly authorized by its Statute to apply equity as distinguished from law', it must, nevertheless, be concluded 'that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply'.<sup>356</sup>

148 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 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.<sup>357</sup> Such delimitations must 'be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution'.<sup>358</sup> 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,<sup>359</sup> clearly shows that 'in this field it is precisely a rule of law that calls for the application of equitable principles'.<sup>360</sup> As the Court clarified in the *Fisheries Jurisdiction* cases: 'It is not a matter of finding simply an equitable solution but an equitable solution derived from the applicable law'.<sup>361</sup> And, even more prudently, in the *Land and*

<sup>352</sup> *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, 31–32 (para. 53); cf. also *Western Sahara*, ICJ Reports (1975), pp. 12, 32 (para. 56).

<sup>353</sup> ICJ Reports (1978), pp. 3, 34 (para. 80).

<sup>354</sup> ICJ Reports (1997), pp. 7, 67 (para. 112).

<sup>355</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 48 (para. 88). Cf. also *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 60 (para. 71), and Judge Jiménez de Aréchaga's separate opinion, *ibid.*, p. 106 (para. 25); *Continental Shelf* (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), pp. 13, 39 (para. 45).

<sup>356</sup> *Diversion of Water from the Meuse*, PCIJ, Series A/B, No. 70, Sep. Op. Hudson, pp. 76 and 77.

<sup>357</sup> On the role of equity in maritime delimitations cf. e.g. Bedjaoui, M., 'L'énigme' des "principes équitables" dans le droit des délimitations maritimes', *Revista española de derecho internacional* 42 (1990), pp. 367–388; 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. 229–239. For further references on equity cf. *supra*, fn. 314.

<sup>358</sup> Arts. 75, para 1, and 83, para.1 UNCLOS.  
<sup>359</sup> ICJ Reports (1969), pp. 3 *et seq.* In these cases, the Court clearly acted as a quasi-legislator; cf. *infra*, MN 318 and fns 860 and 864.

<sup>360</sup> ICJ Reports (1969), pp. 3, 48 (para. 88), and also p. 47 (para. 85).

<sup>361</sup> 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* (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 150). whereas in maritime delimitations, it is the very content of the applicable rules. Cf. further *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 60 (para. 71).

*Maritime Boundary between Cameroon and Nigeria*, 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.<sup>362</sup>

Delimitation of maritime areas, however, is not the only field where equity is substantial to the rule itself. The same is also largely true with respect to the determination of reparation for an internationally wrongful act.<sup>363</sup> Thus, in its 1956 advisory opinion on the *Judgments of the ILOAT Made against the UNESCO*, the Court recognized that, 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'.<sup>364</sup> 149

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',<sup>365</sup> that is a 'legal concept [being] a direct emanation of the idea of justice'.<sup>366</sup> 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',<sup>367</sup> 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'.<sup>368</sup> Applying this general guideline, the Court rejected a purely literal interpretation of the 1950 Thailand's Declaration of the compulsory jurisdiction of the Court considering the result reached by this method to be 'something unreasonable or absurd'.<sup>369</sup> 150

As has been observed, '[e]quity is not used to usurp the function of law, but to ensure its proper operation in accordance with the principles of justice'.<sup>370</sup> It is not a "joker" 151

<sup>362</sup> ICJ Reports (2002), pp. 303, 443 (para. 294).

<sup>363</sup> Cf. the ILC's commentaries on the Articles on Responsibility of States for Internationally Wrongful Acts, *supra*, fn. 273, especially Art. 35 (Restitution), para. (11); Art. 36 (Compensation), paras. (7) and (19).

<sup>364</sup> ICJ Reports (1956), pp. 27. 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*, ICJ Reports (1949), pp. 249 *et seq.*; and the *Wimbledon case*, *supra*, fn. 321.

<sup>365</sup> ICJ Reports (1986), pp. 567-568 (para. 28); cf. also the Chamber judgment of 11 September 1992 in *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 514 (para. 262).

<sup>366</sup> *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 60 (para. 71); *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 633 (para. 149); *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 558 (para. 396).

<sup>367</sup> *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 60 (para. 71).

<sup>368</sup> *South West Africa*, ICJ Reports (1966), pp. 6, 48 (para. 91).

<sup>369</sup> *Temple of Preah Vihear* (Preliminary Objections), ICJ Reports (1961), pp. 17, 33. Cf. also *Polish Postal Service in Danzig*, PCIJ, Series B, No. 11, p. 39; *Ambatielos* (Preliminary Objections), ICJ Reports (1952), pp. 28, 45; *Arbitral Award of 31 July 1989*, ICJ Reports (1991), pp. 53, 69-70 (para. 48). 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.

<sup>370</sup> Cheng, B., 'Justice and Equity in International Law', *Current Legal Problems* 1955, p. 211.

*judiciaire*.<sup>371</sup> 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 to the interpretation of the rules—and, in some cases, it forms the very content of the rule itself.

## 2. *The Exception in Para. 2*

- 152 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 League of Nations.<sup>372</sup> 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.<sup>373</sup>

Haguerup, 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.'<sup>374</sup> 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.<sup>375</sup> However, he understood 'principles of equity' as 'general rules which permit the solution of any question',<sup>376</sup> 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',<sup>377</sup> any reference to the latter seemed superfluous.

- 153 In the Sub-Committee of 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,<sup>378</sup> 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.<sup>379</sup> 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 above all 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.<sup>380</sup>

- 154 During the redrafting of the Statute of the new Court in 1945, para. 2 of Art. 38 was not questioned,<sup>381</sup> neither during the works of the Washington Advisory Committee of Jurists nor at the San Francisco Conference.

<sup>371</sup> Cf. Dupuy, in *Mélanges Valticos*, *supra*, fn. 327, pp. 117, 128.

<sup>372</sup> Cf. *supra*, MN 39.

<sup>373</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 296.

<sup>374</sup> *Ibid.* <sup>375</sup> *Ibid.*, p. 332.

<sup>376</sup> *Ibid.*, p. 314. *Contra* Lord Phillimore, *ibid.*, p. 333, de Lapradelle, *ibid.*, p. 335.

<sup>377</sup> *Ibid.*, p. 335. <sup>378</sup> Cf. *supra*, MN 11–13.

<sup>379</sup> League of Nations, Documents of the First Assembly, Meetings of the Committees, vol. I, p. 386.

<sup>380</sup> *Ibid.*, p. 403.

<sup>381</sup> 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).

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 court of law—at least in the national sphere<sup>382</sup>—this possibility is subject to an agreement between the parties, a condition which the Court has strictly interpreted. 155

a) The Notion of *ex aequo et bono*

Certainly, the expression *ex aequo et bono* is not a ‘term of art’.<sup>383</sup> 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*. 156

There is broad agreement among commentators that ‘[i]n 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.’<sup>384</sup> This is hardly debatable: according to the principle of *ut res magis valeat quam pereat*,<sup>385</sup> Art. 38, para. 2, must be given some meaning in order not to ‘be devoid of purport or effect’.<sup>386</sup> 157

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: 158

- ‘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’;<sup>387</sup>
- ‘[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’;<sup>388</sup>

Guatemala took the opposite approach, arguing that ‘[t]o 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.*).

<sup>382</sup> The possibility for international tribunals to decide *ex aequo et bono* is far from unprecedented; *cf. supra*, MN 5 and 11. <sup>383</sup> Hudson, *PCIJ*, p. 618.

<sup>384</sup> *Ibid.* p. 620. *Cf.* also, among others, Brownlie, *supra*, fn. 145, pp. 26 and 690; Daillier and Pellet, *supra*, fn. 145, p. 355; 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; Oppenheim’s *International Law*, *supra*, fn. 145, 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. 73, p. 412).

<sup>385</sup> *Cf.* the order of 19 August 1929 in the *Free Zones of Upper Savoy and the District of Gex*, *PCIJ*, Series A, No. 22, p. 13; the advisory opinions on the *Acquisition of Polish Nationality*, *PCIJ*, Series B, No. 7, pp. 16–17; the *Exchange of Greek and Turkish Populations*, *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*, *ICJ Reports* (1949), pp. 4, 24; on the *Sovereignty over Certain Frontier Land*, *ICJ Reports* (1959), pp. 209, 221–222; and in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *ICJ Reports* (1994), pp. 6, 23–24 (para. 47).

<sup>386</sup> *Corfu Channel case*, *ICJ Reports* (1949), pp. 4, 24.

<sup>387</sup> *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, *PCIJ*, Series A, No. 24, p. 10.

<sup>388</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *ICJ Reports* (1982), pp. 18, 60 (para. 71). *Cf.* also *South West Africa*, *ICJ Reports* (1966), pp. 6, 48 (para. 90); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *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';<sup>389</sup>
- '[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*';<sup>390</sup>
- '[t]his reference [in the Special Agreement] to the rules of international law and to the "first paragraph" of Article 38 obviously excludes the possibility of any decision *ex aequo et bono*'.<sup>391</sup>

159 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 Section 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'.<sup>392</sup>

160 Similarly, it is interesting to note that several treaties concluded during the inter-war years,<sup>393</sup> using various formulae, 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'.<sup>394</sup>

161 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?

<sup>389</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 278 (para. 59).

<sup>390</sup> *Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports (1986), pp. 554, 567 (para. 28).

<sup>391</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports (1992), pp. 351, 390 (para. 47).

<sup>392</sup> ICJ Reports (1972), pp. 46, 58–59 (para. 20).

<sup>393</sup> 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 (for example, see Art. 7 of Convention XII of 1907 creating the International Prize Court, referred to *supra*, MN 11), and nothing clear can be inferred from them. For examples *cf. e.g.* Hudson, *PCIJ*, pp. 615–616 or Rousseau, *supra*, fn. 73, pp. 412–413. 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).

<sup>394</sup> *Cf.* *PCIJ*, Series D, No. 6, p. 482, fn. 2; as well as the examples given by Hudson, *PCIJ*, pp. 618–619; Rousseau, *supra*, fn. 73, pp. 412–413; and von Stauffenberg, pp. 281–282. 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.<sup>395</sup> 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 above,<sup>396</sup> 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,<sup>397</sup> this implies that, when deciding *ex aequo et bono*, the Court would not refer to equity in its 'legal' manifestations.

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,<sup>398</sup> the Court said (without mentioning Art. 38):

[E]ven 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.<sup>399</sup>

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',<sup>400</sup> it was not deciding *ex aequo et bono*. For example, it has noted that the '[a]pplication of equitable principles is to be distinguished from a decision *ex aequo et bono*';<sup>401</sup> and has observed that '[i]f 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.'<sup>402</sup>

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*.<sup>403</sup> Nevertheless, the distinction must be firmly maintained:<sup>404</sup> equity, as defined by the Court, gives it reasonable flexibility<sup>405</sup> to apply international

<sup>395</sup> Cf. *supra*, MN 152–153.      <sup>396</sup> MN 152.      <sup>397</sup> Cf. *supra*, MN 135–151.

<sup>398</sup> In his famous separate opinion in the *Free Zones case*, Judge Hudson declared: '[I]t 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' (Order of 6 December 1930, PCIJ, Series A, No. 24, p. 34; and cf. more generally, his opinion in its entirety, pp. 29–43).      <sup>399</sup> PCIJ, Series A, No. 24, p. 10 (emphasis added).

<sup>400</sup> Cf. *supra*, MN 139–151.

<sup>401</sup> *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 60 (para. 71). Cf. also *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 48 (para. 88); *Continental Shelf* (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), pp. 13, 39 (para. 45).

<sup>402</sup> *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 575 (para. 42).

<sup>403</sup> Cf. e.g. Abi-Saab, in *Liber Amicorum Jimenez de Arechaga*, *supra*, fn. 150, 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, in *Fifty Years of the International Court of Justice*, *supra*, fn. 314, pp. 121–144, p. 132.

<sup>404</sup> Cf. Jennings, *supra*, fn. 314, *Schweiz. JB Internat. Recht* 42 (1986), pp. 27–38, p. 30.

<sup>405</sup> For a similar view, see 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 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.

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* . . .

166 Some caveats however are necessary:

- (i) First, exactly as in French or international administrative law, 'discretionary' does not mean 'arbitrary':<sup>406</sup> the judges must find a solution which remains within the realm of the judicial function of the Court;<sup>407</sup> 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 intragressible norms (*jus cogens*).
- (ii) Second, it goes without saying that decisions based on Art. 38, para. 2, would have the same legal effect as those made in the 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.
- (iii) 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,<sup>408</sup> that it could base itself on extra-legal considerations.<sup>409</sup>

167 It must however be admitted that this is somehow paradoxical if, as the Court sometimes seems to postulate,<sup>410</sup> 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. It can therefore happen, more often than not, 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.

<sup>406</sup> Cf. e.g. Conseil d'État, 14 January 1916, *Camino*, *Recueil Lebon*, p. 15; or Conseil d'État, Assemblée, 2 November 1973, *Société anonyme Librairie François Maspéro*, *Recueil Lebon*, p. 611; and also the judgment of the ILO Administrative Tribunal of 15 May 1972 in *Ballo v. UNESCO*.

<sup>407</sup> 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.

<sup>408</sup> If one assumes that this is conceptually possible—cf. *supra*, MN 84–87, for a discussion of *non liquet*.

<sup>409</sup> 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 hand 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'.

<sup>410</sup> Cf. *supra*, MN 146.

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 168  
 take a decision *ex aequo et bono* ‘only on condition that the Parties agree’.<sup>411</sup>

As recalled above,<sup>412</sup> in the *Free Zones case*, the PCIJ very firmly took the view that 169  
 such an authorization to decide *ex aequo et bono*<sup>413</sup> ‘could only be derived from a clear  
 and explicit provision to that effect’.<sup>414</sup> This requirement is in keeping with the text of  
 Art. 38, para. 2, and with the ‘absolutely exceptional character’<sup>415</sup> of such a power  
 conferred on a judicial organ ‘whose function is to decide in accordance with interna-  
 tional law’.<sup>416</sup> Rightly, in its 1982 judgment in *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*’.<sup>417</sup>

As a result, it is most implausible that the Court should be invited to decide *ex aequo et* 170  
*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 whether the parties could change the very nature of the dispute after  
 having seised the Court.<sup>418</sup> *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:<sup>419</sup> this is certainly a case where Art. 68 of the Statute does not apply.<sup>420</sup>

#### D. The Sources of International Law in Art. 38

Article 38 gets its fame from the enumeration and concise definitions of the sources of 171  
 international law contained in para. 1—even though, as will be seen below,<sup>421</sup> neither  
 the jurisprudence, nor, certainly, the doctrine, mentioned in para. 1 (d) can be defined as  
 a ‘source’ properly speaking. It goes far beyond the province of this commentary to deal

<sup>411</sup> *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 60 (para. 71);  
 similarly *South West Africa*, ICJ Reports (1966), pp. 6, 48 (para. 90); *Frontier Dispute* (Burkina Faso/Mali),  
 ICJ Reports (1986), pp. 554, 567 (para. 28). For further references *cf. supra*, MN 158. <sup>412</sup> MN 163.

<sup>413</sup> It is worth underlining that the Court’s order in the *Free Zones case* does not use that expression.

<sup>414</sup> PCIJ, Series A, No. 24, p. 10; and *cf.* also pp. 11 and 14.

<sup>415</sup> *Ibid.*, p. 10. It is revealing that, in the 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. 73, p. 414.

<sup>416</sup> Cheng, *supra*, fn. 370, *Current Legal Problems* 1955, p. 204; but contrast Rosenne, *Law and Practice*,  
 vol. III, p. 1596.

<sup>417</sup> *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 47 (para. 46).

<sup>418</sup> *Cf.* the order of 6 December 1930 in the *Free Zones case*, 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*, PCIJ, Series A/B, No. 78, p. 173; *cf.* also the ICJ’s  
 judgments in *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility),  
 ICJ Reports (1984), pp. 392, 427 (para. 80); *Certain Phosphates Lands in Nauru*, 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).

<sup>419</sup> 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 20–27.

<sup>420</sup> For further detail on the relationship between Arts. 68 and 38 *cf. supra*, MN 57–58.

<sup>421</sup> MN 298 *et seq.*



extensively with each of the particular sources listed in Art. 38. However, some cursory remarks are in order to explain briefly how the Court itself views the three ‘main sources’ appearing *lit.* (a), (b) and (c) and how it devises their relationship in practice.

## I. The Particular Sources Listed in Art. 38

- 172 The formulation of Art. 38 in general, and that of para. 1 in particular, has been criticized.<sup>422</sup> However, it has worked well in practice,<sup>423</sup> even if uncertainties remain—more for custom than for conventions, and more for general principles than for custom.

### 1. *International Conventions*

- 173 There could hardly exist a case before the Court where a treaty—or a convention<sup>424</sup>—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);<sup>425</sup> 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’.<sup>426</sup> In virtually all cases one or, 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.

- 174 In so doing, the Court has greatly contributed to consolidating and developing the law of treaties.<sup>427</sup> This commentary is not the proper place to elaborate on this important contribution of the World Court to the development of international law, but it is worth mentioning its role in, for example, the development of a *corpus juris* concerning the rules and principles of treaty interpretation<sup>428</sup> or the principles governing the validity,

<sup>422</sup> Cf. *supra*, MN 78–79.

<sup>423</sup> Cf. *supra*, MN 43, 45 and 80.

<sup>424</sup> On the indiscriminate use of both terms (and others) cf. *infra*, MN 176.

<sup>425</sup> 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 being 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 Chin case*, PCIJ, Series A/B, No. 63; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident At Lockerbie* (Preliminary Objections), ICJ Reports (1998), pp. 9 *et seq.* and 115 *et seq.*; *Gabčíkovo-Nagymaros case*, ICJ Reports (1997), pp. 7 *et seq.*; *LaGrand*, ICJ Reports (2001), pp. 466 *et seq.*; *Avena and other Mexican Nationals*, ICJ Reports (2004), pp. 12 *et seq.*

<sup>426</sup> *Exchange of Greek and Turkish Populations*, PCIJ, Series B, No. 10, p. 17. 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 of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ Reports (1947–1948), pp. 57, 61).

