3.4.4 Treaties as evidence of customary law

The issue here is the extent to which a multilateral treaty can be used as evidence of customary international law. It is a general rule of international law which is confirmed in Article 34 of the Vienna Convention on the Law of Treaties 1969 that treaties cannot bind third parties without their consent. If a state wishes to enforce the provisions of a treaty against a non-party it is necessary to argue that the provisions of the treaty are valid as rules of customary international law. Two possible situations arise:

1 Where the treaty is intended to be declaratory of existing customary international law;

2 Where the treaty is constitutive of new law.

If the treaty on its face purports to be declaratory of customary international law or if it can be established that it was intended to be declaratory of customary international law, then it may be accepted as valid evidence of the state of the customary rule. If the treaty at the time of its adoption was constitutive of new rules of law, then the party relying on the treaty as evidence of customary law will have the burden of establishing that the treaty has subsequently been accepted into custom.

The ICJ in the *North Sea Continental Shelf* cases recognised that it is possible for a treaty to contain norm-creating provisions which become accepted by the *opinio juris* and bind non-parties just as much as parties to the convention but the court did lay down a series of conditions:

1 The convention provision must be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law;

2 There must be widespread and representative participation in the convention particularly of those states whose interests are specifically affected;

3 There must be *opinio juris* reflected in extensive state practice virtually uniform in the sense of the provision invoked.

The following point should also be noted:

> Since treaties and custom are on the same footing, it follows that the relations between rules generated by the two sources are governed by those general principles which in all legal orders govern the relations between norms deriving from the same source: *lex posterior derogat priori* (a later law repeals an earlier law), *lex posterior generalis non derogat priori speciali* (a later law, general in character does not derogate from an earlier law which is special in character), and *lex specialis derogat generali* (a special law prevails over a general law).[52]

3.5 General principles of law

> The general object, then, of inserting the phrase ['general principles of law recognised by civilised nations'] in the statute seems to have been, essentially, to make it clear that the Court was to be permitted to reason, though not to

52 Cassese, *International Law in a Divided World*, 1986 Oxford: Clarendon Press at p 180.

> legislate, and by, for instance, the application of analogies from the law within the state, to avoid ever having to declare that there was no law applicable to any question coming before it. This was a problem which troubled the Continental jurists who assisted in the drafting of the Statute, but did not trouble the Anglo-Saxons, who of course expected judges to reason without express instructions.[53]

The prevailing view as to the meaning of Article 38(1)(c) is that it authorises the Court to apply the general principles of municipal jurisprudence, in particular of private law, in as far as they are applicable to the relations of states. It is not thought to refer to principles of international law itself, which are to be derived from custom or treaty. International tribunals will often refer to 'well-known' or 'generally recognised' principles such as the principle of the independence and equality of states. Such principles do not come within Article 38(1)(c).

> [General principles] are, in the first instance, those principles of law, private and public, which contemplation of the legal experience of civilised nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character – such as the principle that no one may be judge in his own cause, that a breach of legal duty entails the obligation of restitution, that a person cannot invoke his own wrong as a reason for release from legal obligation, that the law will not countenance the abuse of a right, that legal obligations must be fulfilled and rights must be exercised in good faith, and the like.[54]

> No decision of the Court, or indeed the Permanent Court, has yet been based explicitly upon a principle or rule of law drawn from the 'general principles of law recognised by civilised nations' referred to in Article 38, para 1(c) of the Statute.[55] It is comparatively rare for a state to base a claim before the Court on such principles, so that it is correspondingly infrequent for the Court to have occasion to refer to them for the purposes of its decision. Even where referred to

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53 Clive Parry, *The Sources and Evidences of International Law*, 1965, Manchester: Manchester University Press at p 83.

