

EQUITY – A GENERAL PRINCIPLE OF LAW RECOGNISED BY CIVILISED NATIONS?

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I have chosen as my text Article 38 of the Statute of the International Court of Justice which sets out what the Court needs to have regard to when deciding disputes submitted to it. One source set out in Article 38 is the ‘general principles of law recognised by civilised nations’.

In this paper I will explore whether ‘equity’ is such a general principle. The International Court of Justice has decided or given Advisory Opinions in over 130 matters since its inception after World War II as the principal judicial organ of the United Nations. It is the successor to the Permanent Court of International Justice established in the early 1920s by the League of Nations. Its caseload is now as great as it has ever been and the number of international courts and tribunals is growing steadily. Even to embark on the topic I have chosen is to invite disputation. The scholarly literature is replete with analyses of what ‘equity’ means in international law but I think the subject is of some interest to common lawyers and may be worth a brisk walk through an obstacle-strewn path.

At the outset it is as well to be clear that neither the concept nor the role of equity in international law is co-terminus with equity’s characteristics in municipal or domestic law be it the common, Roman, civil or Germanic law variety. In general terms it tends to suggest justice attained through what is fair.¹

This idea has long been developed in legal systems. One of the characteristics of any society is to be found in its own conception of justice and how to achieve it, of right and wrong, of what the law is and what it is intended to do and why. Those conceptions and their rationale do not necessarily coincide with corresponding concepts and their rationale in other societies or the legal systems of other societies.²

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¹ D Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) 424 discussed by S Rosenne ‘The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law’ in Bloed & Van Dijk (eds) *Forty Years of the International Court of Justice* (Europa Instituut, 1988) 85.

² Rosenne, above n 1, 89.

Of even greater relevance to my topic is that in any given society, the judges themselves are an integral part of that society. It is not surprising, indeed it would be surprising if were not so, that judges are directly influenced by tendencies prevailing in their own societies. Domestic judges are shaped by, and in turn help to shape, the society in which they live and which they serve.³ That cannot be true for judges of the International Court. They represent, by virtue of Article 9 of the Statute of the Court, the main forms of civilization and the principal legal systems of the world. Although there will be many shared values the paths to the desired curial outcome will be various.

On the other hand the impulse which has driven the very idea of equity must have been much the same whatever the society which gave rise to it and it was, no doubt, this commonality which permitted its development in the law of nations in Western Europe from the 17th century.

Elements of what we would identify as broadly equitable concepts can be found in the earliest extant records, for example, Hittite treaties with their neighbours in the 14th and 13th centuries BC which attempted to pre-empt dishonesty in carrying out the strict terms of the treaty by specifying acts of bad faith which would be incompatible with the oaths and treaty obligations of the parties.⁴

Equity can be identified in many societies and religions even if in different forms. The Greeks called it clemency. The Romans termed it *aequitas* or equality. Ancient Chinese law described it as compassion and in Hindu philosophy is found the doctrine of righteousness.⁵ In some Islamic schools *istihsan* is employed to avoid undue hardship from the application of the law.⁶

Equity as it has been recognised and developed in international law is most closely related to Western legal traditions. This is no doubt because the body of international law rules were developed in Europe after the Peace of Westphalia in 1648 and the rise of statecraft in Europe in the 19th century.⁷

The profound influence of Aristotle on the Western legal tradition is well known. His articulation of the universality and completeness of the law which necessarily includes broad concepts of justice and equity and, at the same time, recognition of the

³ J Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429, 461.

⁴ Discussed in G Scharzenberger, 'Equity in International Law' (1972) *The Year Book of World Affairs* 348-50. See also S E Finer, *The History of Government Vol 1: Ancient Monarchies and Empires* (Oxford University Press, 1997). Psalm 98 praises the Lord because 'You have established equity, justice and right': J Gelineau, 'Introduction' in *The Psalms: A New Translation* (Collins, 1963) 171.

⁵ R Newman, 'The Principles of Equity as a Source of World Law' (1966) 1 *Israel Law Review* 616-7 cited in C Rossi, *Equity in International Law: A Legal Realist Approach to International Decision Making* (Transitional Publishers, 1993) 22.