<sup>427</sup> 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, in *Fifty Years of the International Court of Justice*, pp. 63, 65–66; Scott, G.L., and Carr, C.L., ‘The International Court of Justice and the Treaty/Custom Dichotomy’, *Texas Int’l LJ* 16 (1981), pp. 347–359; 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 *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (Hafner, G., *et al.*, eds., 1998), pp. 721–748; 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., and Fitzmaurice, M., eds., 1996), pp. 145–166; 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., and Wolfrum, R., eds., 2002), pp. 251–266.

<sup>428</sup> Cf. *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ, Series B, Nos. 2–3, p. 21; *Competence of the General Assembly for the Admission of a State to the*

termination and suspension of treaties;<sup>429</sup> 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.<sup>430</sup> It is only possible to give some indications as to the way the Court has interpreted its mandate to apply international conventions ‘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 State*

While less complete than the definition of treaties in Art. 2, para. 1 (a) VCLT to which 175 the Court has referred on several occasions,<sup>431</sup> 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’,<sup>432</sup> establishing rules expressly recognized by the parties and, therefore, to be applied by the Court.

Nothing in particular can probably be inferred from the use, in Art. 38, para. 1 (a), of 176 the word ‘conventions’ rather than ‘treaties’,<sup>433</sup> usually seen as the generic term.<sup>434</sup>

*United Nations*, ICJ Reports (1950), pp. 4, 8, *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), ICJ Reports (1994), pp. 6, 21–22 (para. 41). Cf. also Fitzmaurice, *Law and Procedure*, vol. I, pp. 42–65 and 337–372; 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. 223–284; Torres Bernárdez, in *Liber Amicorum Seidl-Hohenveldern*, *supra*, fn. 427, pp. 721–748; and more generally Sur, S., *L’interprétation en droit international public* (1974); De Visscher, C., *Problèmes d’interprétation judiciaire en droit international public* (1963).

<sup>429</sup> Cf. *Gabčíkovo-Nagymaros case*, ICJ Reports (1997), pp. 7, 62–68 (paras. 98–112), and, more particularly on the rules concerning ‘error’, *Sovereignty over Certain Frontier Land*, ICJ Reports (1959), pp. 209, 222 and 225; *Temple of Preah Vihear*, ICJ Reports (1961), pp. 17, 26–28.

<sup>430</sup> Cf. e.g. Bishop, W.W., ‘Reservations to Treaties’, *Rec. des Cours* 103 (1961-II), pp. 245–341, pp. 281–295; Fitzmaurice, G., ‘Reservations to Multilateral Conventions’, *ICLQ* 2 (1953), pp. 1–26; *id.*, *Law and Procedure*, vol. I, pp. 406–427; 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., and 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 Determining the Admissibility of Reservations’, *ibid.*, pp. 335–348; 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. 133–148; De Visscher, C., *Théories et réalités en droit international public* (4th edn., 1970), pp. 291–295. For more general considerations on law-making by the Court cf. *infra*, MN 313–319.

<sup>431</sup> *Aegean Sea Continental Shelf case*, ICJ Reports (1978), pp. 3, 39 (para. 96); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports (1994), pp. 112, 120 (para. 23); *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, 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.’

<sup>432</sup> This expression is used in the *Aegean Sea Continental Shelf case*, ICJ Reports (1978), pp. 3, 39 (para. 96).

<sup>433</sup> 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, somehow surprisingly, by ‘international conventions’ in Root’s ‘compromise’ proposal (*supra*, MN 31).

<sup>434</sup> In its advisory opinion concerning the *Austro-German Customs Régime*, the Permanent Court underlined the limited importance of the denomination of a given instrument for determining its legal status—cf. *infra* MN 177.

Generally speaking, the Statute of the Court is not very consistent in this respect: it uses the expressions 'convention',<sup>435</sup> 'treaty',<sup>436</sup> 'treaty [and] [or] convention',<sup>437</sup> in the singular or the plural, without any apparent reason, without even mentioning the words 'instrument'<sup>438</sup> and '[special] agreement',<sup>439</sup> which also appear with a more specific meaning.

177 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, '[f]rom 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'.<sup>440</sup> For its part, the present Court has constantly considered that '[t]erminology is not a determinant factor as to the character of an international agreement or undertaking',<sup>441</sup> and that 'international agreements may take a number of forms and be given a diversity of names'.<sup>442</sup> 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';<sup>443</sup> 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'.<sup>444</sup>

178 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,<sup>445</sup> 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'.<sup>446</sup> 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.<sup>447</sup> 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 who invoking it, have drawn up a convention specifically providing for a particular method by

<sup>435</sup> Arts. 34, para. 3, and 63. Cf. also Arts. 43, 82, paras. 2 (a), (b) and 3 of the Rules of Court.

<sup>436</sup> Art. 36, para. 2 (a), of the Statute.

<sup>437</sup> Arts. 36, para. 1, 37, para. 1, of the Statute. Cf. also Art. 87, para. 1 of the Rules of Court.

<sup>438</sup> Art. 34, para. 1, of the Statute.

<sup>439</sup> Arts. 36, para. 2, 39, para. 2, 40, para. 1, of the Statute. Cf. also Arts. 26, para. 1 (e), 39, paras. 1 and 2, 40, para. 3, 42, 44, para. 2, 46, paras. 1 and 2, 79, para. 10, 91, 92, para. 1, 96, 98, paras. 1, 2 and 4 of the Rules of Court. <sup>440</sup> PCIJ, Series A/B No. 41, p. 47.

<sup>441</sup> *South West Africa* (Preliminary Objections), ICJ Reports (1962), pp. 319, 331.

<sup>442</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports (1994), pp. 112, 120 (para. 23); and cf. also *Aegean Sea Continental Shelf*, ICJ Reports (1978), pp. 3, 39 (para. 96).

<sup>443</sup> *Aegean Sea Continental Shelf*, ICJ Reports (1978), pp. 3, 39 (para. 96).

<sup>444</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 312 (para. 155). As for the consequences of this basic principle cf. MN 189 *et seq.* <sup>445</sup> Cf. *supra*, MN 176.

<sup>446</sup> Hudson, *PCIJ*, p. 608.

<sup>447</sup> Cf. *supra*, MN 90–91. 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 Article. 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...' (PCIJ, Series A/B, No. 46, p. 141).

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.<sup>448</sup>

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’.

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’?

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 . . .’.<sup>449</sup> 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.<sup>450</sup>

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 Continental Shelf 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,

<sup>448</sup> ICJ Reports (1969), pp. 3, 25–26 (para. 28).

<sup>449</sup> *Lotus*, 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*, MN 219). For the views of the present writer on this crucial issue *cf. e.g.* the two articles referred to in fn. 241; 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. In its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 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’ (ICJ Reports (1951), pp. 15, 21). *Cf.* also the advisory opinion of 11 July 1950 on the *International Status of South West Africa*, ICJ Reports (1950), pp. 128, 139.

<sup>450</sup> *Wimbledon*, PCIJ, Series A, No. 1, p. 25.

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.<sup>451</sup>

On the contrary, in *Qatar/Bahrain*, 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.<sup>452</sup>

183 The second question—is the treaty in force?<sup>453</sup>—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’.<sup>454</sup> Applying this general guideline, the Court has, for example:

- 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;<sup>455</sup>
- examined if 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’;<sup>456</sup>
- 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.<sup>457</sup>

<sup>451</sup> ICJ Reports (1978), pp. 3, 44 (para. 107).

<sup>452</sup> 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 signatories cannot vitiate a conclusion based on the terms of the instrument and the circumstances in which it was drawn up (*ibid.*, pp. 121–122, para. 27); *cf.* also *Kasikili/Sedudu Island*, ICJ Reports (1999), pp. 1045, 1106–1108 (paras. 102–103) and 1108 (para. 104 (3)); as well as the PCIJ’s reasoning in the *Eastern Greenland case* in respect to the Ihlen Declaration (although the declaration is more probably a unilateral act than an instrument, part of a treaty; *cf. supra*, MN 89–90).

<sup>453</sup> The Court has had several opportunities to interpret the expression ‘treaties [and conventions] in force’ in relation with 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 paras. 92–114 of the judgment of 15 December 2004 in the *Legality of Use of Force case* (Serbia and Montenegro/Belgium) (available at <http://www.icj-cij.org>); as well as Müller, D., ‘Procedural Developments at the International Court of Justice’, *LP ICT 4* (2005), pp. 149–151; and further Zimmermann on Art. 35 MN 25–32 (on the ICJ’s jurisprudence under Art. 35, para. 2).

<sup>454</sup> ICJ Reports (1997), pp. 7, 38 (para. 47).

<sup>455</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 25–26 (para. 28). *Cf.* also *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series A, No. 23, p. 20; *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, 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 between Cameroon and Nigeria*, ICJ Reports (2002), pp. 303, 429 (para. 264).

<sup>456</sup> *Sovereignty over Certain Frontier Land*, ICJ Reports (1959), pp. 209, 222 and 225; *Temple of Preah Vihear* (Preliminary Objections), ICJ Reports (1961), pp. 17, 30; and *Temple of Preah Vihear* (Merits), ICJ Reports (1962), pp. 6, 26.

<sup>457</sup> *Cf. e.g. Diversion form Waters of the Meuse*, PCIJ, Series A/B, No. 70, p. 32; *Appeal Relating to the Jurisdiction of the ICAO Council*, ICJ Reports (1972), pp. 46, 67–69 (paras. 38–43) or *Gabčíkovo-Nagymaros case*, ICJ Reports (1997), pp. 7, 62–64 (paras. 98–112) and 68 (para. 114).

However, where the treaty is in force, it does not ensue that all of its provisions 184  
establish rules imposing rights or obligations to the Parties:

[M]ultilateral 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.<sup>458</sup>

This is certainly true concerning the preambular provisions;<sup>459</sup> however, as made 185  
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.<sup>460</sup> 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 jurisdiction of the Court'.<sup>461</sup>

In some cases, the Court has accepted that treaties clearly not in force between the 186  
parties could contribute to determining rules relevant for settling the dispute. This is particularly the case of treaties establishing objective regimes, like delimitation treaties,<sup>462</sup> or in cases where treaty practice is part of the customary process.<sup>463</sup> 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 *Qatar/Bahrain*, the Court observed that 'signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature'.<sup>464</sup>

<sup>458</sup> *Appeal Relating to the Jurisdiction of the ICAO Council*, Sep.Op. Dillard, ICJ Reports (1972), pp. 92, 107 (his fn. 1); for a similar view cf. Baxter, *supra*, fn. 241, ICLQ 29 (1980), pp. 549–566, p. 553.

<sup>459</sup> Cf. e.g. *South West Africa*, ICJ Reports (1966), pp. 6, 34 (para. 50); and cf. already *supra*, MN 111.

<sup>460</sup> Cf. e.g. *Lotus*, PCIJ, Series A, No. 10, p. 17; *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ, Series B, No. 13, p. 23; *Rights of Minorities in Upper Silesia (Minority Schools)*, PCIJ, Series A, No. 15, pp. 27–28; *Free Zones of Upper Savoy and the District of Gex*, (Order of 19 August 1928), PCIJ, Series A, No. 22, pp. 15–16; *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, PCIJ, Series B, No. 16, p. 19; *Free Zones of Upper Savoy and the District of Gex* (Judgment), 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*, PCIJ, Series A/B, No. 62, pp. 13–16; *Pajzs, Csáky, Esterházy case*, PCIJ, Series A/B, No. 68, p. 60. As for the ICJ, cf. *Right of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 197; *South West Africa* (Preliminary Objections), ICJ Reports (1962), pp. 319, 330; *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility), ICJ Reports (1984), pp. 392, 428 (para.83) and (Merits), ICJ Reports (1986), pp.14, 138 (para. 275); *Oil Platforms* (Preliminary Objections), ICJ Reports (1996), pp. 803, 813 (para. 27); *Gabčíkovo-Nagymaros*, ICJ Reports (1997), pp. 7, 81 (para. 151); *Sovereignty over Pulau Ligitan and Pulau Sipadan*, ICJ Reports (2002), pp. 625, 652 (para. 51) and 660–661 (paras. 71–72).

<sup>461</sup> ICJ Reports (1996), pp. 815 (para. 31) (Preliminary Objections); and cf. also *ibid.*, pp. 813–814 (paras. 27–28); and the judgment of 6 November 2003 (Merits), ICJ Reports (2003), pp. 161, 178 (para. 31) and 182 (para. 41).

<sup>462</sup> Cf. *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), ICJ Reports (1994), pp. 6, 37 (para. 73)—cf. *infra* MN 188; 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 settlement of disputes' (*United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), pp. 3, 28 (para. 53)); and further *Avena and Other Mexican Nationals*, ICJ Reports (2004), pp. 12, 38 (para. 47).

<sup>463</sup> Cf. *infra*, fn. 541, for references to the Court's case law.

<sup>464</sup> 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 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*, ICJ Reports (1959), pp. 209, 229.

187 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.<sup>465</sup> 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*’.<sup>466</sup>

188 It can also be noted that in *Chad/Libya*, the Court stressed that the establishment of a boundary by a treaty

... 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.<sup>467</sup>

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.<sup>468</sup> In some respect, 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 *Reparations 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.<sup>469</sup>

*bb) Application of Treaty Rules by the Court*

189 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.<sup>470</sup>

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 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.<sup>471</sup>

190 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

<sup>465</sup> *Rights of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 187.

<sup>466</sup> *Anglo-Iranian Oil Co.*, ICJ Reports (1952), pp. 93, 109.

<sup>467</sup> ICJ Reports (1994), pp. 6, 37 (paras. 72 and 73).

<sup>468</sup> On this legal phenomenon cf. e.g. the separate opinion by Sir Arnold McNair in *International Status of South West Africa*, ICJ Reports (1950), pp. 128, 153–155; and also Daillier and Pellet, *supra*, fn. 145, pp. 248–252; or Tomuschat, C., ‘Obligations Arising for States Without or Against Their Will’, *Rec. des Cours*, 241 (1993-IV), pp. 9–292, pp. 244–247.

<sup>469</sup> ICJ Reports (1949), pp. 174, 185 (The situation thus described is convincing; the reasoning is highly debatable); cf. Pellet, A., ‘Le droit internationale à l’aube du XXIème siècle (La société contemporaine—permanence et tendances nouvelles)’, I *Bancaja Euromediterranean Courses of International Law* (1997), pp. 77–78.) Cf. also *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, 56 (para. 126).

<sup>470</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 24 (para. 25).

<sup>471</sup> *Ibid.*

whether or not that Treaty resulted in a conventional boundary between the territories of the Parties.<sup>472</sup>

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'.<sup>473</sup>

This can be seen as a good example of the principle of 'economy of decisions'<sup>474</sup> and as a striking recognition that treaties are the 'primary source, if not of law, at least of litigation',<sup>475</sup> even if the *lex specialis*<sup>476</sup> constituted by the treaty or treaties in force is often checked against the background of general international law.<sup>477</sup>

When a relevant treaty is found to be in force it must be implemented in good faith by the parties.<sup>478</sup> This obligation to implement *bona fide* the obligations deriving from a treaty has been stressed by the Court on several occasions.<sup>479</sup> Thus, the PCIJ 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'.<sup>480</sup> 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.<sup>481</sup>

That being so, the Court's task is clear:

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

<sup>472</sup> ICJ Reports (1994), pp. 6, 20 (para. 38).

<sup>473</sup> *Ibid.*, p. 38 (paras. 25 and 26).

<sup>474</sup> Jennings, Sir R., 'The Proper Work and Purposes of the International Court of Justice', in Muller *et al.*, *ICJ*, pp. 33, 35.

<sup>475</sup> Kearney, pp. 610, 623. *Accord Bastid*, *supra*, fn. 201, pp. 3–4; Dupuy, in *Collection of Essays by Legal Advisers and Practitioners*, pp. 377, 385; *Oppenheim's International Law*, *supra*, fn. 145, p. 31; Rousseau, *supra*, fn. 73, p. 59. *Cf.* also the Colombian declaration at the San Francisco Conference, UNCIO, vol. XIII, p. 287.

<sup>476</sup> *Cf. e.g. Gabčíkovo-Nagymaros case*, 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 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 137 (para. 274), underlining that '[i]n 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'.

<sup>477</sup> *Cf.* further *infra*, MN 283 *et seq.*

<sup>478</sup> Conversely, when the treaty is not in force between the parties, they are not bound by its rules—with the exceptions mentioned above (MN 186–188)—and the Court will not apply the rules established by it; *cf. e.g. Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series A, No. 23, pp. 19–22; *Free Zones of Upper Savoy and the District of Gex*, PCIJ, Series A/B, No. 46, p. 141; *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 25–26 (para. 28); as well as the reference *infra*, fn. 506.

<sup>479</sup> *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 U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 212; *Gabčíkovo-Nagymaros*, ICJ Reports (1997), pp. 7, 68 (para. 114).

<sup>480</sup> *Exchange of Greek and Turkish Populations*, PCIJ, Series B, No. 10, p. 20.

<sup>481</sup> ICJ Reports (1986), pp. 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; ICJ Reports (2003), pp. 161, 217 (para. 123) (emphasis in the original).



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*).<sup>482</sup>

And, according to a celebrated and often repeated *dictum*, '[i]t is the duty of the Court to interpret the Treaties, not to revise them'.<sup>483</sup>

194 '[I]t is clear that refusal to fulfil a treaty obligation involves international responsibility',<sup>484</sup> whatever the demands of the domestic law of the wrongdoer.<sup>485</sup> Moreover, notwithstanding the complex relationship between the law of responsibility and the law of treaties,<sup>486</sup> the Court has accepted the customary character of Art. 60, para. 3 VCLT<sup>487</sup> 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'.<sup>488</sup> However, except from in 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.<sup>489</sup>

195 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 *Tunisia/Libya case*, '[w]hile the Court is, of course, bound to have regard to all the legal sources specified in Article 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'.<sup>490</sup> Consequently, if the two

<sup>482</sup> *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), ICJ Reports (1994), pp. 6, 25 (para. 51); and cf. also *LaGrand*, ICJ Reports (2001), pp. 466, 494 (para. 77).

<sup>483</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports (1950), pp. 221, 229; and cf. also *Acquisition of Polish Nationality*, PCIJ, Series B, No 7, p. 20; *Rights of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 196.