54 Lauterpacht, *International Law*, Vol 1, 1970, Cambridge: Cambridge University Press at p 69.

55 A member of the Court has however gone on record, in an extra-judicial capacity, to the following effect:

'The silence observed in this matter by them International Court of Justice or other international tribunals must [not] be misinterpreted as any neglect of the importance of examining the common grounds of national systems. However, as far as my experience goes, basic principles common to national legal systems are not normally disputed. The *jus gentium* applied by the Roman *praetor peregrinus* is still a reality. The main question is, however, how a generally accepted principle can provide an appropriate solution in the actual case under consideration. Studies of national legislations which have been submitted to the Court in the past are very helpful in clarifying the concepts and solutions found in national law, but usually they cannot offer precise criteria for the application and interpretation of international law in the given case. The presentation of the various solutions of national legislations paraphrasing the basic principle involved, would often not be in conformity with the style of a judgment, the reasoning of which must proceed in a continuous chain of thought and argument to the operative part. I admit, however, that it would be welcomed not only by the parties but also by the international legal world if the reasoning of judgments and advisory opinions were to explain that the Court had examined, by comparative methods, the assertion – sometimes boldly stated – that a general principle of law, having a specified meaning and significance, forms part of binding general international law': Mosler, 'To what extent does the variety of legal systems of the world influence the application of general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice?', *International Law and the Grotian Heritage*, 1985, The Hague: TMC Asser Instituut at p 180.

by a party to proceedings, the general principles tend to be employed as something of a makeweight or last resort, a supplementary argument in case the contentions based on customary law or treaties fail to convince: with the result that the Court hardly ever needs to refer to them. On the other hand, individual Members of the Court invoke general principles more frequently: Judge Ammoun was particularly attached to them, though he had strong objections to the use in the Statute of the term 'civilised nations'.

...

It is fairly well established that the general principles contemplated by Article 38, para 1(c) of the Statute are at least primarily those which reveal themselves in the consistent solutions to a particular problem adopted in the various systems of municipal law – what Mr Elihu Root called, during the discussions of the 1920 Committee of Jurists, those which were 'accepted by all nations *in foro domestico*'.[56] It is necessary, though not always easy, to distinguish these principles from, on the one hand, what Sorensen has called '*les principes fondamentaux de la structure du droit international*'[57] ... and from, on the other hand, mere arguments from analogy by reference to institutions or rules found in one or more systems of municipal law. These discussions were the subject of much argument between the parties in the *Right of Passage* case.[58]

The general principles of law recognised by civilised nations' form part of the law to be applied by the permanent forum of the family of nations, the International Court of Justice ...

[Article 38 of the Statute of the International Court of Justice] is the same as Article 38 of the Statute of the Permanent Court of International Justice, except for an alteration in the numbering of the paragraphs and sub-paragraphs[59] and the addition of a few words of no great practical importance in the introductory phrase. The mention of 'general principles of law recognised by civilised nations' ('*les principes generaux de droit reconnus par les nations civilisées*') as part of the law to be applied by the Permanent Court of International Justice at once provoked considerable discussion among writers, in which the most divergent views on the character of such principles were expressed.

Some writers consider that the expression refers primarily to general principles of international law and only subsidiarily to principles obtaining in the municipal law of the various states.[60] Others hold that it would have been

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56 *Procès-verbal* of the Committee, p 335.

57 *Les Sources du droit international*, p 116. The interpretation of Article 38(1)(c) as restricted to principles derivable from municipal law recognition does not of course signify the exclusion of other general principles form the corpus of law applicable by the Court. Mosler, following Anzilotti, observes that the more basic principles need no transformation into international law, whereas the principles commonly accepted in municipal systems do need to be so transformed, hence the inclusion of Article 38(1)(c) in the Statute: '*Bedeutungswandel in der Anwendung "der van den zivilisierten Staaten annerkannten allgemeinen Rechtgrundsatze"*', *Pensamiento juridico y sociedad internacional*, 1986, Madrid: Melanges Treyol Serra at pp 7–76.

58 H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' Part Two (1990) 61 *BYIL* at pp 110, 114.

59 In the Statute of the PCIJ the paragraphs were not numbered, while the sub-paragraphs were numbered by arabic figures. The present Art 38 1(c) was, therefore, referred to, under the old statute, as Art 38 I 3, or often Art 38 3. For the sake of convenience, the new numbering will be used in this work even when referring to the Statute of the PCIJ.