⁶ Although there are many texts on the principles of Islamic jurisprudence, I am indebted to Ms Susan Anderson BA Int'l Affairs (GWU) JD (UQ) former associate to the Hon Mr Justice B H McPherson CBE of the Supreme Court of Queensland for allowing me to read her research paper 'Equity in International Law: Is it Comparable to Common Law Equity?' and her discussion of sources of Islamic Law at 11-14.

⁷ D P O'Connell, *International Law* (Stevens, 1965) Vol 1, 5. See also Y Makonnen, 'Western Attitudes to International Equity' (1972-3) 42-43 *Annuaire de l'Association des Auditeurs de l'Academie de Droit International de la Haye* 82.

need for systemic correction of shortcomings in the law due, in effect, to that very generality or universality provides equity's roots.⁸ Equity, so understood, entailed and entails discretionary characteristics both as to its application and its extent – an enduring issue both in domestic and international law.

Gradually equitable principles emerged as an adjunct to both Roman law and to the English common law based on the need to ameliorate or correct the body of civil law. In Roman law it was contained in the *jus honorarium* through which the magistrates (praetors), advised by the judges, issued edicts aiding, supplementing or correcting the civil law. It aided by offering more convenient remedies to persons who already held rights of action at civil law such as the interdict by which an heir at civil law could obtain possession of the deceased's goods. It supplemented by granting remedies to persons who did not have rights of action at civil law, for example, a widow of a man who dies intestate leaving no blood relatives was allowed by the praetor to claim her late husband's property although not his heir. The praetor also corrected the law by giving a person a remedy where someone else was entitled at law, for example, where the formal requirements for a valid will were not satisfied the *jus honorarium* might recognise the nominated heir.⁹

Sir Peter Stein, the eminent Roman law scholar, has noted that by the beginning of the 3rd century AD Roman jurists probably realised that there was little more they could do by way of introducing fresh equitable principles or standards into Roman law. They knew, he said, when to call a halt¹⁰ and the codification began.

Unlike the Roman jurists who advised the praetors, the Chancellors of England, once embarked on the great journey, never called it a day, joining the separate stream of the common law via the Judicature Acts, and continuing afresh.

There is little that I would wish or have the temerity to say to an audience which includes so many equity scholars about the history and development of equity in the common law system but I have borrowed the elegant foreword by Sir Frank Kitto to Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*.¹¹ Sir Frank gives an answer to the layman who asks 'What is Equity?':

He must learn how Equity emerged from the mists of the Middle Ages an amorphous and unruly thing, and how it gradually took shape as a coherent body of law, albeit upon many disparate topics. He must be made to see the single bright thread running through the whole of Equity's dealing with the topics, and for that purpose he must be taken back ... to the time when the Chancellors of England found themselves entrusted with a wider power of exercising the King's prerogative of administering justice between subjects than was enjoyed by the King's Judges. On the one hand the Chancellors might proceed, like the Judges, according to the Common Law, according ... "to the right of the laws and statutes of the realm" ... but on the other hand they might proceed "according to the rule of

⁸ Aristotle, *Nicomachean Ethics* (WD Ross trans, Oxford University Press, 1980) Book 5 Chapter 10. This has given rise to the fundamental debate whether equity is of the law or outside the law.

⁹ P G Stein, 'Equitable Principles in Roman Law' in P G Stein (ed) *The Character and Influence of Roman Civil Law: Historical Essays* (Hambledon and London Ltd, 1998) 19 ff.

¹⁰ Ibid 36.

¹¹ R P Meagher, J D Heydon & M J Leeming (eds) *Meagher, Gummow and Lehane Equity Doctrines and Remedies* (Butterworths, 4th ed, 2002) v.

equity” ... wherever the Common Law might seem to fall short of that ideal in either the rights it conceded or the remedies it gave. For the exercise of the latter power they had no guidance or point of reference save in their own opinions as to the standards of conscientiousness to which the conduct of other people should be required to conform; for “equity” was as vague as *aequum et bonum*. The inquirer must be told how this extraordinary power to prevent the injustices and supply the deficiencies that were perceived in the operation of the Common Law attracted a swelling volume of business the pressure of which, together no doubt with a lively appreciation of the advantages of consistency, led the Chancellors to an increasing adherence to precedent; and how in consequence principles became established, determining when the Chancery would intervene and what it would do.