<sup>484</sup> *Interpretation of Peace Treaties*, ICJ Reports (1950), pp. 221, 228. Cf. also *Gabčíkovo-Nagymaros case*, ICJ Reports (1997), pp. 7, 38–39 (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. 273.

<sup>485</sup> Cf. *supra*, MN 118–119.

<sup>486</sup> Cf. *Gabčíkovo-Nagymaros*, 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. 137–145; Dupuy, P.-M., 'Droit des traités, codification et responsabilité internationale', *AFDI* 43 (1997), pp. 7–30; Weckel, Ph., 'Convergence du droit des traités et du droit de la responsabilité internationale', *RGDIP* 102 (1998), pp. 647–684; 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 Jimenez de Aréchaga* (Fundación de cultura universitaria, 1994), pp. 523–543; Yahi, A., 'La violation d'un traité: L'articulation du droit des traités et du droit de la responsabilité internationale', *RBDI* 26 (1993), pp. 437–469.

<sup>487</sup> *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, 47 (para. 94). Cf. also *Jurisdiction of the ICAO Council*, ICJ Reports (1972), pp. 46, 67 (para. 38); as well as Anzilotti's dissenting opinion in *Diversion of Water from the Meuse*, PCIJ, Series A/B, No. 70, p. 50.

<sup>488</sup> *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, 47 (para. 96).

<sup>489</sup> ICJ Reports (1997), pp. 7, 58 (para. 114).

<sup>490</sup> ICJ Reports (1982), pp. 18, 37 (para. 23). Cf. also *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 575 (para. 42).

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)'.<sup>491</sup>

On the other hand, 'the Court cannot, on the proposal of the Parties, depart from the terms of the Statute'.<sup>492</sup> As a consequence, in the *Free Zones case*, the PCIJ was reluctant to accept to take into account 'considerations of pure expediency only' without 'a clear and explicit provision to that effect'.<sup>493</sup> 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.<sup>494</sup> Moreover, in several cases, when requested to do so in the special agreement, the Court has agreed to take into account:

- particular treaties,<sup>495</sup> including when their applicability could be put into doubt;<sup>496</sup>
- 'recent trends of international law' in a particular field;<sup>497</sup>
- or, perhaps, even municipal law.<sup>498</sup>

Except concerning this last point, which is clearly incompatible 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 debatable)<sup>499</sup> 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

<sup>491</sup> *Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports (1986), 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 that the parties 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. 495, 496.

<sup>492</sup> *Free Zones of Upper Savoy and the District of Gex* (Order of 19 August 1929), PCIJ, Series A, No. 22, p. 12.

<sup>493</sup> Order of 6 December 1930, PCIJ, Series A, No. 24, p. 10. For further details on the case *cf. also supra*, MN 69, 163 and 169.

<sup>494</sup> *Cf. supra*, MN 152–170.

<sup>495</sup> 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 Elettronica Sicula, S.p.A.*, 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* (El Salvador/Honduras), ICJ Reports (1992), pp. 351, 390–391 (para. 47) (General Peace Treaty); *Territorial Dispute* (Libyan Arab Jamahiriya/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*, 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)).

<sup>496</sup> In *Oscar Chinn*, 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' (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. 131–135). It will be 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.

<sup>497</sup> *Cf. supra*, MN 143.

<sup>498</sup> *Cf. the Serbian and Brazilian Loans cases*, PCIJ, Series A, Nos. 20/21, pp. 4 *et seq.* and 93 *et seq.*

<sup>499</sup> For a discussion *cf. supra*, MN 125–126.

settlement of international disputes . . . is simply an alternative to the direct and friendly settlement of such disputes between the Parties',<sup>500</sup> which could be based on whatever rules the parties deem suitable in their relations *inter se*, provided they are not precluded by peremptory norms.

b) 'whether general or particular'

198 The meaning of the differentiation between the treaties the Court is bound to decide in accordance to, made in Art. 38, para. 1 (a), is obscure—and it is not clarified by the *travaux préparatoires*. As rightly noted by Manley Hudson, '[t]he phrase *general or particular* seems to add little to the meaning'.<sup>501</sup> It deserves some credit in that it draws attention to the existence of several kinds of treaties—but the credit is more academic than practical: in practice, the Court has hardly made any distinction between the different sorts of treaties it was bound to apply.

199 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.<sup>502</sup>

Clearly, in that case, the Chamber equated 'general conventions' with multilateral treaties.

200 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 hand.<sup>503</sup> But this is of little effect for adjudication purposes: while some special legal institutions apply like adhesion or reservations,<sup>504</sup> 'the underlying legal principles of treaty law apply to multilateral treaties as to bilateral treaties'.<sup>505</sup> 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.<sup>506</sup>

<sup>500</sup> *Free Zones of Upper Savoy and the District of Gex* (Order of 19 August 1929), PCIJ, Series A, No. 22, p. 13. Cf. further *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 47 (para. 87); *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 143 (para. 285); or *Aerial Incident of 10 August 1999*, ICJ Reports (2000), pp. 12, 33 (para. 52). <sup>501</sup> Hudson, *PCIJ*, p. 608.

<sup>502</sup> ICJ Reports (1984), pp. 290–291 (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' ('Law and Procedure, Part Two', *BYIL* 61 (1990), pp. 1, 22). <sup>503</sup> Cf. e.g. Daillier and Pellet, *supra*, fn. 145, pp. 165–187 and 297–302.

<sup>504</sup> Cf. also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 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'.

<sup>505</sup> *Oppenheim's International Law*, *supra*, fn. 145, p. 1203.

<sup>506</sup> *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 7, pp. 28–29.

The last part of this quote not only reconfirms the relative effect of treaties,<sup>507</sup> 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.<sup>508</sup> 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 obligations<sup>509</sup>—still for the parties<sup>510</sup>—even if there is no doubt that some treaties have an influence far beyond the circle of the parties.<sup>511</sup> 201

This does not mean that various special categories of treaties do not exist—simply, 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: 202

- (i) the constituent instruments of international organizations;<sup>512</sup>
- (ii) treaties establishing an objective situation;<sup>513</sup> or
- (iii) treaties embodying principles which are ‘binding on States, even without any conventional obligation’;<sup>514</sup>
- (iv) including those adopted ‘for a purely humanitarian and civilizing purposes’,<sup>515</sup> 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’.<sup>516</sup>

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.<sup>517</sup> 203

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

<sup>507</sup> Cf. *supra*, fn 478.      <sup>508</sup> Cf. the *Gulf of Maine case*, *supra*, MN 199.

<sup>509</sup> That is, more or less ‘general’, more or less ‘particular’.

<sup>510</sup> For similar views cf. *Oppenheim’s International Law*, *supra*, fn. 145, p. 32 or Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 22. *Contra*, Fitzmaurice, in *Symbolae Verzijl*, 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 81–83.

<sup>511</sup> Cf. *Oppenheim’s International Law*, *supra*, fn. 145, pp. 32 and 1204; and Thirlway, ‘Law and Procedure, Part Two’, *BYIL* 61 (1990), pp. 1, 22.

<sup>512</sup> Cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*, ICJ Reports (1996), pp. 66, 74–75 (para. 19): ‘[F]rom 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 of the United Nations*, ICJ Reports (1962), pp. 151, 157: ‘[T]he Charter is a multilateral treaty, albeit a treaty having certain special characteristics’.

<sup>513</sup> Cf. *supra*, MN 188.

<sup>514</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), pp. 15, 23.

<sup>515</sup> *Ibid.*; and cf. also *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 114 (para. 218).

<sup>516</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 257 (para. 79); cf. also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 199 (para. 157), and further *supra*, MN 140.

<sup>517</sup> *North Continental Shelf*, ICJ Reports (1969), pp. 3, 38–39 (para. 63).

process or as a reflection of customary rules.<sup>518</sup> 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.<sup>519</sup>

204 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

205 The relationship between treaty-law and customary law is complex; it will be briefly dealt with hereafter.<sup>520</sup> 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',<sup>521</sup> which does not mean that custom has no part to play in cases where treaties are applicable. Custom 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 seizing of the Court is, so to speak, fortuitous, it has played a major role both 'in developing customary rules in a number of fields'<sup>522</sup> and in clarifying the definition and conditions of application of custom.<sup>523</sup>

206 The present commentary is not concerned with the first of these two aspects<sup>524</sup> and will only show that, exactly as for treaties, Art. 38, para. 1 (b), offers a useful basis for

<sup>518</sup> Cf. further *supra*, MN 186 and *infra*, MN 212–213, 223 and 283–288

<sup>519</sup> Pellet, in *Liber Amicorum Shigeru Oda*, *supra*, fn. 430, pp. 481–514, pp. 507–509; and *id.*, 10th Report on Reservations to Treaties, UN Doc. A/CN.4/558/Add.1. When the rules in question are peremptory, the possibility of formulating reservations to the treaty provisions embodying them is dubious (see *ibid.*, pp. 27–34, paras. 116–128).

<sup>520</sup> Cf. *infra*, MN 283–288.  
<sup>521</sup> *Continental Shelf (Libya/Malta)*, 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' (ICJ Reports (2002), pp. 3, 21 (para. 52)).

<sup>522</sup> Mendelson, in *Fifty Years of the International Court of Justice*, pp. 63, 67.

<sup>523</sup> For an analysis of the particular role of the Court in matters of customary law cf. e.g. Hagggenmacher, 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. 810–854.

<sup>524</sup> The literature on custom is enormous, see 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; *id.*, '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* (Mac Donald, R.St.J., and Johnston, D.M., eds., 1983), pp. 513–554; Danilenko, G.M., 'The Theory of International Customary Law', *GYIL* 31 (1988), pp. 9–47; 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 Jiménez de Aréchaga* (Fundación de cultura universitaria, 1994), pp. 51–68; Dupuy, R.J., 'Coutume sage et coutume sauvage', in *Mélanges offerts 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; Gianni, G., *La coutume en droit international* (1931); Kelsen, H., 'Théorie du droit international coutumier', *Revue internationale de la théorie du droit* 1 (1939), pp. 253–274; Kopelmanas, L., 'Customs as a Means of Creation of International Law', *BYIL* 18 (1937),

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.

#### 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’<sup>525</sup> than the opposite. However, upon reflection, this is but logical: the existence of the customary rule attests that, ‘upstream’, a practice has developed which then became accepted as law.<sup>526</sup> 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?

In light of the *travaux préparatoires*, 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’.<sup>527</sup> 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 elements<sup>528</sup>—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 Court enjoys a rather large measure of discretionary power.

#### aa) The Two ‘Elements’ of Customary Law

In spite of harsh (and, in the opinion of the present writer, largely unfounded) doctrinal criticisms,<sup>529</sup> the Court has very firmly maintained that ‘only if such abstention

pp. 127–151; Mendelson, M., ‘The Subjective Element in Customary International Law’, *BYIL* 64 (1995), pp. 177–208; *id.*, ‘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; Seferiades, S., ‘Aperçu sur la coutume juridique internationale’, *RGDIP* 43 (1936), pp. 129–196; Stern, B., ‘La coutume au cœur du droit international’, in *Mélanges offerts à Paul Reuter: le droit international—unité et diversité* (1981), pp. 479–499; Sur, S., ‘La coutume internationale. Sa vie, son œuvre’, *Droits* 1986, pp. 111–124; Tunkin, G., ‘Is General International Law Customary Law Only?’, *EJIL* 4 (1993), pp. 534–541; Wolfke, K., *Custom in Present International Law* (1993); *id.*, ‘Some Persistent Controversies Regarding Customary International Law’, *NYIL* 24 (1993), pp. 1–16.

<sup>525</sup> *Oppenheim’s International Law*, *supra*, fn. 145, p. 26.

<sup>526</sup> See *ibid.*, fn. 5.

<sup>527</sup> Baron Descamps, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 322.

<sup>528</sup> 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 Haggenmacher, *supra*, fn. 523, *RGDIP* 90 (1986), pp. 5–126, pp. 18–32; accord Cahin, *supra*, fn. 524, p. 259, fn. 9).

<sup>529</sup> For a clear and concise presentation of these criticisms *cf. e.g.* Cahin, *supra*, fn. 524, pp. 257–270; and also Haggenmacher, *supra*, fn. 523, *RGDIP* 90 (1986), pp. 5–126, *passim*; Kohen, M., ‘La pratique et la

[to institute criminal proceedings] were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom',<sup>530</sup> and that, in order to establish an international customary rule, 'it has to direct its attention to the practice and *opinio juris* of States'.<sup>531</sup> In its 1985 judgment in *Libya/Malta*, the Court considered that '[i]t is 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'.<sup>532</sup> But this is of course not the end of the question and difficulties begin with the determination of each of these two elements.

- 210 *The material element*:<sup>533</sup> The principle that it is an indispensable ingredient for the formation of a customary rule has often been recalled by the Court: '[T]wo 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 his practice is rendered obligatory by the existence of a rule of law requiring it'.<sup>534</sup> However, contrary to what could seem logical, determining the existence of practice is far from self-evident.
- 211 In some cases, the Court has been content simply to postulate that a practice sustaining the norm existed, without taking pains to demonstrate it.<sup>535</sup> However, the case law of the Court—which it is not possible to detail in the present paper—gives useful indications as to the character and consistency of practice as one element leading to the formation of customary rules.
- 212 As for the first aspect—the nature of the acts or behaviours<sup>536</sup> which can be taken into consideration in order to determine whether a practice exists—the Court

théorie des sources du droit international', in *La pratique et le droit international. Colloque de Genève* (Société française pour le droit international, ed., 2004), pp. 81–111, p. 93.

<sup>530</sup> *Lotus*, PCIJ, Series A, No. 10, p. 28.

<sup>531</sup> *Military and Paramilitary Activities in and against Nicaragua, Merits*, ICJ Reports (1986), pp. 14, 97 (para. 183), 110 (para. 211). Cf. also *Asylum case*, ICJ Reports (1950), pp. 266, 276–277; *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 6, 40; *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 44 (para. 77); or *Legality of the Threat or Use of Force*, ICJ Reports (1996), pp. 226, 253–255 (paras. 65–73).

<sup>532</sup> *Continental Shelf* (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), pp. 13, 29 (para. 27) (emphasis added).

<sup>533</sup> Cf. the contributions in *La pratique et le droit international. Colloque de Genève, supra*, fn. 529; in particular Boisson de Chazournes, L., 'Qu'est-ce que la pratique en droit international?', *ibid.*, pp. 13–47; Kohen, *supra*, fn. 529, *ibid.*, pp. 81–111; Caflisch, L., 'La pratique dans le raisonnement du juge international', *ibid.*, pp. 125–138.

<sup>534</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 44 (para. 77); and cf. also *ibid.*, p. 43 (para. 74); as well as *Asylum Case*, ICJ Reports (1950), pp. 266, 276; *Wimbledon*, PCIJ, Series A, No. 1, p. 25; *Fisheries case*, ICJ Reports (1951), pp. 116, 139; *Rights of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 200; *Right of Passage over Indian Territory*, ICJ Reports (1960), p. 6, 40.

<sup>535</sup> This was the usual practice of the Permanent Court; cf. e.g. *Certain Questions relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, PCIJ, Series B, No. 6, p. 36; *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 7, p. 22. However, for example in *Nicaragua*, the present Court too considered it sufficient that '[e]xpressions 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' (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).

<sup>536</sup> As is well known, abstentions to act, just as positive actions, can constitute a practice. Thus, in the *Lotus case*, the Court implicitly admitted that the abstention to institute 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

has mentioned:

- administrative acts or attitudes,<sup>537</sup> in particular in the field of diplomatic protection;<sup>538</sup>
- legislation;<sup>539</sup>
- acts of the judiciary;<sup>540</sup>
- or, and this might be the most important and frequent aspect of practice, treaties.<sup>541</sup>

However, as the Permanent Court had 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.<sup>542</sup> 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 negotiations<sup>543</sup> or regarding its acceptance,<sup>544</sup> can be more important than the text itself, a difficulty that the Court has not 'tackled squarely' in *Nicaragua*.<sup>545</sup>

The collective attitude of States at diplomatic conferences<sup>546</sup> or in international organizations as well as the practice of the organizations themselves<sup>547</sup> can also be of paramount 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'<sup>548</sup> of the

such a rule (PCIJ, Series A, No. 10, p. 28). *Cf.* further *Nottebohm*, ICJ Reports (1955), pp. 4, 22; or *Legality of Threat and Use of Nuclear Weapons*, ICJ Reports (1996), pp. 266, 254 (para. 67).

<sup>537</sup> *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 6, 39–40.

<sup>538</sup> *Nottebohm*, ICJ Reports (1955), pp. 4, 22–23; *Interhandel*, ICJ Reports (1959), pp. 6, 27; or *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Reports (1970), pp. 3, 42 (para. 70).

<sup>539</sup> *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 a sufficient evidence of a 'general' practice (ICJ Reports (1951), pp. 116, 131).

<sup>540</sup> *Lotus*, PCIJ, Series A, No. 10, p. 28; *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ, Series B, No. 13, p. 20; *Serbian and Brazilian Loans cases*, PCIJ, Series A, Nos. 20/21, p. 47 and p. 125; or *Arrest Warrant of 11 April 2000*, ICJ Reports (2002), pp. 3, 23 (para. 56) in conjunction with p. 24 (para. 58).

<sup>541</sup> *Cf. e.g. Wimbledon*, PCIJ, Series A, No. 1, p. 25; *Factory at Chorzów (Jurisdiction)*, PCIJ, Series A, No. 9, p. 20, 22; 10 September 1929, *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series A, No. 23, p. 27; as well as the ICJ's judgments in *Nottebohm*, ICJ Reports (1955), pp. 4, 22–23; *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 41 (para. 71); *Fisheries Jurisdiction (United Kingdom/Iceland)*, ICJ Reports (1974), pp. 3, 23 (paras. 51–53) and 26 (para. 58); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports (1985), pp. 13, 29 (para. 27); *Arrest Warrant of 11 April 2000*, 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 opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980), pp. 73, 94 (paras. 45–46).

<sup>542</sup> *Cf. Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, p. 35; *Lotus*, PCIJ, Series A, No. 10, p. 27.

<sup>543</sup> ICJ Reports (1969), pp. 3, 35 (para. 54), 37 (para. 60), or 43 (para. 76); and *cf.* also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports (1985), pp. 13, 30 (para. 27). However, this is probably more relevant in respect to the *opinio juris* than to practice—*cf. infra*, MN 221–222.