60 Anzilotti, (1929) 1 *Cours de Droit International* at p 117. Hudson, *The PCIJ 1920–42*, 1943, New York: Macmillan at p 611. Castberg '*La methodologie du droit international public*,' (1933) 43 *Recueil La Haye* p 313 at p 370 *et seq*. Morellie '*La théorie générale du procès international*', 61 *ibid*, p 253 at p 344 *et seq*.

redundant for the Statute to require the Court to apply general principles of international law, and that, therefore, this provision can refer only to principles obtaining in municipal law.[61] Some writers even maintain that the expression is intended to refer exclusively to principles of private law.[62]

A difference of opinion also exists as to whether 'the general principles of law recognised by civilised nations' are or are not principles of natural law. While certain authors think they are, others deny categorically that they have any connection with natural law. A leading exponent of the modern doctrine of natural law believes, however, that while they are not actually principles of natural law, they are derived from it.[63]

Nor do authors agree as to whether 'general principles of law' are part of the international legal order, simply because it is a legal order, or because there exists a rule of customary international law according to which such principles are applicable in international relations. Moreover, some writers maintain that 'general principles of law' do not form part of the law to be applied by the World Court by virtue of the enabling provision in its Statute.

The greatest conflict of views concerns the part played in international law by these 'general principles'. While some writers regard them merely as a means for assisting the interpretation and application of international treaty and customary law, and others consider them as no more than a subsidiary source of international law, some modern authors look upon 'general principles' as the embodiment of the highest principles – the 'superconstitution' of international law.

Interesting though this discussion of the character of such 'general principles' may be in the theory of international law, it is even more important to know what they in fact represent. For this reason, the purpose of the present study is not to ascertain what they ought to be theoretically, or how they should be classified, but is primarily intended to determine what they are in substance and the manner in which they have been applied by international tribunals.

As an introduction to this study, the genesis of Article 38(1)(c) of the Statute of the World Court may usefully be examined. In February 1920 at its second meeting, the Council of the League of Nations appointed an Advisory Committee of Jurists for the purpose of preparing plans for the establishment of

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61 Strupp, '*Le droit de juge international de statuer selon l'équité*' 33 *ibid* (1930) p 357 at pp 474–75. Scerni, *I principi generali di diretto riconosciuti dala nazioni civili*, 1932, p 13 *et seq*.

62 *Cf* Lauterpacht, *Private Law Sources and Analogies of International Law*, 1927, Cambridge: Cambridge University Press at p 71: 'Those general principles of law are for the most practical purposes identical with general principles of private law.' See also *ibid*, p 85. For a criticism of this exclusive approach, see Le Fur, '*Règles générales du droit de la paix*' (1935) 54 *Recueil La Haye* p 5 at pp 206–07. In his *The Function of Law in the International Community*, 1933, Lauterpacht admitted that they included also general principles of public law, general maxims and principles of jurisprudence.

Graspin, *Valeur internationale des principaux generaux du droit*, 1934, pp 64–66. Ripert '*Règles du droit civil applicables aux rapports internationaux* (1933) 44 *Recueil La Haye* at p 569. Ripert believed that they were principles of municipal law (*jus civile* of the Romans): he seemed to have allowed it subsequently to assume its modern meaning of private law by tracing the evolution of the meaning of the term in France (p 583). His main object, however, was to ascertain which principles of private law were really principles applicable in all legal systems (p 569) and he did not appear to maintain that the latter were exclusively to be found in private law.

63 Le Fur, '*La coutume et les principes generaux du droit comme sources du droit international public*', (1936) 3 *Recueil Geny* p 362 at p 368. The relevant passage was almost textually reproduced in the same authors '*Règles generales* etc' *loc cit* p 205.

the Permanent Court of International Justice provided for in Article 14 of the Covenant of the League of Nations. This Advisory Committee held its meetings from June 16 to July 24, 1920 and was able to present its Report together with the Draft Statute of the Court to the Council of the League at its eighth session (July 30–August 5, 1920).

Before the Advisory Committee actually met, a Memorandum was submitted to it by the Secretariat of the League of Nations, together with a number of draft schemes prepared by states and individuals, relating to the establishment of a World Court. In so far as the law to be applied by the Court was concerned, it will be found that none of these drafts took a positivist[64] or voluntarist[65] view. Besides treaties and established rules, the Court was according to these various drafts directed to apply 'general principles of law,'[66] 'general principles of law and equity,'[67] 'general principles of justice and equity,'[68] or even 'rules which, in the considered opinion of the Court, should be the rules of international law'.[69]

It was, therefore, quite in line with these drafts, which may be considered as a fair indication of the general opinion on the subject, that, when the question of the law to be applied by the Court came up for discussion in the Advisory Committee of Jurists, Baron Descamps, Chairman of the Committee, proposed that, after conventions (clause 1) and commonly recognised custom (clause 2), the Court should apply 'the rules of international law as recognised by the legal conscience of civilised nations' (clause 3), or, as they were described in the original French version of the proposal '*les règles de droit international telles que les reconnaît la conscience juridique des peuples civilisés*.'