Sir Frank, in the course of his summary, quoted with approval from Maitland comparing the development of English equity with law on the continent:

But if we look abroad we shall find good reason for thinking that but for these institutions (the Star Chamber and the Chancery) our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the ‘ungodly jumble’ would have made way for Roman jurisprudence and for despotism. Were we to say that equity saved the common law, and that the Star Chamber saved the constitution, even in this paradox there would be some truth.¹²

Two great legal theorists of the 17th century who greatly influenced the emerging law of nations, Grotius and Pufendorf, included an important place for equity in dealings between nations. Grotius referred to the Aristotelian idea of equity as twofold – being an understanding of what was right and just as well as in its corrective capacity to moderate the general law.¹³

Both Grotius and Pufendorf and later writers recognised the tension in the judge exercising discretion against the letter of the law. Grotius said that equity must be applied with an abundance of circumspection and Pufendorf – to a standard of prudence – sentiments echoed in modern international law jurisprudence.

It was an unease at the role of judicial discretion which lay at the heart of the lengthy debates at The Hague in 1920 by a number of jurists, famous in their day, meeting to advise the Council of the League of Nations on the creation of a Permanent Court of International Justice.

Before turning to those interesting discussions let me say something very briefly about equity in civil law systems. In a word, the codification of the law in the several continental systems tended against the development of a separate stream of equitable principles. Instead, certain general clauses, designed to ensure an equitable interpretation of statutory provisions against a too strict or formalistic interpretation,

¹² Ibid vi.

¹³ Hugo de Groot (Grotius), *Of the Rights of War and Peace, In Which are Explained the Laws and Claims of Nature and Nations, and the Principle Points That Relate either to Publick Government or the Conduct of Private Life* (1715); Grotius, *De Jure Belli ac Pacis, libri tres* (1735); Grotius, *The Law of War and Peace, Book Three* (William Whewell trans, 1853) [trans of: *De Jure Belli et Pacis, libri tres*]. S Von Pufendorf, *The Law of Nature and Nations, or, a General System of the Most Important Principles of Morality, Jurisprudence and Politics. To which is prefix'd M Barbeyrac's prefatory discourse containing an historical and critical account of the science of morality* (Basil Kennett trans 1749).

were inserted into the various codes¹⁴ making those systems rather closer to the Aristotelian idea of equity.

It is now time to turn to the sources of international law and see if equity has a role to play.

Article 38 of the Statute of the International Court of Justice which mandates the sources of law to be applied by the Court had its genesis in Article 35 of the Statute of the Permanent Court of International Justice which was incorporated without relevant change into the Statute of the International Court of Justice. It provides:

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.

As is plain, there is no express reference to equity and there is no agreement amongst commentators that deciding a case *ex aequo et bono*, as Article 38(2) allows, imports principles of equity. A decision *ex aequo et bono* would be against the law. It implies law creation by the Court and no party to a dispute before the International Court has, so far, agreed that the Court may proceed in that way. It is with the third source of law – “the general principles of law recognised by civilized nations” – that I am principally concerned. I should mention that this has given rise to an enormous literature by international scholars, impossible to summarise, if I could, in a brief lecture.

The working papers of the Advisory Committee make clear that although equity was proposed for express inclusion as a source of law it was ultimately rejected. The members of the Advisory Committee included the great names of international law of the day from continental Europe, Latin America and distinguished common law jurists. Of interest to this audience were the United Kingdom representative, Lord Phillimore PC, an important maritime jurist and Mr Elihu Root, former Secretary of State of the United States and one of the best known international lawyers of the day. He was the American delegate to the 1907 Hague Peace Conference, the first President of the Carnegie Endowment for International Peace, a member of the Permanent Court

¹⁴ W G Friedmann, *Legal Theory* (Stevens, 5th ed, 1967) 543-5.

of Arbitration, former United States Secretary of State for War, the Republican Senator for New York and the winner of the Nobel Peace Prize in 1912.

The expression in Article 38(1)(c) referring to “general principles of law recognised by civilised nations” had meaning *then* so far as it referred to “civilised nations” which need not be spelt out here. It bears no real meaning in international law today. There are now 189 members States of the United Nations. A far cry from the few who were represented by the Advisory Committee (which did include the Japanese Ambassador to Belgium). Rather, the general principles which the International Court may take into account will be those generally recognised across a range of different legal systems.