<sup>544</sup> ICJ Reports 1969, pp. 3, 43–44 (para. 76).

<sup>545</sup> Thirlway, 'Law and Procedure, Part Two', *BYIL* 61 (1990), pp. 1, 48. *Cf. Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 94–96; and further *infra*, MN 222.

<sup>546</sup> *Cf.* the PCIJ's advisory opinion on *Article 3, Paragraph 2, of the Treaty of Lausanne*, PCIJ, Series B, No. 12, p. 30.

<sup>547</sup> On this important issue, which cannot be dealt with in any detail here, *cf.* above all the luminous analysis of Cahin, *supra*, fn. 524, *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. 529, pp. 138–157.

<sup>548</sup> *Cf.* Jenks, C.W., *The Proper Law of International Organisations* (1962).



organization concerned,<sup>549</sup> 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.<sup>550</sup> 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.<sup>551</sup>

215 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:

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.<sup>552</sup>

This important and well-known *dictum* sets out all the conditions permitting a practice to be taken into account in the customary process, namely:

- (i) Length: There is no such a thing as ‘instantaneous custom’;<sup>553</sup> however ‘implicitly, the Court rejects the necessity of time immemorial’<sup>554</sup> 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’.<sup>555</sup>
- (ii) 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’; and second that the practice of those States take place in a more general framework (‘including that . . .’); this has been repeated elsewhere.<sup>556</sup>

<sup>549</sup> Cf. e.g. *Judgment of the Administrative Tribunal of the ILO upon Complaints Made Against the UNESCO*, ICJ Reports (1956), pp. 77, 91; or *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, 22 (para. 22).

<sup>550</sup> Cf. *ibid.*; as well as *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), pp. 15, 25; and *Certain Expenses of the United Nations*, ICJ Reports (1962), pp. 151, 160, 162 and 168–169.

<sup>551</sup> Cf. *infra*, MN 221.

<sup>552</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 43 (para. 74).

<sup>553</sup> 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).

<sup>554</sup> Skubiszewski, *supra*, fn. 523, *ZaöRV* 31 (1971), pp. 810–854, p. 853.

<sup>555</sup> 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*, ICJ Reports (1969), pp. 3, 44 (para. 74) (ten years, concerning maritime delimitation rules); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982), pp. 18, 74 (para. 101) (definition of ‘continental shelf’).

<sup>556</sup> *Certain Questions relating to Settlers of German Origin in the Territory Ceded to Poland*, PCIJ, Series B, No. 6, p. 36 (speaking of ‘an almost universal opinion and practice’); *Fisheries*, ICJ Reports (1951), pp. 116, 131.

(iii) Constancy and uniformity: Often reduced to the mere assertion that the usage or practice is 'constant and uniform':<sup>557</sup> in the *Asylum* case the Court considered that the facts brought before it 'disclose so much discrepancy in the exercise of diplomatic asylum',<sup>558</sup> that no such 'constant and uniform usage' could be established.

However, concerning this last aspect, the Court has been satisfied with a 'virtually uniform' standard.<sup>559</sup> 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.<sup>560</sup>

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.<sup>561</sup>

*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.<sup>562</sup> 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*.<sup>563</sup>

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'.<sup>564</sup>

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.<sup>565</sup> The jurisprudence of the Court nevertheless casts some light on this apparently undefined requirement.

Only once,<sup>566</sup> 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

<sup>557</sup> *Asylum case*, ICJ Reports (1950), pp. 266, 277; *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 6, 40.

<sup>558</sup> *Asylum case*, ICJ Reports (1950), pp. 266, 277.  
<sup>559</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 43 (para. 74). Cf. also *Wimbledon*, PCIJ, Series A, No. 1, p. 25; *Article 3, Paragraph 2, of the Treaty of Lausanne*, PCIJ, Series B, No. 12, p. 30; *Fisheries* ICJ Reports (1951), pp. 116, 131; *Rights of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 200.

<sup>560</sup> ICJ Reports (1986), pp. 14, 98 (para. 186). Cf. also *Fisheries*, ICJ Reports (1951), pp. 116, 138.

<sup>561</sup> Cf. *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 255 (para. 73).

<sup>562</sup> It is worth noting however that, in some cases, the Court did not bother to investigate 'whether the subjective element was also present' (Mendelson, in *Fifty Years of the International Court of Justice*, pp. 63, 70, at fn. 37, and the examples cited there). Cf. also *id.*, *Rec. des Cours* 272 (1998), *supra*, fn. 524, pp. 250–251.

<sup>563</sup> ICJ Reports (1969), pp. 3, 44 (para. 77). Cf. also, in the same sense, *Lotus*, PCIJ, Series A, No. 10, p. 28; *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 108–109 (para. 207).

<sup>564</sup> ICJ Reports (1969), pp. 3, 44 (para. 77) (emphasis added).  
<sup>565</sup> Cf. Mendelson, *Rec. des Cours* 272 (1998), *supra*, fn. 524, pp. 281–282; Pellet, *supra*, fn. 241, *Australian YIL* 12 (1992), pp. 22–53, pp. 36–37.

<sup>566</sup> 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

generally accepted as expressing principles of law'.<sup>567</sup> 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.<sup>568</sup> Nor is it what the Court usually requires: in parallel with practice,<sup>569</sup> it will usually rely on a *general* opinion, not that of States individually.<sup>570</sup> 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.<sup>571</sup>

220 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;<sup>572</sup> if they have 'consented, . . . so much the better; but . . . consent has never yet been held to be a *necessary* condition';<sup>573</sup> nor is it sufficient.<sup>574</sup> 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 Article 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

voluntarist approach can be found in the phenomenon of the persistent objector which the Court has sanctioned (*cf. Asylum case*, ICJ Reports (1950), pp. 266, 277–278; *Fisheries*, 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., 'À 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. 257–272; Pentassuglia, G., *La rilevanza dell'obiezione persistente nel diritto internazionale* (1996).<sup>567</sup> PCIJ, Series A, No. 10, p. 18.

<sup>568</sup> 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 of the Proceedings of the Advisory Committee of Jurists (1920), 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 '[i]t 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). Root's proposal (*cf. supra*, MN 31), 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 Haggenmacher, *supra*, fn. 523, *RGDIP* 90 (1986), pp. 5–126, pp. 28–30.<sup>569</sup> *Cf. supra*, MN 215.

<sup>570</sup> *Wimbledon*, PCIJ, Series A, No. 1, pp. 26–28; *Nottebohm*, ICJ Reports (1955), pp. 4, 12–26; *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Reports (1970), pp. 3, 42–47 (paras. 70–91); *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 292–293 (para. 90).

<sup>571</sup> Weil, *supra*, fn. 241, *AJIL* 77 (1983), pp. 413–442, 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 be the 'necessary expression in the field of delimitation' in regard to the equidistance principle (*North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 28–29 (para. 37) and 32 (para. 46)). *Cf.* also *Military and Paramilitary Activities in and against Nicaragua*, 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' (ICJ Reports (1986), pp. 554, 565 (para. 20)).

<sup>572</sup> 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 the interdiction to use force in international relations at the Sixth Conference of American States or in the Helsinki Act (ICJ Reports (1986), pp. 14, 100 (para. 189)).

<sup>573</sup> Mendelson, *Rec. des Cours* 272 (1998), *supra*, fn. 524, p. 260 (emphasis in the original).

<sup>574</sup> *Contra*: Mendelson, *ibid.* Citing the 1951 *Fisheries case* (ICJ Reports 1951, pp. 116, 138–139), 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 240–241.

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.<sup>575</sup>

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). 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.

The present Court<sup>576</sup> has made great use of the resolutions of the UN General Assembly to prove the existence of an *opinio juris*.<sup>577</sup> Thus, in *Western Sahara*, it found support of the customary law status of the self-determination principle in GA Res. 1514 (XV) of 14 December 1960 and 2625 (XXV) of 24 October 1970, reconfirming its previous analysis in the *Namibia* advisory opinion.<sup>578</sup> It is however the Court's judgment in *Nicaragua* which gives the most striking example of recourse to resolutions of the General Assembly: in that case, for example, 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)'.<sup>579</sup> 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*.<sup>580</sup>

<sup>575</sup> *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 97–98 (para. 184). Cf. also *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 294 (para. 94) and 299 (para. 111).

<sup>576</sup> The Permanent Court usually did not take pain 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 (*Article 3, Paragraph 2, of the Treaty of Lausanne*, 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 and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, Series A/B, No. 44, p. 23).

<sup>577</sup> When customary rules existing within the legal order of the organisation itself are at stake, resolutions can be evidence of practice; cf. *supra*, MN 214.

<sup>578</sup> ICJ Reports (1975), pp. 6, 31–33 (paras. 55–59); and ICJ Reports (1971), pp. 16, 31 (para. 52) respectively; cf. also *East Timor*, ICJ Reports (1995), pp. 90, 102 (para. 29).

<sup>579</sup> ICJ Reports (1986), pp. 14, 100 (para. 188), 101 (para. 191) or 106 (para. 202). Cf. also the use made by the Court of General Assembly Resolution 3314 (XXIX) of 14 December 1974 as reflecting customary international law (*ibid.*, p. 103, para. 195), or Resolution 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 233. 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 General Assembly Resolution 2625 (XXV) (ICJ Reports (2004), pp. 136, 171–172 (paras. 87–88)).

<sup>580</sup> ICJ Reports (1996), pp. 226, 254–255 (para. 70), and further *ibid.*, paras. 71–73.

223 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 in respect 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';<sup>581</sup>
- found that '[a] review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion';<sup>582</sup>
- 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';<sup>583</sup>
- 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';<sup>584</sup>
- 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';<sup>585</sup>
- 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.'<sup>586</sup>

224 Among the codification conventions to which it has referred,<sup>587</sup> 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.<sup>588</sup> Similarly, the Court has frequently referred to the Geneva

<sup>581</sup> ICJ Reports (1969), pp. 3, 32 (para. 46), and, more generally, pp. 28–32 (paras. 37–45).

<sup>582</sup> *Ibid.*, p. 32 (para. 47), and, more generally, pp. 32–56 (paras. 47–56).

<sup>583</sup> *Ibid.*, paras. 62, p. 38 (referring again to pp. 33–36, para. 48–55).

<sup>584</sup> *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. 519.

<sup>585</sup> ICJ Reports (1969), pp. 3, 41 (para. 70), and, more generally, pp. 41–45 (paras. 70–80).

<sup>586</sup> *Ibid.*, pp. 44–45 (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 hand. On this aspect *cf.* further *infra*, MN 232–233.

<sup>587</sup> In the *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' (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 (ICJ Reports (1982), pp. 66 (para. 84); *cf.* also *Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports (1986), pp. 554, 563 (para. 17).

<sup>588</sup> For example, as regard Arts. 31 and 32 VCLT on the interpretation of treaties (*Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports (1989), pp. 15, 70–71 (para. 118); *Arbitral Award of 31 July 1989*, ICJ Reports (1991), pp. 53, 70 (para. 48); *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 582–583 (para. 373) and 586 (para. 380); *Territorial Dispute*, ICJ Reports (1994), pp. 6, 21–22 (para. 41); *Maritime*

Conventions on the Law of the Sea of 1958,<sup>589</sup> and subsequently to the Convention of Montego Bay of 1982.<sup>590</sup> However, it has scarcely explained why it considered these conventions to be evidence of an *opinio juris*.

In quite a number of cases, the Court also referred to the work of the ILC as a means 225 to establishing the existence (*vel non*) of the psychological element of a particular customary rule. 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 the equidistance rule was not envisaged by it as a customary rule,<sup>591</sup> or by invoking the

*Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility), ICJ Reports (1995), pp. 6, 18 (para. 33); *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, ICJ Reports (1996), p. 66, 75 (para. 19); *Oil Platforms* (Preliminary Objections), ICJ Reports (1996), pp. 803, 812 (para. 23); *Kasikili/Sedudu Island*, ICJ Reports (1999), pp. 1045, 1059 (para. 18); *LaGrand*, ICJ Reports (2001), pp. 466, 501 (para. 99) and 502 (para. 101); *Sovereignty over Pulau Ligitan and Pulau Sipadan*, ICJ Reports (2002), pp. 625, 645 (para. 37); *Oil Platforms* (Merits), ICJ Reports (2003), pp. 161, 182 (para. 41); *Avena and other Mexican Nationals*, ICJ Reports (2004), pp. 12, 48 (para. 83); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 174 (para. 94).

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 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*), *Advisory Opinion*, ICJ Reports 1971, p. 47 and *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court, Judgment*, ICJ Reports 1973, p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, pp. 95–96' (*Gabčikovo-Nagymaros case*, ICJ Reports (1997), pp. 7, 38 (para. 46). Cf. also *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 95 (para. 178); *Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports (1986), pp. 563 (para. 17) Cf. also *Fisheries Jurisdiction (United Kingdom/Iceland)* (Jurisdiction of the Court), ICJ Reports (1973), pp. 3, 14 (para. 24) (Art. 52 VCLT); *Aegean Sea Continental Shelf* (Jurisdiction of the Court), ICJ Reports (1978), pp. 3, 39 (para. 96) (Arts. 2, 3 and 11 VCLT); *Military and Paramilitary Activities in and against Nicaragua* (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* (Provisional Measures), ICJ Reports (1993), pp. 3, 11 (para. 13) (Art. 7 VCLT); *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 264 (para. 102) (Art. 26 VCLT); *Arrest Warrant of 11 April 2000*, ICJ Reports (2002), pp. 3, 21–22 (para. 53) (Art. 7); *Land and Maritime Boundary Between Cameroon and Nigeria*, ICJ Reports (2002), pp. 303, 429–430 (paras. 263–265) (Arts. 7 and 46 VCLT).

<sup>589</sup> Thus, the Court referred to the 1958 Geneva Conventions as 'generally declaratory of established principles of international law' (*Fisheries Jurisdiction (United Kingdom/Iceland)* (Jurisdiction of the Court), ICJ Reports (1973), pp. 3, 22 (para. 50) and 29 (para. 67)); cf. also *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 22 (para. 19) and 38–39 (para. 63); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982), pp. 18, 45–46 (paras. 41–42); *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 111 (para. 212); *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 558 (para. 383).

<sup>590</sup> The Court referred to the Montego Bay Convention well before it entered into force: cf. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982), pp. 18, 47 (para. 45), 49 (para. 49), 65 (para. 82), 66–67 (para. 87), 74 (para. 101), 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 (Libyan Arab Jamahiriya/Malta)* (Application for Permission to Intervene), ICJ Reports (1984), pp. 3, 11 (para. 16), 29–30 (para. 26), 33–34 (paras. 33–34); *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 111–112 (paras. 212 and 214); *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 588–589 (paras. 383–384); *Maritime Delimitation in the Area between Greenland and Jan Mayen*, ICJ Reports (1993), pp. 38, 59 (paras. 47–48), 62 (para. 55), 64–66 (paras. 59–62), 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 between Qatar and Bahrain*, ICJ Reports (2001), pp. 40, 91 (para. 167).

<sup>591</sup> ICJ Reports (1969), pp. 3, 33 (para. 49): '[T]here 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 223. For another

ILC draft, even before it had turned into a convention. The most striking example<sup>592</sup> 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.<sup>593</sup>

- 226 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*'.<sup>594</sup> It is but an important 'subsidiary means for the determination of rules of law'.<sup>595</sup> 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 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.<sup>596</sup>

[O]*pinio 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).<sup>597</sup>

- 227 In its 1986 judgment in *Nicaragua*, the Court, without expressly taking position as to the merit of this proposition, added:

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,

example *cf.* *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 74 (para. 101) and 79 (para. 109).

<sup>592</sup> In addition to the *Gabčíkovo 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); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 195 (para. 140). In other cases, the Court has referred to other ILC draft articles and commentaries: *cf. e.g.* *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 33–35 (paras. 48–54); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980), pp. 73, 94–95 (para. 47) ILC draft articles on treaties between States and international organization or between international organizations); *Kasikili/Sedudu Island*, ICJ Reports (1999), pp. 1045, 1075–1076 (para. 49) (Commentary to draft article 27 (now Art. 30 VCLT) of the ILC's work on the law of treaties); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports (2001), pp. 40 76–77 (para. 113) (ILC's work on arbitral procedure); *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002), pp. 303, 430 (para. 265) (Commentary to draft article 6 (now Art. 7 VCLT) of the ILC's work on the law of treaties).

<sup>593</sup> *Gabčíkovo-Nagymaros case*, ICJ Reports (1997), pp. 7, 38–42 (paras. 47, 50–54), 46 (para. 58).

<sup>594</sup> Thirlway, 'Law and Procedure, Part Two', *BYIL* 61 (1990), pp. 1, 59–60.

<sup>595</sup> *Cf. infra*, MN 324.

<sup>596</sup> It being accepted that silence, too, can be revealing of an *opinio juris*: *cf.* *Factory at Chorzów* (Merits), PCIJ, Series A, No. 17, pp. 27–28; *Corfu Channel*, ICJ Reports (1949), pp. 4, 18; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954), pp. 47, 53; *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against UNESCO*, ICJ Reports (1956), pp. 77, 85–86.

<sup>597</sup> *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 99–100 (para. 188) (emphasis added). For the implementation of this guideline *cf. ibid.*, pp. 100–101 (paras. 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 case*, *supra*, MN 223. *Cf.* also *Territorial Jurisdiction of the International Commission of the River Oder*, 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).

that is a 'principle of *jus cogens*', a position also taken by the ILC and by the contesting States themselves.<sup>598</sup>

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', 'essential', 'inderogable' or 'intransgressible'.<sup>599</sup> 228

Without it being necessary to discuss whether these expressions are inter-changeable,<sup>600</sup> 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'<sup>601</sup> 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 rare 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.<sup>602</sup> 229

#### *bb) A Complex Alchemy*

As noted above, it is far from exceptional that the Court simply contends that a customary rule does exist without taking pains to investigate the practice or the *opinio juris*, or both<sup>603</sup>—and, in many cases, this is probably acceptable: 230

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 that it is a (well-established) rule (or principle) of

<sup>598</sup> ICJ Reports (1986), pp. 14, 100–101 (para. 190).