Mr Elihu Root, the American member of the Committee, whilst not objecting to the application by the Court of conventions and recognised custom (ie clauses 1 and 2 of the Descamps proposal) said that he 'could not understand the exact meaning of clause 3'. He wondered whether it was possible to compel states to submit their disputes to a court 'which would administer not merely law but also what it deems to be the conscience of civilised peoples'.

It may be apposite to point out here that although some words, which are identically spelt in French and English, can be literally transposed from one language into the other, others carry subtle but important differences in meaning in the two languages so that literal transposition becomes impossible. Thus the word '*conscience*', which exists in both English and French, while it often conveys the same meaning in both languages, does not invariably do so. 'Conscience' has

64 As used in this work, 'positivism' denotes that school of thought which consider that law 'properly so called' consists only of rules derived from a 'determinate source' or, in other words, rendered 'positive' by means of a formal process.

65 As used in this work 'voluntarism' denotes that school of thought which emphasises the element of will in the formation of legal norms, either the will of the state, in the form of a command, or the will of the subjects, as manifested by consent.

66 Draft scheme of Denmark, Norway and Sweden, Art 27 II.

67 German Draft Scheme, Art 35. Clovia Bevilaqua's Draft scheme, Art 24 II. Bevilaqua's second category of rules is in fact customary international law.

68 Article 42 of the Swiss Draft Scheme establishes the following three categories: conventions, principles of international law, and the general principles of justice and equity. Article 12 of the Draft of the *Union Juridique Internationale* directs the court to apply 'law, justice and equity'.

69 Draft Scheme of Denmark, Norway and Sweden, Art 27 II (Alternative) Danish Draft Scheme, Art 15 II, Norwegian Draft Scheme, Art 15 II, Swedish Draft Scheme, Art 17 II, Draft Scheme of the Five Neutral Powers (Denmark, Norway, Netherlands, Sweden, Switzerland), Art 2 II.

acquired in current English usage a primarily moral and introspective connotation – the sense of what is *morally* right or wrong possessed by an individual or a group *as regards things for which the individual himself*, or the group collectively, *is responsible*.

In French '*conscience*' denotes also 'the sense of what is right or wrong', but not necessarily what is *morally* right or wrong. For instance, the French speak of '*liberté de conscience*' for 'freedom of belief', thus distinguishing '*conscience réligeuse*' from '*conscience morale*'. It follows that '*conscience juridique*' is equally distinguishable from '*conscience morale*'. It is a familiar expression with French jurists, meaning 'the sense of what is juridically right or wrong'.

Furthermore, although '*conscience*' in French also implies the passing of judgment upon human actions and motives, it does not invariably mean an introspective judgment upon one's own actions and motives. Thus '*conscience publique*' in French merely means 'the people's sense of what is right or wrong' without necessarily implying self-judgment.

For these reasons, the phrase '*la conscience juridique des peuples civilisés*' which figured in the Descamps proposal may be translated into English as 'the sense common to all civilised peoples[70] of what is juridically right or wrong', or as 'the *opinio juris communis* of civilised mankind'.

The literal translation of the phrase by 'the conscience of civilised nations' would seem to have a different meaning in English, namely 'the moral sense of right or wrong possessed by each civilised nation as regards things for which it is responsible'. And, since 'conscience' in English denotes an essentially moral quality, the original English translation of the Descamps proposal which spoke of the 'legal conscience of civilised nations', is, if not self-contradictory, at least as difficult to understand, as, indeed, Mr Root found it.

The reason why Mr Root at first objected to the Descamps proposal was certainly more substantial than one arising from a linguistic misunderstanding but a proper understanding of the original proposal is nevertheless important.

An examination of the various proposals put forward and opinions expressed during the discussion, concerning the rules of law to be applied by the Court, discloses five distinct views:

(1) First, a group of proposals refrained from indicating to the Court which rules of law it was to apply.