The term ‘general principles’ in Article 38(1)(c), it seems to be generally agreed, refers to both principles of international law and principles common to international law and various municipal systems of law.¹⁵ The inclusion of this provision was controversial and gave rise to conflict between the common law representatives on the one hand and the continental European and some Latin American representatives on the other. The common lawyers, Phillimore and Root, wanted the sources of law restricted to conventions (treaties) and custom in order to induce as many countries as possible to accept the jurisdiction of the court, as well as to avoid reposing unconstrained power in the judges. The continental representatives were anxious to avoid the possibility of *non liquet* – a situation in which a court declares itself unable to resolve a dispute due to an absence of applicable law on the subject – anathema to those from code systems – by extending the sources of law which the court could take into account.¹⁶ In oversimplified terms, it was a struggle between legal positivism and natural law theorists although Lord Phillimore suggested that the serious differences arose from profoundly different views about the role of the judge between common lawyers and civilians.

In order to reach an agreement the Belgian representative, Baron Descamps, emphasised that the principles referred to in Article 38(1)(c) should be restricted to those common to all states — the “fundamental laws of justice and injustice”.¹⁷ This, he thought, would limit the liberty of judges and prevent them from relying on subjective considerations.¹⁸ Within such principles he included ‘objective justice’ which he would have referred to as equity, were it not for the potential for misunderstanding.¹⁹ Signor Ricci-Busatti, the legal adviser to the Italian Foreign Ministry in support pointed out that judges applying general principles of law would not be creating new rules, but applying general rules already in existence.²⁰ Lord Phillimore pointed out that all the principles of the common law were part of international law.²¹ The framers intended that only those principles generally accepted across different legal systems could be taken into consideration as a source of law.

¹⁵ M O Hudson, *The Permanent Court of International Justice: a Treatise* (The Macmillan Company, 1934) 528.

¹⁶ Permanent Court of International Justice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (1920) 293-297.

¹⁷ *Ibid* 310.

¹⁸ *Ibid* 311.

¹⁹ *Ibid* 324.

²⁰ *Ibid* 315. The Brazilian representative was of a similar view: at 346.

²¹ *Ibid* 316. See Rossi, above n 5, 112.

Although the majority of the Advisory Committee was prepared to accept that equity would play a role in the new Court's decisions, they were not prepared to accept equity as an independent source of international law because of the different understandings accorded to it in different systems.²² They were also mindful of its sometimes disastrous inclusion in the terms establishing numerous important arbitrations as an undefined standard, such as the *Venezuelan Preferential Claims*²³ and the *Jay Treaty Arbitrations*.²⁴ So, although some would have preferred an express reference to equity,²⁵ there was concern that it was too vague and, necessarily, too fraught, a term to be included.²⁶ Lord Phillimore, although content to see the expression “maxims of equity” employed, opposed the inclusion of equity generally as a source of law, on the basis that it would give the judge too much liberty, unless the technical meaning equity bore in England were adopted.²⁷ He did accept that general principles accepted by States in a domestic context included the principles of good faith and *res judicata*,²⁸ indicating that equity might well be taken into consideration by judges under the umbrella of “general principles”.

The general understanding of the drafters of Article 38 appears to have been that equity itself was not an independent source of law, since it was too vague a concept to command universal acceptance but that particular equitable principles, as recognised within the various legal systems of the world, might play a role as ‘general principles’ of international law. There was, however, a failure to ‘colour in’ the words, so that the framers offered no content to the ‘general principles’. What emerged accommodated the common lawyers’ concern (shared by many civilians) that the judge should not have a law creating role and the civil lawyers’ concern that there might occur a denial of justice because of a declaration *non liquet* – no law to apply. What the framers seemed concerned to exclude was “pure” equity which might operate against the law.

New life was breathed into the dispute when Judge Manley Hudson pointed out in the case of the *Diversion of Waters from the River Meuse*²⁹ 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’.³⁰

²² P van Dijk, ‘Equity: a Recognized Manifestation of International Law?’ in M Bos and W Heere (eds) *International Law and its Sources* (Kluwer Law and Taxation, 1989) 1, 11.

²³ (1904) UN Reports Vol ix 99.

²⁴ (1794) 1 *British and Foreign State Papers* 784 and see generally Moore, *International Arbitrations International Adjudications* where they are reported.

²⁵ Above n 16, 295 (de Lapradelle); 332 (Ricci-Busatti).