<sup>599</sup> The Court has shown extreme parsimony in resorting to these qualifications. However, it has used '*erga omnes*' on at least five occasions: *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Reports (1970), pp. 3, 32 (para. 33); *East Timor*, ICJ Reports (1995), pp. 90, 102 (para. 29); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections), ICJ Reports (1996), pp. 595, 616 (para. 31); *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo/Rwanda, New Application) (Provisional Measures), ICJ Reports (2002), pp. 219, 245 (para. 71); and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 199 (paras. 155–157). It has also described as 'intransgressible' the basic rules of international humanitarian law applicable to armed conflicts (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 257 (para. 79); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), pp. 136, 199 (para. 157)). And, in *East Timor* for example, it has defined the principle of self-determination as 'one of the essential principles of contemporary international law' (ICJ Reports 1995, p. 102, para. 29). While sometimes mentioning the position of the parties that a particular norm was peremptory (cf. e.g. *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 100–101 (para. 190), *Legality of the Threat or Use of Nuclear Weapons*, 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 (*United States Diplomatic and Consular Staff in Tehran* (Provisional Measures), ICJ Reports (1979), pp. 3, 20 (para. 41)), the Court never adopted this terminology as its own. The—quite unfortunate—reason for it is 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 and Practitioners*, pp. 377, 390; see also Pellet, A., 'Conclusions' in *Les règles fondamentales de l'ordre juridique international. jus cogens et obligations erga omnes* (Tomuschat, Ch., and Thouvenin, J.M., eds., 2006), p. 417).

<sup>600</sup> According to the present writer, the answer is clearly in the negative, as the expression '*erga omnes* obligations', in spite of the ambiguous precedents (cf. *supra*, fn. 599), 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.

<sup>601</sup> Cf. *supra*, MN 218.

<sup>602</sup> Cf. the cases cited *supra*, fn. 599.

<sup>603</sup> Cf. *supra*, fn. 535, 562 and 576 for references.



customary law (or sometimes, just 'of international law') without more ado: there is no need to 'reinvent the wheel'.<sup>604</sup>

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.<sup>605</sup> In such cases, it is certainly to be regretted that the Court's practice seems somewhat erratic or 'rather delphic'.<sup>606</sup>

231 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*,<sup>607</sup> 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 lit. (b) of Art. 38, para. 1 lies within the province of law and that 'it is a task for persons trained in law'.<sup>608</sup> 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.<sup>609</sup>

232 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.<sup>610</sup>

<sup>604</sup> Mendelson, in *Fifty Years of the International Court of Justice* pp. 63, 67. For examples of such mere assertions cf. e.g. *Lotus*, PCIJ, Series A, No. 10, p. 25 ('principle of the freedom of the seas'); *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, Series A/B, No. 44, p. 25 ('general principle of the international responsibility of States'); *Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, p. 12; *Reparation for the Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), pp. 174, 186; *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Reports (1970), pp. 3, 38 (paras. 53-54) (the latter three examples concerning diplomatic protection); *Mavrommatis Jerusalem Concessions*, PCIJ, Series A, No. 5, p. 48 ('fundamental principles of the maintenance of contracts and agreements duly entered into'); *Article 3, Paragraph 2, of the Treaty of Lausanne*, 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*, 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'); *Inserhandel*, 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').

<sup>605</sup> Cf. e.g. *Western Sahara*, ICJ Reports (1975), pp. 12, 39 (para. 79) (legal definition of *terra nullius* at the end of the nineteenth century); *Military and Paramilitary Activities In and Against Nicaragua*, ICJ Reports (1986), pp. 14, 110-111 (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), ICJ Reports (1986), pp. 554, 565-566 (para. 22) (*uti possidetis* as 'a rule of general scope').

<sup>606</sup> Mendelson, in *Fifty Years of the International Court of Justice* pp. 63, 67.

<sup>607</sup> Pascal, B., *Pensées* (La Pleiade, NRF Gallimard, 1954), p. 1091.

<sup>608</sup> Hudson, *PCIJ*, p. 609.

<sup>609</sup> 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. 569-598.

<sup>610</sup> ICJ Reports (1960), pp. 6, 40. Cf. also *Fisheries Jurisdiction*, 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.<sup>611</sup>

Conversely, as shown above,<sup>612</sup> the Court has shown a strong inclination towards 233 using the same instruments, mainly General Assembly resolutions and, to a lesser extent, the conventions of codification, as a 'judicial joker'<sup>613</sup> capable of evidencing at one and the same time both elements of the customary process.<sup>614</sup> It must be stressed again that, except when the internal law of an international organization is concerned,<sup>615</sup> resolutions—and, more conveniently, the attitudes of States towards them—can provide evidence of an *opinio juris*, not a practice.<sup>616</sup>

This, again, is not to say that *opinio juris*, while a 'feeling' of the States,<sup>617</sup> is a pure 234 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.<sup>618</sup>

All this having been said, globally, in practice, the Court's approach has worked well 235 and the alchemy has been satisfactory: the chrysalis is transformed into butterfly<sup>619</sup> 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,<sup>620</sup> but which had not really been envisaged by the founding fathers,<sup>621</sup> and to which, as brilliantly demonstrated by Haggemacher, it has not always stuck in practice.<sup>622</sup> 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.

These observations also draw attention to an important aspect: the significance of the 236 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 Visscher:

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.

<sup>611</sup> This is all the more remarkable as, in principle, consent of the parties is necessary with regard to 'local customs'—*cf. infra*, MN 241–242. <sup>612</sup> MN 222–225.

<sup>613</sup> *Cf. supra*, fn. 371.

<sup>614</sup> It has been alleged in this respect that '[o]ver the last thirty years [this article having been written in 1996], the ICJ has significantly changed the way it applies Article 38': in the first period, as attested by the 1969 *North Sea Continental Shelf case*, 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, 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 275) excluding the application of the Charter (*cf. ICJ Reports* (1986), pp. 14, 38 (para. 56)). It is interesting to note that, for example, 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 relating 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.

<sup>615</sup> *Cf. supra*, MN 214. <sup>616</sup> *Cf. supra*, MN 222. <sup>617</sup> *Cf. supra*, MN 217 *et seq.*

<sup>618</sup> *Cf. supra*, MN 222. <sup>619</sup> *Cf. Barboza, supra*, fn. 524. <sup>620</sup> *Cf. supra*, MN 209–210.

<sup>621</sup> *Cf. supra*, MN 208.

<sup>622</sup> Haggemacher, *supra*, fn. 523, *RGDIP* 90 (1986), pp. 5–126; *cf. also* Dupuy, P.-M., *supra*, fn. 609, *RGDIP* 93 (1989), pp. 569–598, pp. 585–586.

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, which it is the true 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.<sup>623</sup>

237 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.<sup>624</sup>

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. Up to now this has been exercised with discernment and a relative measure of caution.

#### b) Whether General or Particular?

238 Clearly, the jurists of 1920 had not contemplated the possibility of custom of a limited geographical scope. The contrast between the respective drafting of *lit. (a)* and *(b)* of Art. 38, para. 1, 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.<sup>625</sup>

239 Even though it is often suggested that the Permanent Court resorted to the notion of regional custom,<sup>626</sup> this is highly debatable and, in any case, the Court never used expressions such as 'particular' or 'regional' or 'local custom' before 1945.<sup>627</sup> However, there is no doubt that the actual Court had little difficulty in accepting such customary

<sup>623</sup> *Theory and Reality in Public International Law* (1968), p. 398, as quoted in Kearney, pp. 610, 705.

<sup>624</sup> 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'.

<sup>625</sup> On particular custom *cf.* (in addition to the general literature on international custom, *supra*, fn. 523) *e.g.* Cohen-Jonathan, G., 'La coutume locale', *AFDI* 7 (1961), pp. 119-140; d'Amato, A., 'The Concept of Special Custom in International Law', *AJIL* 63 (1969), pp. 211-223; 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.*

<sup>626</sup> *Cf. e.g.* Sørensen, pp. 103-104; *contra*: Haggenmacher, *supra*, fn. 523, *RGDIP* 90 (1986), pp. 5-126, pp. 36-43.

<sup>627</sup> 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, [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 and the International Labour Organization*, PCIJ, Series B, No. 18, pp. 35-36). 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.

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 as international custom 'as evidence of a general practice accepted as law'.<sup>628</sup>

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.<sup>629</sup>

In this last case, the usage at the origin of the 'mutual rights and obligations between 240 the two States' appears as an 'historical right', which can be analyzed 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'.<sup>630</sup> While usually used in matters of historical rights at sea,<sup>631</sup> there is no particular reason why the notion could not be transposed in regard to land territory.<sup>632</sup>

However, these rules of 'particular custom' differ from general customary rules in at 241 least two important respects:

- First, '[b]eing in the nature of an exception, [their] existence will be a matter of strict proof':<sup>633</sup> while the Court 'is deemed itself to know what [international] law is',<sup>634</sup> it is incumbent upon 'the Party which relies on a custom of this kind' to prove it.<sup>635</sup>

<sup>628</sup> *Asylum case*, ICJ Reports (1950), pp. 266, 276–277. Cf. also *Rights of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 200. The possibility of a regional custom also results *a contrario* from the 1986 judgment in the *Frontier Dispute (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' (ICJ Reports (1986), pp. 554, 565 (para. 20))—however, in *El Salvador/Honduras*, another Chamber of the Court clearly dealt with that same principle as an American rule (ICJ Reports (1992), pp. 351, 386 (paras. 40–41)).

<sup>629</sup> 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 232.

<sup>630</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982), pp. 18, 73 (para. 100).

<sup>631</sup> Cf. *Fisheries*, ICJ Reports (1951), pp. 116, 138–139; *Fisheries Jurisdiction (United Kingdom/Iceland)*, ICJ Reports (1974), pp. 3, 28–29 (paras. 63–68); or *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 586–590 (paras. 381–387).

<sup>632</sup> 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*, 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. *Sovereignty over Pulau Ligitan and Pulau Sipadan*, ICJ Reports (2002), pp. 625, 685 (para. 148): '[A]t the time when these activities [of Great Britain] were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed a disagreement or protest').

<sup>633</sup> *Oppenheim's International Law*, *supra*, fn. 145, p. 30.

<sup>634</sup> *Brazilian Loans*, PCIJ, Series A, No. 21, p. 124. Cf. further *supra*, MN 66.

<sup>635</sup> Cf. *Asylum case*, ICJ Reports (1950), pp. 266, 276; and already *supra*, MN 239. Cf. also *Rights of U.S. Nationals in Morocco*, 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

- Second, unlike in the case of general custom,<sup>636</sup> the *opinio juris* attached to them is of a consensualist kind.

242 This last point must however be qualified. Concerning bilateral custom, it is usually maintained that it must be accepted by the two States concerned. This is probably true,<sup>637</sup> 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.<sup>638</sup> As for regional custom, on the contrary, the most pertinent case seems to show that a general 'feeling' of the States in question is enough.<sup>639</sup>

243 Another related issue must be discussed: what, if any, is the role of the international community as a whole in respect to particular custom? Clearly, these customary rules appear as *leges speciales* departing from the general rule.<sup>640</sup> 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;<sup>641</sup> 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.<sup>642</sup>

244 In his dissenting opinion appended to the 1950 judgment in the *Asylum case*, Judge Alvarez alleged: '[I]f 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'.<sup>643</sup> This last assertion is debatable: it is more likely that a particular customary rule cannot affect the enjoyment, by the other States, of their rights under general customary law.<sup>644</sup> This seems to have been the Chamber's conclusion in *El Salvador/Honduras*: 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'.<sup>645</sup>

### c) General Principles of Law

245 *Lit. (c)* of Art. 38, para. 1,<sup>646</sup> 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

it into account (*cf. supra*, MN 115–134), 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.

<sup>636</sup> *Supra*, MN 219.

<sup>637</sup> *Cf. Fisheries*, ICJ Reports (1951), pp. 116, 138; or *Rights of U.S. Nationals in Morocco*, ICJ Reports (1952), pp. 176, 200.

<sup>638</sup> ICJ Reports (1960), pp. 6, 40; and *cf. already supra*, MN 232.

<sup>639</sup> *Asylum case*, ICJ Reports (1950), pp. 266, 276–277. Moreover, this case provides a good illustration of the persistent objector doctrine (on which *supra*, fn. 566).

<sup>640</sup> *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, 104–105.

<sup>641</sup> *Cf. Fisheries*, ICJ Reports (1951), pp. 116, 138: 'The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact'.

<sup>642</sup> Exactly as when a third State recognizes a rule included in a treaty to which it is not a party: *cf. supra*, MN 178–179.

<sup>643</sup> ICJ Reports (1950), pp. 266, 293–294.

<sup>644</sup> Compare with Art. 41 VCLT ('Agreements to modify multilateral treaties between certain of the parties only').

<sup>645</sup> ICJ Reports (1992), pp. 351, 605 (para. 412).

<sup>646</sup> On general principles of law, *cf.* from an abundant literature: Akehurst, M., 'Equity and General Principles of Law', *JCLQ* 25 (1976), pp. 801–825; Battaglini, B., 'Il riconoscimento internazionale dei principi generali del diritto', in *International Law at the Time of its Codification. Essays in Honour of Roberto*

law.<sup>647</sup> 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',<sup>648</sup> they were all in agreement that (i) the first purpose of para. 3 was to avoid a *non liquet*;<sup>649</sup> (ii) without giving to the Court the possibility to legislate.<sup>650</sup> Moreover, they were more concerned with finding an acceptable formula for States than with doctrinal theoretical views.<sup>651</sup>

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'.<sup>652</sup> To some members of the Committee, this dangerously seemed to open the door to subjectivity.<sup>653</sup> 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'.<sup>654</sup> 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.<sup>655</sup> 246

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.<sup>656</sup> 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.<sup>657</sup> And it is a matter of fact that 'recourse to general principles of law was a characteristic feature' of the arbitral awards prior to 1920<sup>658</sup> and was also frequent in the practice of States and 247

*Ago*, vol. I (1987), p. 97-140; Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (1953); Elias, O., and Lim, Ch., 'General Principles of Law', 'Soft Law' and the Identification of International Law', *NYIL* 28 (1997), pp. 3-49; Lauterpacht, H., *Private Law Sources*, *supra*, fn. 308; 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, thesis Paris, mult.); 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* (IUHEI, ed., 1968), pp. 521-530; Vitanyi, B., 'La signification de la généralité des principes de droit', *RGDIP* 80 (1976), pp. 536-545.

<sup>647</sup> *Cf. supra*, MN 84.

<sup>648</sup> Bin Cheng identifies no less than five different positions among the ten Jurists (*supra*, fn. 646, pp. 10-14).

<sup>649</sup> *Cf. Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* (1920), pp. 318 and 338 (Descamps), p. 311 (Loder), pp. 312-313 (La Pradelle), pp. 307 and 317 (Hagerup).

<sup>650</sup> *Ibid.*, p. 296 (La Pradelle), p. 309 (Root), p. 314 (Ricci-Busatti), p. 316 (Phillimore) and p. 319 (Hagerup).

<sup>651</sup> 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.

<sup>652</sup> *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* (1920), p. 306; and *cf.* already *supra*, MN 21.

<sup>653</sup> 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).

<sup>654</sup> *Ibid.*, pp. 310 and 318.

<sup>655</sup> *Ibid.*, p. 331 and Annex 1.

<sup>656</sup> *Cf.* the explanations given by Baron Descamps, *ibid.* p. 316.

<sup>657</sup> *Cf. e.g.* Lauterpacht, H., *Private Law Sources*, *supra*, fn. 308, pp. 8-15.

<sup>658</sup> Jenks, C.W., *The Prospects for International Arbitration* (1964), p. 266. See the long list of relevant awards given by this author (*ibid.*, pp. 266-267) based on Lauterpacht, *Private Law Sources*, *supra*, fn. 308, pp. 216-291. *Cf.* also Verdross, A., 'Les principes généraux du droit dans la jurisprudence internationale', *Rec. des Cours* 52 (1935-II), pp. 195-251, pp. 207-219; but contrast Kopelmanas, *supra*, fn. 20, *RGDIP* 43 (1936), pp. 285-308, pp. 288-290. Among the most illustrative awards in this respect *cf.* *Van Bokkelen*

the works of scholars.<sup>659</sup> The adoption of the Statute did of course encourage the arbitrators to resort to the principles of Art. 38,<sup>660</sup> which are sometimes expressly referred to in their decisions.<sup>661</sup>

248 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 1922<sup>662</sup> and each time, it has been ruled out for one reason or another.<sup>663</sup> However, without referring expressly to Art. 38, both 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.<sup>664</sup>

249 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*

250 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

(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. 11, pp. 294 *et seq.*; *Russia v. Turkey*, *ibid.*, pp. 441 *et seq.*

<sup>659</sup> Cf. Pellet, *supra*, fn. 646, pp. 35–46.

<sup>660</sup> Cf. e.g. *Sarrapoulos (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. 247–261; and the decisions of the United States–Germany Mixed Claims Commission in *Providence Mutual Life Insurance Co. and others (U.S.) v. Germany*, *RIAA*, vol. 7, p. 115; and *Lehigh Valley Railroad Co. and others (U.S.) v. Germany*, *ibid.*, vol. 8, p. 173.

<sup>661</sup> United States–Germany Mixed Claims Commission, Administrative Decision No. 2, *RIAA*, vol. 7, pp. 25–26; and the arbitral awards in *Responsibility of Germany for Damages Caused in the Portuguese Colonies in the South of Africa*, *RIAA*, vol. 2, p. 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 51–54. Recourse to general principles is particularly frequent in the new fields of international relations (international criminal law, economic transnational law, etc.), cf. Daillier and Pellet, *supra*, fn. 145, p. 353; and also Weil, P., 'Principes généraux de droit et contrats d'État' in *Le droit des relations économiques internationales—Études offertes à B. Goldman* (1982), pp. 387–414.

<sup>662</sup> And the PCIJ never referred to it expressly.  
<sup>663</sup> Cf. *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 6, 43; *South West Africa*, ICJ Reports (1966), pp. 6, 47 (para. 91); *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 21 (para. 17); *Avena and other Mexican Nationals*, ICJ Reports (2004), pp. 12, 61 (para. 127).