(2) Secondly, the various Scandinavian drafts and that of the five neutral powers inspired by the Swiss Civil Code directed the Court to apply conventions and recognised rules of international law, and, in default of such rules, to apply what, in its considered opinion, the rule of international law on the subject

70 It should be noticed that the original proposal of Descamps referred to '*peuples civilisés*', ie 'civilised peoples' or 'civilised mankind'. This is important, because the expressions 'civilised nations' and '*nations civilisés*' which are now found in the English and French text of Art 38 1(c) originate from Root's amendment to the Descamps proposal. This amendment referred to 'civilised nations' which was the English translation used by the Committee of Jurists for Descamps' '*peuples civilisés*'. In fact, the earlier translation of the Root amendment also used '*peuples civilisés* in the French version. Looked at from this angle, the word 'nation' in Art 38 1(c) should be understood not in its politico-legal sense, as it is used in the 'League of Nations' 'United Nations' or 'International Law' but in its more general sense of a people, as for instance, the Scottish nation, the French nation, the Maori nation, etc. Some further support for this view may be found in the fact that, at certain stages of the drafting of the article, the word nation in clause 3 was written with a small n, while the same word in clause 4 in the sense of a country was written with a capital N.

ought to be. The latter part of this proposal was regarded as conferring on the Court a legislative power, and, since all the members of the Committee were in agreement that a Court should not legislate, this formula did not find any favour.

(3) Thirdly, there was the proposal of Baron Descamps, which was supported by M Loder and M Hagerup and received no serious opposition except from Mr Elihu Root. In order to appreciate how much this view coincides with the fifth view which was that of Lord Phillimore's, it must be realised that, in his proposal, Baron Descamps defined international custom as '*pratique commune des nations, acceptée par elles comme loi*'. As such, his conception of custom was much more restrictive than Lord Phillimore's. According to the Descamps formula, both the *consuetudo* and the *opinio juris*, the two constitutive elements of a custom, have to be common to all nations. Adopting so stringent a view of international custom, it is not surprising that Baron Descamps should classify another portion of international law under a third heading, *'les règles de droit international telles que les reconnait la conscience juridique des peuples civilisés'*. While he conceived these as rules of objective justice, he limited the formula to what the *opinio juris communis* of the civilised world considered as rules of international law. These rules of objective justice Baron Descamps also called 'general principles of law', and, as an illustration of the principles he had in mind, he cited the case of the application of the principle of *res judicata* in the *Pious Fund* case by the Permanent Court of Arbitration.

(4) Fourthly, there was the original view of Mr Root who seemed ready to admit only clauses 1 and 2 of the Descamps proposal, and even entertained some doubt as to clause 2 concerning the application by the Court of commonly recognised custom. The position originally adopted by this distinguished American statesman, who had contributed so much to the establishment of the Permanent Court of International Justice, was, however, actuated more by an earnest wish to see the Statute accepted by all countries than by a strict adherence to juridical principles. In this connection, it should be borne in mind that, at the time, the Advisory Committee had agreed in principle that the compulsory jurisdiction of the Court should be accepted by all the members of the League of Nations by the very fact of adhering to the Statute of the Court. Mr Root rightly linked this aspect of the question with the rules concerning the application of law. However unconnected they may be from a juridical standpoint, their relation is certainly real and substantial from the point of view of states called upon to submit to the jurisdiction of the Court. A restrictive formula with regard to the law to be applied would, in Mr Root's opinion, have facilitated the acceptance of the step forward in the field of jurisdiction. He was, therefore, disposed to accept the Descamps proposal in respect of all the Court's jurisdiction other than its compulsory jurisdiction. He was even disposed to accept it, where the Court had compulsory jurisdiction, so long as the dispute concerned the extent and nature of reparation for breach of an obligation, or the interpretation of judgments, but he was not prepared to accept it where the dispute concerned questions of international law in general.

(5) Finally, there was Lord Phillimore's amended text of the Descamps proposal, elaborated in conjunction with Mr Root, which was in fact the text adopted by the Advisory Committee. On closer examination, Lord Phillimore's views were not so different from Baron Descamps. His attitude with regard to the rules concerning the law to be applied was even more liberal than that of Baron Descamps; for he was ready to allow that, in the absence of treaty law,