²⁶ Ibid 296-7 (Hagerup); 335 (de Lapradelle, resiling from his earlier position).

²⁷ Ibid 333.

²⁸ Ibid 335.

²⁹ (*Netherlands v Belgium*) [1937] PCIJ (ser A/B) No 70, 4.

³⁰ *Diversion of Waters from the River Meuse (Netherlands v Belgium)* (1937) PCIJ Ser A/B No 70, 4. This statement has given rise to a vigorous debate amongst international scholars some of whom see this as an impermissible empowerment to judges to depart from recognised principles, see R Lapidoth, ‘Equity in International Law’ (1987) 22 *Israel Law Review* 161; E McWhinney, ‘Equity in International Law’ in R A Newman (ed) *Equity in the World's Legal Systems: A Comparative Study* (Etablissements Emile Bruylant, 1973); E Lauterpacht, ‘Equity, Evasion, Equivocation and Evolution in International Law’ in *Proceedings and Commentaries, Report of the American Branch of the International Law Association* (1977-8).

Confirming the understanding of the Advisory Committee in 1920, the arbitrators in the *Norwegian Ship Owners' Claims*³¹ (between the U.S. and Norway) who were to decide the claims by applying 'law and equity' said:

The words 'law and equity' ... can not be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence. The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state.³²

Two commentators have described equity in this sense as 'the spirit of the law'.³³

An international tribunal may apply equity within the law. That is, if a law can be interpreted in more than one way, then equity may be applied in order to ascertain the interpretation that would best serve the purposes of the law. In another sense equity may be used where the law is silent to bring the case within the law so that the intention of the states can be implemented. This is different from equity *contra legem*, that is, where the text of the law goes against what is said to be its real intention or purpose. It is generally recognised that an international court or tribunal would need explicit powers before it could modify the law in that fashion.³⁴

When equity is applied as a 'general principle', judges of the International Court rarely express it in that way. Rather, it seems to be taken for granted that various equitable rules, such as estoppel and the principle that 's/he who comes to equity must come with clean hands' are part of international law and require no further explanation than their relevance to the case at hand. This is consistent with an approach to equity that seeks to draw upon aspects of equitable doctrine common to 'civilised nations' without resorting to technicalities specific to particular legal systems.

Despite evidence that equity is applied broadly, nonetheless its characterisation as a 'general principle' of law places certain constraints on its operation. Professor Rosenne points out that equity does not automatically work to correct a decision where the strict application of law results in an unsatisfactory conclusion.³⁵ A principle of equity can only come into play when it is recognised generally by the laws of 'civilised nations'. In the *Frontier Dispute*³⁶ case, for example, between Mali and Upper Volta, the Court stated that it would be unjustified in resorting to equity to modify an established frontier inherited from the colonial powers. Equity as a legal concept was said by the Court to be a direct emanation of the idea of justice – but it was not simply an arbitrary concept of 'fairness' (something which resonates with Australian lawyers) which could be interposed at will by a court or tribunal. The Court declined to alter the frontier to reflect some argued concept of equity. Where the boundary did not delimit in any

³¹ (1922) 1 *Reports of International Arbitral Awards* 307.

³² Ibid 331.

³³ W E Holder and G A Brennan, *The International Legal System* (Butterworths, 1972) 97. See also L D M Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries' (1990) *American Journal of International Law* 837, 839-40.

³⁴ For example, the special agreement between Canada and the Cayuga Indians, (1926) 6 *Reports of International Arbitral Awards* 173.

³⁵ Above n 1.

³⁶ [1986] ICJ Rep 554.

precise manner an important water pool the Court said ‘the [boundary] line should divide the pool ... in two, in an equitable manner. Although “equity does not necessarily imply equality” where there are no special circumstances the latter is generally the best expression of the former’.³⁷

In many of its decisions the International Court has applied equitable principles familiar to but not identical with, equity as it operates within the common law system. Might I offer three examples: (i) estoppel or acquiescence; (ii) “unclean hands” and (iii) the maxim that “equity will not suffer a wrong to be without a remedy”?