<sup>664</sup> On Art. 38, para. 1 (c), and its use by the Court, cf. e.g.—in addition to the works cited in fn. 646—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* (IUHEL, ed., 1968), pp. 201–236; Kopelmanas, *supra*, fn. 20, *RGDIP* 43 (1936), 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', *Revue de droit international, des sciences diplomatiques et politiques* 80 (2002), pp. 103–136; Verdross, *supra*, fn. 658, *Rec. des Cours* 52 (1935-II), pp. 195–251.

of this finds any reflection in the utterances of the ICJ, which tends to treat the two terms as synonymous'.<sup>665</sup> 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.<sup>666</sup>

However, there can be no doubt that, when associated with 'general' the word 'principle' implies a wide-ranging norm. 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 the judges to be guided by legal considerations. That the roots of such principles lie in the municipal law of States<sup>667</sup> is meant as a guarantee that those principles do correspond 'to the dictates of the legal conscience of civilised nations'.<sup>668</sup> This is also confirmed by the fact that it was precisely to make a clear distinction between law on the one hand and 'justice' (or equity in the broad sense) on the other hand that then para. 5 (now para. 2) was introduced by the League of Nations.<sup>669</sup> 251

Moreover, as seen above, 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'.<sup>670</sup> It might be true that 'in Article 38, para. 1 (c), some natural law elements are inherent',<sup>671</sup> 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 *lit. (c)* of Art. 38, para. 1 from both equitable or moral principles and from the general principles of international law. 252

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'.<sup>672</sup> This might have been an attempt, by a Court led by blind adherence to voluntarism,<sup>673</sup> to deprive the general principles mentioned in para. 1 (c), of any specificity.<sup>674</sup> 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 253

<sup>665</sup> Mendelson, in *Fifty Years of the International Court of Justice* pp. 63, 80.

<sup>666</sup> ICJ Reports (1984), pp. 246, 288–290 (para. 79). In its advisory opinion of 11 April 1949 (*Reparation for Injuries in the Service of the United Nations*), the Court based itself on 'the principle underlying this rule' (the rule of the nationality of claims) (ICJ Reports (1949), pp. 174, 182). <sup>667</sup> Cf. *infra*, MN 255–256.

<sup>668</sup> Cf. *supra*, MN 246. In that sense, it can be accepted that 'in Article 38, para. 1 (c), some natural law elements are inherent' (*South West Africa*, 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. <sup>669</sup> Cf. *supra*, MN 152–153.

<sup>670</sup> *South West Africa*, ICJ Reports (1966), pp. 6, 34 (para. 49); and cf. already *supra*, MN 111.

<sup>671</sup> Cf. *South West Africa* Diss. Op. Tanaka, *supra*, fn. 668. ICJ Reports (1966), pp. 250, 298.

<sup>672</sup> *Lotus*, PCIJ, Series A, No. 10, p. 16. <sup>673</sup> Cf. *supra*, MN 181 (fn. 449) and 219.

<sup>674</sup> For doctrinal views concurring with this approach cf. e.g. Chaumont, Ch., '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. 663–687, p. 675; Herczegh, *supra*, fn. 646, 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. 651, *RGDIP* 86 (1982), pp. 48–116, pp. 56–70.



Art. 38, para. 1 (c), were a source of law distinct from the two others.<sup>675</sup> Moreover, such an interpretation would leave this provision without any content, in contradistinction to the basic principle *ut res magis valeat quam pereat*.<sup>676</sup> 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 *lit. (b)*.<sup>677</sup>

254 The same objection can be made with regard to the assertion that these general principles derive from both international law *and* municipal law.<sup>678</sup> It is certainly true that the Court has at times had recourse to 'general conception[s] of law',<sup>679</sup> to 'rule[s] of law generally accepted',<sup>680</sup> to 'general and well recognized principles',<sup>681</sup> or to 'principle[s] universally accepted'.<sup>682</sup> But, besides the fact that in none of these cases, 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.

255 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: '[T]he general principles referred to in point 3 were these which were accepted by all nations *in foro*

<sup>675</sup> Although Lord Phillimore, followed by Lapradelle, had first assimilated general principles to custom (Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), pp. 334–335), the Committee eventually endorsed the President's proposal that 'point 3 . . . was necessary to meet the possibility of a *non-liquef*' (*ibid.*, p. 336).

<sup>676</sup> Cf. *supra*, fn. 385.

<sup>677</sup> 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. 604), but it is apparent from the context that they are nothing else than very general legal propositions derived from the system of international law. Another indication that the general principles of Art. 38 (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*.

<sup>678</sup> 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, *Cours de droit international*, *supra*, fn. 191, pp. 117–118; Reuter, P., *Droit international public* (1968), pp. 56 *et seq.*; Verdross, *Quellen*, *supra*, fn. 150, p. 124; *id.*, in *Recueil Guggenheim*, *supra*, fn. 646, pp. 521–530, p. 525); for others, they are 'the fundamental principles of every legal system' (Cheng, *General Principles*, *supra*, fn. 646, p. 390; cf. also Härle, *supra*, fn. 674, *Rev. de droit international et de lég. comp.* 62 (1935), pp. 663–687, 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. 523–532, p. 526; Vitanyi, *supra*, fn. 651, *RGDIP* 86 (1982), pp. 48–116, pp. 103 *et seq.*).

<sup>679</sup> *Factory at Chorzów* (Merits), 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').

<sup>680</sup> *Right of Passage over Indian Territory* (Preliminary Objections), ICJ Reports (1957), pp. 125, 142: '[O]nce the Court has been validly seized 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.*).

<sup>681</sup> *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 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), p. 14, 112 (para. 215) and *supra*, MN 140.

<sup>682</sup> *Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B No. 79, p. 199; *LaGrand*, ICJ Reports (2001), pp. 466, 503 (para. 103): '[T]he 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'.

*domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.’<sup>683</sup>

This explanation also makes it clear that one must not give too much importance to the ‘archaistic’<sup>684</sup> requirement of recognition ‘by civilized nations’: apparently, the members of the 1920 Committee themselves considered ‘all nations’ to be civilized.<sup>685</sup> This being said, there is no question that this formula, which was debated even at that time,<sup>686</sup> is nowadays entirely devoid of any particular meaning;<sup>687</sup> moreover, as noted by Shabtai Rosenne, ‘[i]t is tacitly dropped in today’s literature on the Court and on international law’.<sup>688</sup> It can be firmly admitted that, for the time being, all States must be considered as ‘civilized nations’.<sup>689</sup>

It could be thought that the wider the circle of States whose law is to be considered, the more unlikely the possibility would be to find rules common to all of them. This thesis was defended by Kopelmanas as early as 1936<sup>690</sup> and, more recently, by Kelsen<sup>691</sup> or Chaumont<sup>692</sup> 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’,<sup>693</sup> 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,<sup>694</sup> 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*.<sup>695</sup> In the abstract, it could seem that recourse to comparative

<sup>683</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), 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.

<sup>684</sup> Cf. e.g. Dupuy, in *Collection of Essays by Legal Advisers and Practitioners* pp. 377, 394.

<sup>685</sup> Lapradelle thought that the phrase was ‘superfluous, because law implies civilization’ (Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annex No. 3, p. 335).

<sup>686</sup> See Vitanyi, B., *supra*, fn. 651, *RGDIP* 86 (1982), pp. 48–116, p. 54.

<sup>687</sup> For strong criticism cf. Judge Ammoun’s separate opinions appended to the Court’s judgments of 20 February 1969 in the *North Sea Continental Shelf* and *Barcelona Traction cases* (ICJ Reports (1969), pp. 100, 132–135; ICJ Reports (1970), pp. 286, 308–313, respectively).

<sup>688</sup> *Law and Practice*, vol. III, p. 1602 (his fn. 81). Cf. however the somewhat persuasive point made by Hugh Thirlway who, while stressing that ‘[t]he 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 (*JLR* 18, 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).

<sup>689</sup> Cf. e.g. Daillier and Pellet, *supra*, fn. 145, p. 351; Herczegh, *supra*, fn. 646, p. 41 or Vitanyi, *supra*, fn. 651, *RGDIP* 86 (1982), pp. 48–116, pp. 55.

<sup>690</sup> Kopelmanas, *supra*, fn. 20, *RGDIP* 43 (1936), pp. 285–308, p. 294.

<sup>691</sup> *The Law of the United Nations* (4th edn., 1964), p. 533.

<sup>692</sup> Cf. *supra*, fn. 674, *Rec. des Cours* 129 (1970-I), pp. 333–528, pp. 460–461.

<sup>693</sup> ICJ Reports (1984), pp. 246, 299 (para. 111); and cf. already *supra*, fn. 624.

<sup>694</sup> Cf. *supra*, MN 237.

<sup>695</sup> 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 131).

law is essential;<sup>696</sup> 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)<sup>697</sup> but who, with all due respect, usually can hardly be seen as comparatists.<sup>698</sup> 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',<sup>699</sup> 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.

- 259 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 over Indian Territory 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 the right of access to enclaved pieces of land.<sup>700</sup> Individual judges, too, have sometimes resorted to the comparative method.<sup>701</sup> But the Court itself has been most reluctant and, in the case of the *Mavrommatis Concessions in Palestine*, 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.<sup>702</sup>

It thus showed a clear disinclination towards the use of the comparative method.

- 260 Yet this does not mean that the Court has never resorted to general principles of law.<sup>703</sup> The PCIJ never did so in a straightforward manner, and in most of the cases cited as

<sup>696</sup> 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.

<sup>697</sup> Art. 2 of the Statute; and cf. Aznar Gomez on Art. 2 MN 16-18 for an analysis of the background and qualifications expected from judges.

<sup>698</sup> 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.

<sup>699</sup> That is, 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., Jauffret-Spinozi, C., *Les grands systèmes de droit contemporain* (2002).

<sup>700</sup> *Right of Passage*, Pleadings, vol. I, pp. 714 *et seq.* and 858 *et seq.*; cf. also the oral pleadings of Mr. P. Lalive d'Espinay, *ibid.*, vol. IV, pp. 516-531. The Court did not deal with the argument, but, in his separate opinion, 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' (ICJ Reports (1960), pp. 54, 66-67). For another example cf. the Belgian memorial in *Barcelona Traction*, ICJ, *Pleadings*, vol. I, pp. 136-137.

<sup>701</sup> Cf. in particular Judge Ammoun's separate opinion appended to the Court's judgment of 20 February 1969 in *North Sea Continental Shelf*, ICJ Reports (1969), pp. 100, 139-140 (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 *Diversion of Water from the Meuse*, PCIJ, Series A/B, No. 70, p. 77; Judge Azevedo's dissent in *Conditions of Admission of a State to Membership in the United Nations*, ICJ Reports (1947-1948), pp. 67, 80; or Judge Hersch Lauterpacht's separate opinion in *Certain Norwegian Loans*, ICJ Reports (1957), pp. 34, 49-50.

<sup>702</sup> PCIJ, Series A, No. 2, p. 10.

<sup>703</sup> 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 presqu'inépuisable de décisions. Les internationalistes n'ont pas échappé à la loi

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 in the sense of para. 1 (c).<sup>704</sup> 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',<sup>705</sup> or in that of *Certain German Interests*, where it considered that '[w]hether 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';<sup>706</sup> 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.<sup>707</sup> 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',<sup>708</sup> 'general principles of law'<sup>709</sup> or 'the basic principle regarding the question of costs'.<sup>710</sup> Many other examples can be given.<sup>711</sup>

However, the gap between the theory and the practice is even more striking than with 261 respect to customary law:<sup>712</sup> the Court asserts the existence of the general principles of

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'; *Temple of Preah Vihear* (Merits): 'Qui tacet consentire videtur si loqui debuisset ac potuisset' (ICJ Reports (1962), pp. 6, 23); cf. also: *Land and Maritime Boundary between Cameroon and Nigeria: 'Nemo dat quod non habet'* (ICJ Reports (2002), pp. 303, 400 (para. 194), 402 (para. 201), or 404 (para. 204). As for individual opinions cf. e.g. 'nemo plus juris transferre potest quam ipse habet' (Sep. Op. Seferiades, *Lighthouses case between France and Greece*, PCIJ, Series A/B, No. 62, pp. 49–50; 'audiatur et altera pars' (Diss. Op. Winiarski, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), ICJ Reports (1950), pp. 89, 92); 'utile non debet per inutile vitari' (Sep. Op. Lauterpacht, *Certain Norwegian Loans*, ICJ Reports (1957), pp. 34, 57); 'jus posterior derogat priori' (Sep. Op. Moreno Quitana, *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Reports (1958), pp. 102, 107); 'ex una causa nullitas' (Sep. Op. de Castro, *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. 170, 179); or 'nemo dare potest quam ipse non habet' (Diss. Op. Fitzmaurice, *ibid.*, pp. 220, 264).

<sup>704</sup> Cf. *supra*, MN 254; as well as *Mavrommatis Jerusalem Concessions*, PCIJ, Series A, No. 5, p. 30; *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 6, p. 19; *Article 3, Paragraph 2, of the Treaty of Lausanne*, PCIJ, Series B, No. 12, p. 132; *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 7, p. 22; *Factory at Chorzów* (Jurisdiction), PCIJ, Series A, No. 9, p. 31; *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, PCIJ, Series B, No. 16, pp. 20 and 25; *Factory at Chorzów* (Merits), PCIJ, Series A, No. 17, p. 29.

<sup>706</sup> PCIJ, Series A, No. 5, p. 30. <sup>707</sup> Cf. *supra*, MN 248.

<sup>708</sup> *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, ICJ Reports (1973), pp. 166, 177 (paras. 29 and 30).

<sup>709</sup> *Ibid.*, p. 181 (para. 36) (equality between the parties); cf. also *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, ICJ Reports (1982), pp. 325, 338 (para. 29).

<sup>710</sup> *Ibid.*, p. 212 (para. 98): '[E]ach party shall bear its own [costs] in the absence of a specific decision of the tribunal'.

<sup>711</sup> Cf. e.g. *Corfu Channel*, 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, Light and Power Company, Ltd.*, 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'); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 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*).

<sup>712</sup> Cf. *supra*, MN 230–235.

law without 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'. Yet what the Court does not do overtly, or, probably even deliberately, it might nevertheless do spontaneously and intuitively. As Judge Levi Carneiro wrote:

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)).<sup>713</sup>

And indeed, the composition of the Court<sup>714</sup> makes this intuitive process rather natural.

#### b) Transposability to International Law

262 The following question has been asked: '[W]herein lies the magic of this philosopher's stone that transmutes municipal into international law?'<sup>715</sup> 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,<sup>716</sup> 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.<sup>717</sup> 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'<sup>718</sup> 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'.<sup>719</sup> This however is not enough.

263 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.<sup>720</sup>

264 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

<sup>713</sup> Dissenting opinion appended to the judgment in *Anglo-Iranian Oil Co.* (Preliminary Objection), ICJ Reports (1952), pp. 151, 161.

<sup>714</sup> 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 for comment. <sup>715</sup> Kearney, pp. 610, 701.

<sup>716</sup> Cf. *supra*, MN 84 and 245.

<sup>717</sup> For a clear rejection of this principle cf. *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Reports (1970), pp. 3, 37 (para. 51).

<sup>718</sup> Lauterpacht, H., *The Development of International Law by the International Court* (1958), p. 172, also quoted with approval by Rosenne, *Law and Practice*, vol. III, p. 1605. Cf. also *supra*, MN 251.

<sup>719</sup> Quadri, R., 'Cours général de droit international public', *Rec. des Cours* 113 (1964-III), pp. 237-483, p. 350.

<sup>720</sup> Separate opinion appended to the Court's advisory opinion of 11 July 1950 on the *International Status of South-West Africa*, ICJ Reports (1950), pp. 128, 148.

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'.<sup>721</sup> A clear example of such an impossible 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, absent an express consent of the respondent State, the opposite principle prevails.<sup>722</sup> Similarly, in the *Temple of 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'.<sup>723</sup>

## 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. 265

### 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', that is: treaty law first, custom second, general principles of law,<sup>724</sup> then and lastly 'international jurisprudence'.<sup>725</sup> This was the object of quite harsh discussions inside the Committee: Ricci-Busatti, supported by Hagerup and Lapradelle,<sup>726</sup> considered that 'the judge should consider the various sources of law simultaneously in relation to one another',<sup>727</sup> while, with the support of Lord Phillimore and Altamira,<sup>728</sup> Descamps remarked that: 266

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.<sup>729</sup>

<sup>721</sup> *Barcelona Traction, Light and Power Company, Ltd.*, Sep.Op. Fitzmaurice, ICJ Reports (1970), pp. 64, 66 (para. 5). Cf. also the pleadings of France in the *Phosphates in Morocco case*, PCIJ, Series C, No. 85, pp. 1060–1061.

<sup>722</sup> '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' (*Status of Eastern Carelia*, 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*, ICJ Reports (1995), pp. 90, 101 (para. 26)).

<sup>723</sup> ICJ Reports (1961), pp. 17, 31. There are other examples: as for the mandate cf. *supra*, fn. 311; with respect to the right of *actio popularis* cf. *South West Africa*, 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' (ICJ Reports (1951), pp. 15, 21).

<sup>724</sup> At the time of the first drafting, this read 'the rules of international law as recognized by the legal conscience of civilised nations'.

<sup>725</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annex No. 3, p. 306.

<sup>726</sup> *Ibid.*, p. 338.

<sup>727</sup> *Ibid.*, p. 332; cf. also p. 337.

<sup>728</sup> *Ibid.*, pp. 333 and 338.

<sup>729</sup> *Ibid.*, p. 337.

267 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.<sup>730</sup> 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 Committee of Jurists: it is a successive order of consideration.

268 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':

- 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 for 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.<sup>731</sup>

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).<sup>732</sup>

269 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.<sup>733</sup> 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.<sup>734</sup>

270 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<sup>735</sup> as are general principles recognized by the national systems of law, without any precise method guaranteeing their acceptability in the international sphere.<sup>736</sup> 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 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 them as law is revealing of

<sup>730</sup> Cf. *supra*, MN 33 and 38.

<sup>731</sup> See Dupuy, in *Collection of Essays by Legal Advisers and Practitioners* pp. 377, 381 and 388.

<sup>732</sup> For a similar view cf. Sørensen, p. 249.