the Court should apply the rules of international law in force 'from whatever source they may be derived'. But, even on the assumption that, by this formula, Lord Phillimore intended the only alternative to treaty law to be customary law, his conception of international custom was much more liberal than that of Baron Descamps; for he declared that 'generally speaking, all the principles of common law are applicable to international relations. they are in fact part of international law.' He considered the example cited by Baron Descamps to illustrate '*les règles de droit international telles que les reconnait la conscience juridique des peuples civilisés*', namely the principle of *res judicata* as one of the principles of common law. 'This', he said, 'is a principle which has the same character of law as any formulated rule'. In other words, there are principles of international law in force which have not yet assumed the form of formulated rules. Indeed when questioned by Baron Descamps Lord Phillimore agreed that international law as understood by him resembled natural law. Theoretical niceties apart, there is, therefore, little practical difference between the views of Baron Descamps who held that international law included certain principles of objective justice and the views of Lord Phillimore who held that international law included all the principles of common law, which itself resembled natural law. Furthermore, Lord Phillimore declared himself generally in agreement with M Ricci-Busatti who has said that the Court should apply 'general principles of law'. It is indeed, in this formula that the views of Baron Descamps and Lord Phillimore found their common denominator.

When, therefore, at the 15th meeting of the Committee (3 July 1920) the formula 'the general principles of law recognised by civilised nations' in lieu of the original clause 3 was actually proposed by Mr Root, who had in collaboration with Lord Phillimore prepared an amended text to the Descamps proposal, it was immediately agreed to by Baron Descamps and the rest of the committee. This is the origin of the present Article 38(1)(c) of the Statute of the International Court of Justice.[71]

DRAFT CODE OF GENERAL PRINCIPLES OF LAW

Article 1 Good faith shall govern relations between states.

In particular, every state shall fulfil its obligations and exercise its rights in good faith.

Article 2 A state is responsible for any failure on the part of its organs to carry out the international obligations of the state, unless the failure is due to *vis major*.

Vis major, in order to relieve a state of its obligations, must be of such a nature as to make it impossible for the state to fulfil that obligation, and this impossibility must not be imputable to the state itself.

Article 3 Responsibility involves an obligation on the part of the state concerned to make integral reparation for the damage caused, in so far as it is the proximate result of the failure to comply with the international obligation.

The state shall, wherever possible, make restitution in kind. If this is not possible, a sum corresponding to the value which restitution in kind would bear shall be paid. Whenever restitution in kind, or

71 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1993, Cambridge: Cambridge University Press at pp 1–14.

payment in lieu of it, does not cover the entire loss suffered, damages shall be paid in order that the injured party is fully compensated.

The damage suffered shall be deemed to be the proximate result of an act if it is the normal and natural consequence thereof, or if it would have been foreseen by a reasonable man in the position of the author of the act, or if it is the intended result of the act.

Article 4 Any claim by one state against another shall be deemed invalid if the claimant state has, by its own negligence, failed to present the claim for so long as to give rise to a danger of mistaking the truth.

Article 5 Every tribunal has the power, in the first instance, to determine the extent of its jurisdiction, in the absence of express provision to the contrary.

Article 6 The jurisdiction of a tribunal extends to all relevant matters incidental to the principal question in respect of which it is competent, in the absence of express provisions to the contrary.

Article 7 Parties to a dispute are disqualified from acting as judges or arbitrators in such a dispute.

Where a judge or arbitrator is the national of, or has been selected by, one of the parties to the dispute, he shall not consider himself as an agent of that party, but must decide the case submitted to him impartially without fear or favour.

Article 8 In judicial proceedings, the tribunal shall ensure that both parties have an adequate and equal opportunity to be heard.

Article 9 The above provision shall not affect the right of the tribunal to decide by default, if one of the parties, without valid reason, fails to appear before the tribunal, or to defend his case.

In such an event the tribunal must decide according to the merits of the case, after satisfying itself that it has jurisdiction.

Article 10 The tribunal shall, within the limits of its jurisdiction, examine points of law *proprio motu*, without being limited to the arguments of the parties.

Article 11 Parties to a case must abstain from any act which might aggravate or extend the dispute and, in particular, from any measure calculated to have a prejudicial effect in regard to the carrying out of the decision to be given.

Article 12 The decision of an international tribunal is final. Any question which has been resolved by a valid and final decision may not be reopened between the same parties.

Article 13 The decision of an international tribunal is binding only upon the parties to the dispute.

Decisions on incidental or preliminary questions are only binding upon the parties to the dispute.