The application of estoppel appears in the *Serbian Loans*³⁸ case in 1929. Serbia had an agreement with French bondholders under which the bondholders were to be repaid in gold francs. For some time the bondholders had been accepting depreciated paper francs. Serbia claimed that this amounted to estoppel and that the bondholders by accepting the paper francs had impaired their rights. The Permanent Court found that there was no basis for an estoppel, applying the principle in much the same way as at common law. The Court said that there had been ‘no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied’ and that there had been ‘no change in position on the part of the debtor State’.³⁹

The *Fisheries*⁴⁰ case provides another example of estoppel or acquiescence, although not so expressed and with no reference being made to ‘general principles’. The British had refrained for almost 300 years from fishing in Norwegian coastal waters until 1906 when a few British vessels started doing so. Trouble began in 1911 when a British trawler was seized for violating Norwegian regulations as to permissible fishing zones. The United Kingdom complained that the Norwegian government had made use of unjustifiable straight base-lines across the fjords in delineating its sea-boundaries.⁴¹ The Court found that the boundaries imposed by Norway were not contrary to international law. As part of its finding, the Court considered it significant that Norway had applied its method of delimitation consistently over a very long period, that this was well-known to the United Kingdom, and, with this knowledge, it had abstained from making any complaint.⁴²

In 1962, the International Court of Justice applied the concept of estoppel or, as some have characterised it, acquiescence, in the *Temple of Preah Vihear*⁴³ case. This case concerned a dispute over the ownership of a temple located close to the border between Thailand and Cambodia. In 1908 Thailand had accepted as accurate a map placing the temple within Cambodian territory drawn as a consequence of an agreement entered into between Thailand (Siam) and French Indochina in 1904.

³⁷ *Frontier Dispute* [1986] ICJ Rep 554, [149].

³⁸ [1929] PCIJ (ser A) Nos 20/21, 5.

³⁹ *Serbian Loans* [1929] PCIJ Ser A Nos 20/21, 5, 38-9..

⁴⁰ (*United Kingdom v Norway*) [1951] ICJ Rep 116. Sometimes estoppel in this sense is characterised as acquiescence, see separate opinion of Judge Ajibola in *Territorial Dispute (Libya/Chad)* (1994) ICJ Rep 6.

⁴¹ *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 124.

⁴² *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 139.

⁴³ (*Thailand v Cambodia*) [1962] ICJ Rep 6.

By its subsequent conduct it was found to have accepted Cambodian ownership of the temple, for example, by a member of the Thai Royal Family visiting the temple where the French flag was flying (Cambodia was then a French colony).⁴⁴ The Court found that Cambodia had relied upon Thailand's acceptance of its ownership of the temple⁴⁵ and that for 50 years Thailand had accepted the benefit of, at the least, a stable frontier based on the treaty. Thailand was thereby precluded from asserting that it had not accepted the boundary as drawn and Cambodian ownership of the temple.

Estoppel may have played a role in the decision of the International Court in the *Nuclear Tests*⁴⁶ case. Australia and New Zealand both brought proceedings against France seeking a declaration that France's activities testing nuclear devices in the Pacific were unlawful. The Court found it unnecessary to decide the case on the merits because prior to the hearing the French President, Foreign Minister and other officials had made statements that France had 'finished' atmospheric testing. The Court considered the status of these unilateral declarations made not only to Australia and New Zealand, but also to the world at large in deciding not to proceed to judgment. The Court said:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. 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. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.⁴⁷

Detriment, a necessary aspect of estoppel on *Walton Stores*⁴⁸ principles, was not a determining factor although detriment to Australia and New Zealand could be identified as not pressing the litigation in the Court relying on the French representations.

An express reference to estoppel can be found in the separate opinion of Vice-President Weeramantry in the *Gabcikovo-Nagymaros Project*⁴⁹ case. Hungary and Czechoslovakia entered into a treaty in 1977 to implement a joint investment project on the River Danube which also involved arrangements for navigability improvement and flood control. Neither party fully performed its obligations under the treaty. Judge Weeramantry found Hungary's conduct precluded it from asserting that the treaty obligations were no longer binding. Hungary had allowed Czechoslovakia (Slovakia inherited the treaty regime) to believe it (Hungary) intended to fulfil the terms of the project.⁵⁰

⁴⁴ *Temple of Preah Vihear (Thailand v Cambodia)* [1962] ICJ Rep 6, 30.

⁴⁵ *Temple of Preah Vihear (Thailand v Cambodia)* [1962] ICJ Rep 6, 32-3.

⁴⁶ *(Australia v France)* [1974] ICJ Rep 253.