<sup>733</sup> 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 and Practitioners* 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*.

<sup>734</sup> Ago, R., 'Droit positif et droit international', *AFDI* 3 (1957), pp. 14–62, p. 62.

<sup>735</sup> Cf. *supra*, MN 219. <sup>736</sup> Cf. *supra*, MN 263 *et seq.*

this state of mind.<sup>737</sup> 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 parties<sup>738</sup> 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,<sup>739</sup> 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.<sup>740</sup>

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.<sup>741</sup> Therefore, in most cases, treaty law will appear as a *lex specialis* and will enjoy priority as such:

- 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 Article 9 of Protocol XII of Lausanne'.<sup>742</sup>
- 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'.<sup>743</sup>
- Lastly, 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*,

<sup>737</sup> Cf. *supra*, MN 220.

<sup>738</sup> *Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, p. 11; cf. also, *inter alia*, *Northern Cameroons*, ICJ Reports (1963), pp. 15, 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Reports (1988), pp. 12, 27 (para. 35); *East Timor*, ICJ Reports (1995), pp. 90, 99–100 (para. 22); or para. 24 of the judgment of 10 February 2005 in *Certain Properties* (available at <http://www.icj-cij.org>).

<sup>739</sup> Cf. *supra*, MN 189 *et seq.* <sup>740</sup> Cf. *supra*, MN 128–129 and 258.

<sup>741</sup> Cf. *supra*, MN 237 and 258.

<sup>742</sup> PCIJ, Series A/B, No. 62, p. 25. Cf. also *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ, Series A/B, No. 44, pp. 23–24; or Anzilotti's dissenting opinion appended to the *Eastern Greenland* judgment of 5 April 1933, 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 189–191.

<sup>743</sup> *Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports (1989), pp. 15, 42 (para. 50) (with respect to the local remedies rule).



the Court first examined the relevance of a treaty provision invoked by Indonesia in support of its argument,<sup>744</sup> and only after this lengthy examination turned to the other, and possibly more relevant, arguments made by the parties.

273 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.<sup>745</sup> 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 mean that this practice amounts to recognizing a hierarchy between the sources listed in Art. 38; it only shows that, in particular cases, the Court will follow the order of priority indicated in this provision.

274 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.<sup>746</sup> Thus, for example, 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.<sup>747</sup>

275 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',<sup>748</sup> could not decide in accordance with multilateral treaties, including the Charter of the United Nations, made the correct statement that:

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.<sup>749</sup>

However, it considered that 'in the field in question' (the prohibition of the use of force), '[t]he areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content'.<sup>750</sup> 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.<sup>751</sup>

276 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

<sup>744</sup> ICJ Reports (2002), pp. 625, 645–668. <sup>745</sup> Cf. *infra*, MN 289–291.

<sup>746</sup> As alleged, for example, by Sørensen, p. 245; but this learned scholar wrote in 1946: at that time, the Court had not been confronted with concrete issues in this respect.

<sup>747</sup> See the advisory opinion in *Namibia*, where the Court held that the procedure followed by the Security Council in respect to the adoption of resolutions 'has been generally accepted by Members of the United Nations and evidences a general practice of that Organization' (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.

<sup>748</sup> By virtue of which the Court's compulsory jurisdiction should not extend to 'disputes arising under a unilateral 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 *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility), ICJ Reports (1984), pp. 392, 421–422 (para. 67)).

<sup>749</sup> ICJ Reports (1986), pp. 14, 95 (para. 177); cf. also *ibid.*, pp. 95–96 (paras. 178–179), and ICJ Reports (1984), pp. 392, 424–425 (para. 73).

<sup>750</sup> ICJ Reports (1986), pp. 14, 94 (para. 176).  
<sup>751</sup> The Court alleged that '[t]he 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' (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.

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'.<sup>752</sup>

#### b) (Ir)Relevance of International *jus cogens*

The question of the hierarchy between the formal *sources* of law listed in Art. 38 is 277 distinct from that of the combination of the legal *norms* flowing from these sources. As explained above,<sup>753</sup> 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.

In the great majority of cases, the Court will refer, explicitly or implicitly, to the well 278 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).<sup>754</sup> But, in these cases, there is no question of hierarchy between the formal sources concerned.

It has been suggested that the concept of *jus cogens* formed an exception to the absence 279 of hierarchy between the sources of international law. This is not so: *jus cogens* is not a 'new'<sup>755</sup> category of formal *sources* of international law, but a particular quality of certain *norms*.<sup>756</sup> usually of a customary nature,<sup>757</sup> 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.<sup>758</sup>

It cannot be denied that those norms have special consequences for the existence or 280 application of non-peremptory norms of international law.<sup>759</sup> In particular, '[a] treaty is

<sup>752</sup> Kearney, pp. 610, 697.

<sup>753</sup> MN 75 and 81–83. Cf. further Daillier and Pellet, *supra*, fn. 145, pp. 114–116.

<sup>754</sup> 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*, PCIJ, Series A/B, No. 41, pp. 45–53, *passim*.

<sup>755</sup> According to the present writer, *jus cogens* existed prior to the adoption of the 1969 Vienna Convention: cf. Daillier and Pellet, *supra*, fn. 145, pp. 201–202.

<sup>756</sup> 'The question whether a norm is part of the *jus cogens* relates to the legal character of the norm' (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 258 (para. 83)).

<sup>757</sup> 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. 599 and 600) could derive from 'international instruments of a universal or quasi-universal nature' (ICJ Reports (1970), pp. 3, 32 (para. 34)).

<sup>758</sup> Cf. *supra*, MN 227–229.

<sup>759</sup> 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. 219–270; Annacker, C., 'The Legal Régime of *Erga Omnes* Obligations in International Law', *Austrian Journal of Public and International Law* 46 (1993), pp. 131–166; 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. 241–264; Gaja, G., '*Jus cogens* beyond the Vienna Convention', *Rec. des Cours* 172 (1982-III), pp. 271–316; Gomez Robledo, 'Le *jus cogens* international: sa genèse, sa nature, ses fonctions', *ibid.*, pp. 9–217; Hannikainen, L., *Peremptory Norms (Jus Cogens) in International*

void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law';<sup>760</sup> such a norm can only 'be modified by a subsequent norm of general international law having the same character';<sup>761</sup> 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.<sup>762</sup> 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).

281 Moreover, even accepting that other expressions are equivalent to *jus cogens*, the Court up to now has recognized the existence of such rules on only very rare occasions<sup>763</sup> and has drawn consequences from them even more rarely:<sup>764</sup> its qualification of certain principles as 'intransgressible'<sup>765</sup> 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 violations.<sup>766</sup>

## 2. Complementarity

282 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

283 It will be apparent from the above presentations of the treaty-making and customary processes that their interactions are multiple and intricate.

284 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*;<sup>767</sup>

*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', *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 42 (1991), pp. 183–214; Kolb, R., *Théorie du ius cogens international: essai de relecture du concept* (2001); *id.*, 'Théorie du *ius cogens* international', *RBDI* 36 (2003), pp. 5–55; Ragazzi, M., *The Concept of International Obligations 'Erga Omnes'* (1997); Verdoss, 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), pp. 5–29; De Visscher, C., 'Positivism et *jus cogens*', *RGDIP* 75 (1971), pp. 5–11.

<sup>760</sup> Art. 53 VCLT. <sup>761</sup> *Ibid.*

<sup>762</sup> See *e.g.* Arts. 40, 41, 48 and 54 of the ILC 2001 Articles on Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly's Resolution 56/83, 12 December 2001, also reproduced with the corresponding commentaries in Crawford, J., *op. cit.* fn. 273, pp. 242–253, 276–280 and 302–305.

<sup>763</sup> *Cf. supra*, MN 228–229.

<sup>764</sup> However, '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' (Order of 10 July 2002 in the *Armed Activities on the Territory of the Congo case*, (Democratic Republic of Congo/Rwanda, New Application) (Provisional Measures), ICJ Reports (2002), pp. 219, 245 (para. 71)).

<sup>765</sup> *Cf. supra*, fn. 599.

<sup>766</sup> ICJ Reports (2004), pp. 136, 200 (para. 159). *Cf. also* *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), pp. 3, 41–43 (paras. 90–92).

<sup>767</sup> *Cf. supra*, MN 189 *et seq.*

- 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,<sup>768</sup> or as an expression of the applicable customary rules;<sup>769</sup>
- more generally, the Court will frequently interpret a treaty in light of the customary law in the field.

Thus, in *Jan Mayen*, the Court observed:

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The fact that it is the 1958 Convention which applies to the continental shelf delimitation in this case does not mean that Article 6 thereof can be interpreted and applied either without reference to customary law on the subject.<sup>770</sup>

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 Article X, paragraph 1, of the 1955 Treaty of Amity between Iran and the United States,<sup>771</sup> 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'.<sup>772</sup> It specified however that it could not:

. . . accept that Article 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.<sup>773</sup>

Conversely, treaties are also present in the process of the formation of custom. 286  
They can:

- reflect an existing customary rule, in which case they appear as codification conventions in the strict sense;<sup>774</sup>
- be 'regarded as . . . crystallizing received or at least emergent rules of customary international law';<sup>775</sup> or
- be the point of departure for the formation of a new customary rule;<sup>776</sup> and
- be an important (and, quite often, the main) component of the practice accepted as law, that is the objective element of custom.<sup>777</sup>

More generally, quite often, the Court resorts to treaty rules to reinforce its reasoning 287  
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.<sup>778</sup> In its judgment, the Court

<sup>768</sup> Cf. in particular *Gabčíkovo-Nagymaros case*, ICJ Reports (1997) pp. 7, 38 (para. 47); and further *supra*, MN 183.

<sup>769</sup> Cf. e.g. *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), pp. 14, 95 (para. 178); and further *supra*, MN 186 and 224.

<sup>770</sup> ICJ Reports (1993), pp. 38, 58 (para. 46).  
<sup>771</sup> Judgment on preliminary objections, ICJ Reports (1996), pp. 803, 821 (para. 55 (2)); cf. also the merits judgment of 6 November 2003, ICJ Reports (2003), pp. 161, 178 (para. 31).

<sup>772</sup> ICJ Reports (2003), pp. 161, 178 (para. 31).  
<sup>773</sup> *ibid.*, p. 182 (para. 41).

<sup>774</sup> Cf. *supra*, MN 224.  
<sup>775</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 39 (para. 63).

<sup>776</sup> Cf. *ibid.*, p. 43 (para. 74), and cf. the references *supra*, MN 215.

<sup>777</sup> Cf. the references *supra*, fn. 541.

<sup>778</sup> Cf. ICJ Reports (1980), pp. 3, 24–28 (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,

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'.<sup>779</sup> On the contrary, in *Nicaragua*, the Court, which had no jurisdiction to adjudicate on the alleged violations of multilateral conventions by the United States,<sup>780</sup> did not, in fact, hesitate to refer to the UN Charter to strengthen its argument based on the application of customary principles.<sup>781</sup>

288 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'.<sup>782</sup> 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*'.<sup>783</sup> 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.<sup>784</sup>

#### b) The Subsidiary and Transitory Nature of General Principles

289 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.<sup>785</sup> This phenomenon is even more pronounced in respect to the general principles of law of Art. 38, para. 1 (c), which can be defined as a 'transitory source' of international law—and indeed are treated as such by the Court.

290 A formal source distinct from both conventions and custom,<sup>786</sup> 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 for filling 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.

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).

<sup>779</sup> *ibid.*, p. 31 (para. 62). <sup>780</sup> *Cf. supra*, MN 275.

<sup>781</sup> 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 dissenting opinion, *ibid.*, pp. 532–533. <sup>782</sup> *ibid.*, p. 95 (para. 178).

<sup>783</sup> *ibid.*, p. 96 (para. 180) (the argument was made by the United States but seems to have been accepted by the Court). <sup>784</sup> *Cf. supra*, MN 203.

<sup>785</sup> *Cf. supra*, MN 189–190 and 272. <sup>786</sup> *Cf. supra*, MN 253–254.

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: 291

... 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.<sup>787</sup>

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,<sup>788</sup> 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'.<sup>789</sup>

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',<sup>790</sup> thus confirming that it could resort to what clearly appears as a general principle of law. However, it showed itself extremely cautious not to endorse a final view on the existence of such a principle in international law: 292

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.<sup>791</sup>

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: 293

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.<sup>792</sup>

For its part, the PCIJ itself restrictively interpreted Head III of Germano-Polish Convention concerning Upper Silesia, concluded at Geneva on 15 May 1922 in 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,

<sup>787</sup> PCIJ, Series A, No. 1, p. 24.

<sup>788</sup> Cf. *supra*, MN 232.

<sup>789</sup> ICJ Reports (1960), pp. 6, 43.

<sup>790</sup> ICJ Reports (1999), pp. 1045, 1103 (para. 93).

<sup>791</sup> *Ibid.*, p. 1105 (para. 97). With respect to acquisitive prescription cf. also *European Commission of the Danube*, PCIJ, Series B, No. 14, pp. 36-37.

<sup>792</sup> ICJ Reports (1957), pp. 34, 56. Cf. also Judge Fernandes' dissenting opinion appended to the Court's judgment in *Right of Passage over Indian Territory*, ICJ Reports (1960), pp. 139-140.

which is not justified on special grounds taking precedence, is therefore incompatible with the regime established by the Convention.<sup>793</sup>

294 The indisputable reluctance of the Court to resort to general principles of law can be easily understood: they are difficult to handle<sup>794</sup> and it is a fact that the provision of Art. 38, para. 1 (c), ‘conflicts with the voluntaristic point of view’,<sup>795</sup> which certainly increases the risk that parties will be less inclined to accept the judgment.<sup>796</sup> 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 mainly 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 exclusively 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.

295 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’.<sup>797</sup> 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 in international law, not without difficulties, by the first arbitrators<sup>798</sup> 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’.<sup>799</sup> 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,<sup>800</sup> even if, here again, the underlying principle is sometimes recalled *ex abundante cautela*.

<sup>793</sup> *Certain German Interests in Polish Upper Silesia*, 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.

<sup>794</sup> *North Sea Continental Shelf*, Sep.Op. Ammoun, ICJ Reports (1969), pp. 100, 134–135.

<sup>795</sup> Cf. *supra*, MN 269–270.

<sup>796</sup> Cf. *supra*, MN 245 *et seq.*

<sup>797</sup> ‘General Course on Public International Law’, *Rec. des Cours* 106 (1962-II), pp. 1–251, p. 62.

<sup>798</sup> Cf. e.g. the *Betsey case* (Jay Treaty Arbitration, 19 November 1794, reproduced in Moore, J.B., *supra*, fn. 276, p. 179) or the *Alabama* arbitration (14 September 1872, reproduced *ibid.*, and also in Lapradelle, A. de, and Politis, N., *Recueil des arbitrages internationaux* (1932), vol. II, p. 910).

<sup>799</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954), pp. 47, 52.

<sup>800</sup> Cf. e.g. Nemer Caldeira Brant, L., *L’autorité de la chose jugée en droit international public* (2003), pp. 15–44.

Anzilotti's dissent appended to the PCIJ judgment of 16 December 1927 in the *Chorzów Factory case* is a good illustration.<sup>801</sup> 296

As I have already observed, the Court's Statute, in Article 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).<sup>802</sup>

It is an interesting demonstration: the general principle lying 'behind' Art. 59 is 297 invoked in order to reinforce a treaty law argument which could perfectly be self-sufficient. But this way of reasoning—which is not at all an isolated incident<sup>803</sup>—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 a 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'.<sup>804</sup>

### 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 298 'subsidiary means for the determination of rules of law', now appearing under *lit.* (d) of Art. 38, para. 1, were extremely confusing.<sup>805</sup> It may, however, be inferred from the—sometimes passionate—discussions among the jurists 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.<sup>806</sup>

Be that as it may, in itself, para. 1 (d) as finally adopted deserves less criticism than 299 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

<sup>801</sup> All the more so given that the rigid positivist views of Anzilotti did not predispose him to invoke general principles of law lightly. <sup>802</sup> PCIJ, Series A, No. 13, p. 27.

<sup>803</sup> Cf. the examples given in MN 293. <sup>804</sup> Cf. *supra*, MN 254.

<sup>805</sup> 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 which insisted that doctrine and jurisprudence were purely subsidiary (such as Ricci-Busatti, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 332, or, but much less reluctant, Descamps, *ibid.*, pp. 334 or 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). <sup>806</sup> For a concurring view cf. Shahabuddeen, *Precedent*, p. 77.



exist may be sought by referring to jurisprudence and doctrine'.<sup>807</sup> In the fortunate words of Shabtai Rosenne,<sup>808</sup> the 'subsidiary means' of Lit. (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 above.

- 300 The appropriateness of placing doctrine and jurisprudence on the same footing has also been criticized.<sup>809</sup> 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.<sup>810</sup>

## I. Judicial Decisions

- 301 The role of jurisprudence in the development of international law would deserve a book-length treatment<sup>811</sup> rather than the cursory analysis it will necessarily receive here. The present essay 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

- 302 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.<sup>812</sup> At the same time

<sup>807</sup> Hudson, p. 603. Cf. also Shahabuddeen, *Precedent*, p. 80. <sup>808</sup> *Law and Practice*, vol. III, p. 1607.

<sup>809</sup> Cf. e.g. Fitzmaurice, in *Symbolaw Verzijl*, pp. 153, 174–175.

<sup>810</sup> 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. 259–286; as well as the general literature on the sources of international law, *supra*, fn. 150.

<sup>811</sup> Among the very 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, Ph., '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. 353–366; Lauterpacht, H., *The Development*, *supra*, fn. 718; Guillaume, G., in *Colloque de Tunis*, pp. 175–192; Miller, N., 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', *Leiden J. Int'l L* 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. 819–857; Shahabuddeen, *Precedent*; Stern, B., *20 ans de jurisprudence de la Cour internationale de Justice 1975–1995* (1998).

<sup>812</sup> Cf. in particular *Anglo-Iranian Oil Co.*, Diss. Op. Read, ICJ Reports (1952), pp. 142, 143; as well as the advisory opinion of the PCIJ itself on the *Interpretation of the Greco-Turkish Agreement of December 1st 1926*, 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 (PCIJ, Series B, No. 16, p. 15).