Article 14 A judgment may be annulled:

(a) if the tribunal which gave the judgment lacked jurisdiction or exceeded its jurisdiction;

(b) if the tribunal, or any member thereof is proved to have been guilty of fraud or corruption in connection with the particular case; or

(c) if the tribunal failed to give both parties an equal and adequate opportunity to be heard.

Article 15 A judgment may be revised on the grounds of:

(a) manifest and essential error;

(b) after-discovered evidence; or

(c) fraud of the parties or collusion of witnesses.

Article 16 A tribunal may annul or revise its own judgment, either *proprio motu*, or on the application of one of the parties, for any of the reasons mentioned in the two preceding Articles provided that it still has jurisdiction over the dispute.[72]

3.5.1 Some examples

A number of decisions of the International Court help illustrate the nature of 'general principles'. In the *Chorzow Factory (Jurisdiction)* case, the Permanent Court enunciated the principle that:

> ... one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would be open to him.[73]

Later on in the same case, the Court observed:

> ... that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.[74]

In a number of cases the International Court has made use of the doctrine of estoppel as recognised by a number of municipal legal systems. Perhaps the clearest example came in the *Temple* case involving Thailand (formerly Siam) and Cambodia, formerly part of French Indo-China. The two states were in dispute over a section of the frontier. Cambodia successfully relied on a map of 1907 which the predecessor French authorities had produced at the request of the Siamese Government. The map clearly showed the Temple area as part of French Indo-China. The Siamese authorities, far from protesting at the error, had thanked the French for preparing the map and requested a number of copies. Furthermore, in 1930, a Siamese prince paid a state visit to the disputed area and was officially received there by the French authorities. Together, these two events were seen by the International Court as conclusive and it found that Thailand was precluded by its conduct from denying the frontier indicated on the map.[75]

Other principles considered by the Court have included the right to bring class actions (*actio popularis*)[76] and the doctrine of corporate personality in the *Barcelona Traction, Light and Power Company Limited* case.[77]

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72 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1993, Cambridge: Cambridge University Press at Appendix I.

73 *Chorzow Factory (Jurisdiction)* case PCIJ Ser A, No 9 (1927).

74 *Chorzow Factory (Merits)* case (1928) PCIJ Ser A, No 17 (1928).

75 *Temple of Preah Vihear* [1962] *ICJ Rep* at p 1.

76 *South West Africa* case [1950] *ICJ Rep* at p 128.

77 [1970] *ICJ Rep* at p 3.

3.5.2 Equity

Amongst these general principles it could be argued that equity, in the sense of justice and fairness, is included and in a number of cases it has been used indirectly to affect the way in which substantive law is applied. The application of equity as a general principle should not be confused with Article 38(2) which states that if both parties to a dispute agree, the court can decide a case *ex aequo et bono*, ie the court can apply equity in precedence to all other legal rules.

> During the period under review [1960–1989] there has been a striking increase in references to equity in the work of the Court – not only in the pleadings of the parties, but in the judgments themselves; so much so that one observer has felt able to declare that 'after 50 years of hesitation the World Court has clearly accepted equity as an important part of the law that it is authorised to apply'.[78] Concepts of equity have certainly had a very extensive influence in one particular domain – that of the delimitation of maritime areas; but it is probably premature to see in the decisions of the Court even in that specific field the application of any consistent and mature theory of equity. In matters unconnected with maritime delimitation, equity has been referred to and applied sporadically, but in ways which paradoxically are easier to reconcile with classical concepts of equity than the specialised use of it in disputes of maritime areas.[79]

The ICJ itself has on a number of occasions indicated that it considers the principles of equity to constitute an integral part of international law. In the *Diversion of Water from the Meuse* case (1937), Judge Hudson declared:

> What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals.[80]

Over 40 years later the ICJ confirmed this view in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (1982):

> Equity as a legal concept is a direct emanation of the idea of justice. The court whose task is by definition to administer justice is bound to apply it ... [The Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result.

For a particularly full discussion of the place of equity within international law readers are referred to the judgment of Judge Weeranmantry in the *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)*(1993).

3.6 Judicial decisions

In the event of the court being unable to solve a dispute by reference to treaty law, custom or general principles, Article 38 provides a subsidiary means of

78 Sohn, *The Role of Equity in the Jurisprudence of the International Court of Justice*, 1984, *Mélanges Georges Perrin* (1984) at p 311.

79 H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' Part One (1989) 60, *BYIL* (1989) at p 49.

80 PCIJ Ser A/B, No 70.