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.

In effect, the judicial decisions to which the Court refers first and foremost are, by far, 303 its own (and, concerning the present Court, those of its predecessor)—without making any difference 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;<sup>813</sup> 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.<sup>814</sup> 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 to refer expressly 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,<sup>815</sup> and in only three printed pages of its 2004 *Wall* advisory opinion, the Court made not less than 28 cross-references to its previous decisions.<sup>816</sup>

It might be doubted whether this method adds much to the authority of the Court’s 304 decisions,<sup>817</sup> 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’.<sup>818</sup> 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 should display consistency and a degree of predictability’.<sup>819</sup>

Even though it is not bound to apply the precedents, the Court is usually careful in 305 avoiding self-contradiction. 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.<sup>820</sup>

<sup>813</sup> See the recollection of the relevant judgments and advisory opinions in Hudson, *PCIJ*, p. 627.

<sup>814</sup> *Corfu Channel*, ICJ Reports (1949), pp. 4, 24.

<sup>815</sup> ICJ Reports (1999), pp. 1045, 1076 (para. 50). <sup>816</sup> ICJ Reports (2004), pp. 135, 154–156.

<sup>817</sup> Even if it is indeed extremely useful to students of international law...

<sup>818</sup> 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. 628–629). Cf. also Lauterpacht, H., *The Development, surpa*, fn. 718, p. 18.

<sup>819</sup> *Continental Shelf* (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), pp. 13, 39 (para. 45). Cf. also *Maritime Delimitation in the Area between Greenland and Jan Mayen*, 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).

<sup>820</sup> ICJ Reports (1998), pp. 275, 292 (para. 28).

In that case, the Court found that there was not such cause.

306 Generally speaking, '[t]he 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'.<sup>821</sup> Consequently, it should be a rather easy task to explain different solutions by reference to the different 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.

307 Thus, for example, 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 *Temple case* and the 1959 judgment in the *Aerial Incident case* was nothing less than obvious.<sup>822</sup> 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,<sup>823</sup> 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.<sup>824</sup>

308 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'.<sup>825</sup> 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.<sup>826</sup>

<sup>821</sup> Rosenne, *Law and Procedure*, vol. III, pp. 1611–1612.

<sup>822</sup> ICJ Reports (1964), pp. 65, 66–72. The Court may face the problem, as it did in the *Temple case* (ICJ Reports (1961), pp. 6, 27–28), or it can deal with it by paralipsis as it did in its advisory opinion of 30 March 1950 (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), ICJ Reports (1950), pp. 65 *et seq.*) where it did not take pains to explain the consistency of the solution it gave to the issue of jurisdiction by comparison with that retained in *Eastern Carelia* (see Judge Azevedo's Separate Opinion, *ibid.*, p. 81 and Judge Winiarski, Zoričić and Krylov's Dissenting Opinions, respectively pp. 89–91, 102–104 and 108–111).

<sup>823</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections), ICJ Reports (1996), pp. 595, 623 (para. 47 (2) (a)); and the *Application for Revision* of that decision, ICJ Reports (2003), pp. 3, 31 (paras. 70–71).

<sup>824</sup> *Legality of Use of Force* (Serbia and Montenegro/Belgium), available at <http://www.icj-cij.org> (para. 129). The seven other judgments contain identical statements.

<sup>825</sup> *Ibid.*, para. 40.

<sup>826</sup> Joint Declaration, *ibid.*, paras. 3 and 13.

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 has multiple reasons:

- even if now competed with by numerous other judicial bodies, the Court remains the most prestigious of all and the only one having a general competence for all legal disputes between States (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');<sup>827</sup>
- its organic permanence and precedence in time has enabled the Court to elaborate an impressive case law<sup>828</sup> without equal in general international law.

This explains in large part the Court's quasi-exclusive 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',<sup>829</sup> which it 'considers as having a different status than those of any other tribunal, however exalted'.<sup>830</sup> Another consideration should probably be added to the objective reasons indicated above: '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'.<sup>831</sup> 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.<sup>832</sup>

However, the Court is less unconcerned by the decisions of other courts and tribunals than usually alleged.<sup>833</sup> Leaving aside the cases where it is a decision of another tribunal which is at issue,<sup>834</sup> as a matter of fact, the Court has long been extremely

<sup>827</sup> Art. 9 of the Statute. <sup>828</sup> *Cf. supra*, MN 304–305. <sup>829</sup> Kearney, pp. 610, 699.

<sup>830</sup> *Ibid.*, p. 698.

<sup>831</sup> Mendelson, in *Fifty Years of the International Court of Justice*, pp. 63, 83.

<sup>832</sup> ICJ Reports (1970), pp. 3, 40 (para. 63). *Cf. also Certain German Interests in Polish Upper Silesia (Merits)*, PCIJ, Series. A, No. 6, p. 20: '[T]he Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character'.

<sup>833</sup> 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, his fn. 471).

<sup>834</sup> *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 on 23 December 1960* (ICJ Reports (1960), pp. 192 *et seq.*) or that of the *Arbitral Award of 31 July 1989* (ICJ Reports (1991), 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 judgment of 11 September 1992 in the *Land, Island and Maritime Frontier Dispute*, 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"'). For comment *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.

parsimonious in citing arbitral awards: in some cases it referred to 'precedents',<sup>835</sup> 'decisions of arbitral tribunals',<sup>836</sup> 'international decisions'<sup>837</sup> or 'international jurisprudence'<sup>838</sup> in general and, in some other, both the PCIJ<sup>839</sup> and the present Court have mentioned specific arbitral awards,<sup>840</sup> two of which having apparently enjoyed the special favour of the Court for a long time: the *Alabama* arbitration<sup>841</sup> and the Franco-British Arbitration of 1977 concerning the *Delimitation of the Continental Shelf*.<sup>842</sup> However, since the 1990s, the Court is certainly more inclined to refer more systematically to a relatively diversified pattern of arbitral cases.<sup>843</sup> It is also interesting to note that, in its advisory opinion of 2004 in the *Wall case*, the Court has not hesitated to refer to '[t]he constant practice' of the Human Rights Committee of which it cited several reports.<sup>844</sup>

312 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,<sup>845</sup> the present writer tends to share the view that these decisions should better be treated as elements of State practice in the customary process<sup>846</sup> or, maybe, as being at the cross-road between evidence of practice and *opinio juris*.

## 2. Law-Making by the International Court?

313 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'<sup>847</sup> had been considerably amended with the result that any allusion

<sup>835</sup> *Lotus*, PCIJ, Series A, No. 10, p. 26.

<sup>836</sup> *Factory at Chorzów* (Merits), PCIJ, Series A, No. 17, p. 47. Cf. also *Gulf of Maine*, ICJ Reports (1984), pp. 246, 290 (para. 83); *Arrest Warrant of 11 April 2000*, ICJ Reports (2002), pp. 3, 31–32 (para. 76).

<sup>837</sup> *Corfu Channel*, ICJ Reports (1949), pp. 4, 18; and also *Nottebohm*, ICJ Reports (1955), pp. 4, 21–22.

<sup>838</sup> *Constitution of the Maritime Safety Committee of the IMCO*, ICJ Reports (1960), pp. 150, 169.

<sup>839</sup> Cf. *Lotus*, PCIJ, Series A, No. 10, p. 26 (Award, 1897, *Costa Rica Packet*); *Polish Postal Service in Danzig*, PCIJ, Series B, No. 11, p. 30 (PCA, 1902, *Pious Funds of the Californias*).

<sup>840</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine*, ICJ Reports (1984), pp. 246, 309 (para. 146) (PCA, 1909, *Grisbadarna*).

<sup>841</sup> Arbitral Award of 14 September 1872, cited e.g. in *Nottebohm* (Preliminary Objection), ICJ Reports (1953), pp. 111, 119; or *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 (para. 57).

<sup>842</sup> Cf. *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18, 57 (para. 66) and 79 (para. 109); *Delimitation of the Maritime Boundary in the Gulf of Maine*, ICJ Reports (1984), pp. 246, 293 (para. 92), 302–303 (para. 123) and 324 (para. 187); *Maritime Delimitation in the Area between Greenland and Jan Mayen*, ICJ Reports (1993), pp. 38, 58 (para. 46), 51–52 (para. 51), 62 (para. 55) and 67 (para. 66); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports (2001), pp. 40, 114–115 (para. 247); *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002), pp. 303, 432 (para. 270).

<sup>843</sup> Cf. e.g. *Land, Island and Maritime Frontier Dispute*, ICJ Reports (1992), pp. 351, 380 (para. 28) (Award of 1933, concerning the *Border between Guatemala and Honduras*), 387 (para. 42 (Award of the Swiss Federal Council, 1922, on *Certain Boundary Questions between Colombia and Venezuela*) and 591–592 (para. 391) (PCA, 1910, *North Atlantic Fisheries*); or *Kasikilil/Sedudu Island*, ICJ Reports (1999), pp. 1045, 1060 (para. 20) (1994 award on *Laguna del Desierto*), 1064 (para. 30) (Award of 1966, *Palena*), and 1066 (para. 33) (Award of 1933, *Border between Guatemala and Honduras*). Cf. further *Maritime Delimitation and territorial Questions between Qatar and Bahrain*, ICJ reports (2001), pp. 40, 70 (para.100)(Award of 1928, *Island of Palmas*), 77 (paras. 112–113) and 78 (para. 117)(Award of 1981, *Dubai/Sharjah Border Arbitration*); *Sovereignty over pulau Ligitan and pulau Sipadan*, ICJ Reports(2002),pp. 625,665(para.82)(Award of 1928, *Islands of Palmas*), 628 (para. 135) (Award of 1966, *Palena*); *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002), pp. 303, 346 (para. 223) (Awards of 1968, *Rann of Kutch* and 1977, *Beagle Channel*), 417 (para. 228) (Award of 1999, *Eritrea/Yemen* (Second phase)),433 (paras.272–273) (Awards of 1968, *Delimitation of the Guinea and Gunea-Bissau Maritime Boundary*).

<sup>844</sup> ICJ Reports (2004), pp. 136, 179 (para. 109).

<sup>845</sup> Cf. e.g. *Oppenheim's International Law*, supra, fn. 145, pp. 41–42; or Thirlway, 'Law and Procedure, Part Two', *BYIL* 61 (1990), pp. 1, 128.

<sup>846</sup> Mendelson, in *Fifty Years of the International Court of Justice*, pp. 63, 81.

<sup>847</sup> Cf. supra, MN 21.

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.

After receiving the Draft Statute of the Permanent Court in 1920, Balfour declared 314 that 'the decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law'.<sup>848</sup> 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,<sup>849</sup> the Court has always denied 315 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 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.<sup>850</sup>

However, it is precisely when specifying the scope of the applicable law that the Court 316 has an opportunity to play a part in the shaping—or reshaping—of international law.<sup>851</sup> Indeed, it must decide the disputes submitted to it, but the often uncertain content or scope of the applicable law leaves it a wide latitude in its determination—less when it only has to apply and interpret a treaty,<sup>852</sup> more when, absent treaty-law, it must find evidence of a customary rule<sup>853</sup> or of general principles of law.<sup>854</sup> As has been observed, '[t]he malleability of the law in the hands of the Court has converted it into a powerful instrument for progress'<sup>855</sup>—or, sometimes, of regress.

The present commentary is not the appropriate place to elaborate on this aspect. 317 However, some examples of the deep influence that the Court has exercised on 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;<sup>856</sup>

<sup>848</sup> 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. 38. Cf. Shahabuddeen, *Precedent*, p. 78.

<sup>849</sup> Cf. *supra*, e.g. MN 27 and 245.

<sup>850</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226, 237 (para. 18). Cf. also the firm statement in Judge Guillaume's separate opinion: '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 64 and 142.

<sup>851</sup> 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' (in *Colloque de Tunis*, 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., for example, the *dictum* of the Court with respect to the consequences of obligations *erga omnes* in *Barcelona Traction* (ICJ Reports (1970), pp. 3, 32 (para. 33)).

<sup>852</sup> Cf. *supra*, MN 189–191.

<sup>853</sup> Cf. *supra*, MN 216 and 230–237.

<sup>854</sup> Cf. *supra*, MN 260–264.

<sup>855</sup> Rosenne, *Law and Practice*, vol. III, p. 1600.

<sup>856</sup> Cf. e.g. *Mavrommatis Palestine Concessions*: '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

- the 1949 advisory opinion of the present Court on *Reparation for Injuries Suffered in the Service of the United Nations*<sup>857</sup> 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*<sup>858</sup> 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 today; and
- the jurisprudence of the Court has exercised decisive influence on the evolution of the law of the sea for example in respect to the fixation of straight base-lines<sup>859</sup> or the delimitation of the continental shelf.<sup>860</sup>

318 Sometimes, the Court's formulae have been included into formal treaties as is the case, for example, of the criterion of the 'object and purpose' in respect to the validity of reservations to treaties<sup>861</sup> or—much less fortunately—of the 'equitable principle' applicable to the delimitation of continental shelf or exclusive economic zones.<sup>862</sup> 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*.<sup>863</sup>

319 This last example shows that the Court does not have the last word in the adaptation, formulation and, probably, sometimes, 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.<sup>864</sup>

## II. 'The Teachings of the Most Highly Qualified Publicists of the Various Nations'

320 Not mentioned in the initial proposal of Baron Descamps, which is at the origin of Art. 38,<sup>865</sup> the 'opinions of writers' were introduced in the works of the 1920 Committee

rights—its right to ensure, in the person of its subjects, respect for the rules of international law'. (PCIJ, Series A, No. 2, p. 12); *Factory at Chorzów* (Merits): '[I]t 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' (PCIJ, Series A, No. 17, p. 29); and further, *ibid.*, p. 47: '[R]eparation 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.'

<sup>857</sup> ICJ Reports (1949), pp. 174 *et seq.* <sup>858</sup> 28 May 1951, ICJ Reports (1951), pp. 15 *et seq.*

<sup>859</sup> *Cf.* in particular, *Fisheries*, ICJ Reports (1951), pp. 116 *et seq.*

<sup>860</sup> *Cf.* in particular, *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3 *et seq.*

<sup>861</sup> Directly copied into Art. 19 (c) VCLT from the 1951 advisory opinion, ICJ Reports (1951), pp. 15, 24.

<sup>862</sup> Transposed from the 1969 judgment (ICJ Reports (1969), pp. 3, 47) into Arts. 74, para. 1, and 83, para. 1 UNCLOS. <sup>863</sup> Contrast PCIJ, Series A, No. 10, and UNTS 493, pp. 233 *et seq.*

<sup>864</sup> 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. 449 and MN 220, 253), the 1969 Judgment in the *North Sea Continental Shelf* (which 'invented' the far too subjective 'equitable principle' for delimitation of maritime areas; *cf. supra*, fn. 359 and 360), 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 power—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 . . .

<sup>865</sup> *Cf. supra*, MN 21.

of Jurists by the Root-Phillimore draft.<sup>866</sup> 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'.<sup>867</sup>

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 close to nil: with the exception of one formal mention of the 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 *El Salvador/Honduras*,<sup>868</sup> the Court seems to have only referred (and rarely) to 'the teachings of legal authorities',<sup>869</sup> 'legal doctrine',<sup>870</sup> 'the opinions of writers'<sup>871</sup> or 'legal thinking'<sup>872</sup> 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'.<sup>873</sup>

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 get knowledge of State practice.<sup>874</sup> However, the scarcely 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 it is given by the quite abundant references to the opinions

<sup>866</sup> Cf. *supra*, MN 31. At the request of Baron Descamps, it was envisaged to specify that their opinions were to be 'concording' (Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), 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).

<sup>867</sup> 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. 275–281; 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. 507–580; Schwarzenberger, G., 'The Province of the Doctrine of International Law', *Current Legal Problems* 1956, pp. 235–265; Schwebel, S.M., 'The Inter-active Influence of the International Court of Justice and the International Law Commission' in *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Barea, C.A.A., ed., 2000), pp. 479–505.

<sup>868</sup> 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).

<sup>869</sup> In which case they were placed on the same footing as 'the jurisprudence of the principal countries': cf. *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 6, p. 20 (concerning *litispendence*). In the advisory opinion on *Jaworzina*, the French authoritative text 'doctrine constante' was translated into English as 'established principle'! (cf. PCIJ, Series, B, No. 8, p. 37).

<sup>870</sup> *Customs Régime between Germany and Austria*, PCIJ, Series A/B, No. 41, p. 45 (definition of 'independence of States').

<sup>871</sup> *Nottebohm*, ICJ Reports (1955), pp. 4, 23.

<sup>872</sup> *North Sea Continental Shelf*, ICJ Reports (1969), pp. 3, 35 (para. 55).

<sup>873</sup> *Lotus*, PCIJ, Series A, No. 10, p. 26.

<sup>874</sup> For similar views cf. e.g. *Oppenheim's International Law*, *supra*, fn. 145, p. 42; or Roucouas, *supra*, fn. 810, *Thesaurus Acroasium* XIX (1992), pp. 259–286, p. 271.



of writers in the opinions of the individual judges:<sup>875</sup> this suggests that these views have probably been discussed during the deliberation.<sup>876</sup>

323 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 contrasted, 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 much 'different'.

324 However, there is one exception to the apparent disregard of the Court for the legal doctrine: the Court'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 has been described above<sup>877</sup> and there is no need to return to the topic; suffice it to say that there might be some paradox for the World Court to pay an increasing attention to the ILC's work at a time when the Commission itself gives the impression of suffering an identity crisis and losing part of its prestige.<sup>878</sup> 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.

ALAIN PELLET\*

<sup>875</sup> For a striking example (noted by Orison, A., *supra*, fn. 428, *Revue de droit international, de sciences diplomatiques et politiques* 79 (2001), pp. 223–284, pp. 233–234) cf. Judge Shahabuddeen's extremely well-argued dissenting opinion appended to Court's order of 28 February 1990 in the *Land, Island and Maritime Frontier Dispute* (Application for Permission to Intervene), ICJ Reports (1990), pp. 18–62.

<sup>876</sup> 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 analyzing 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 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. <sup>877</sup> MN 225.

<sup>878</sup> For a more optimistic view cf. Schwebel, in *Liber Amicorum Ruda*, *supra*, fn. 867.

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