⁴⁷ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, [46].

⁴⁸ *Walton Stores (Intestate) v Maher* (1988) 164 CLR 387.

⁴⁹ *(Hungary v Slovakia)* [1997] ICJ Rep 7.

⁵⁰ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1977] ICJ Rep 7, separate opinion of Vice-President Weeramantry Part C.

An important case applying the doctrine of ‘clean hands’ is the judgment of the Permanent Court of International Justice in *Diversion of Water from the River Meuse*.⁵¹ This is a rare example of judges applying equitable principles expressly as ‘general principles’ of international law. The Netherlands complained that Belgium by constructing a lock in Belgian territory had violated an agreement between the two States that they would both take water from the River Meuse only at a certain point. However, the Netherlands had also constructed and operated for a period of time a similar ‘unlawful’ lock in its own territory. Judge Hudson said that one ‘unlawful’ lock could not be treated more favourably than the other. He said:

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, “Equality is equity”; “He who seeks equity must do equity”. ... A very similar principle was received into Roman Law.⁵²

Judge Hudson denied the relief sought by the Netherlands on the basis that it was itself guilty of the same breaches which were alleged against Belgium.

An interesting application of the clean hands doctrine can be seen in the dissenting opinion of Judge Morozov in the *Tehran Hostages*⁵³ case. Following the 1979 occupation of the United States embassy in Tehran by militants, the United States brought a claim against Iran before the International Court pursuant to the Treaty of Amity, Economic Relations and Consular Rights of 1955. While the Court was deliberating the United States launched a military operation inside Iran in an attempt to rescue the hostages, as well as initiating economic sanctions. The Court, by majority, found in favour of the United States. Judge Morozov found against the United States because, by invading Iran and imposing sanctions, it had, in his view, deprived itself of the right to rely upon treaty obligations to bring its claim.⁵⁴ He did not refer expressly to ‘clean hands’ but said that in light of military invasion of the territory of Iran and a series of economic sanctions and other coercive measures which were incompatible with a treaty of amity, it was clear:

that the United States of America, according to commonly recognized principles of international law, has now deprived itself of any right to refer to the treaty of 1955 in its relations with the Islamic Republic of Iran.⁵⁵

The majority concluded that since the legality of the United States rescue operation and sanctions were not before the Court the Court should not rule upon them.⁵⁶

⁵¹ (*Netherlands v Belgium*) [1937] PCIJ (ser A/B) No 70, 4.

⁵² *Diversion of Water from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4, 77.

⁵³ (*United States v Iran*) [1980] ICJ Rep 3.

⁵⁴ *Tehran Hostages (United States v Iran)* [1980] ICJ Rep 3, [3] (Morozov J).

⁵⁵ *Tehran Hostages (United States v Iran)* [1980] ICJ Rep 3, [3] (Morozov J).

⁵⁶ *Tehran Hostages (United States v Iran)* [1980] ICJ Rep 3, [94].

The doctrine of clean hands was also relied upon by Judge Schwebel in the *Nicaragua*⁵⁷ case. Nicaragua brought a claim against the United States alleging that by its financial and logistical support for rebel groups in Nicaragua it had unlawfully intervened in Nicaragua's affairs. Judge Schwebel would have disallowed Nicaragua's claim due to a combination of what he found to be Nicaragua's support to rebels in El Salvador predating the United States' assistance to the Contras in Nicaragua, and Nicaragua's subsequent misrepresentation of the facts about its El Salvador involvement before the International Court.⁵⁸ He referred to *River Meuse*, *Tehran Hostages* and other cases to declare that the doctrine of clean hands was a general principle of law.⁵⁹ He found that Nicaragua had deprived itself of standing to bring the claim against the United States because the conduct of the latter was consequential upon Nicaragua's own illegality.⁶⁰ A more recent application of the clean hands doctrine can be seen in the dissenting opinion of Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant*⁶¹ case. The Democratic Republic of the Congo brought proceedings against Belgium, who had issued an arrest warrant *in absentia* in respect of its Foreign Minister, Mr Yerodia, alleging that Belgium was precluded from doing so on the basis of diplomatic immunity. Judge Van den Wyngaert found that the Congo was precluded from bringing its claim: because of its own failure to investigate and prosecute Mr Yerodia it did not come to the Court with clean hands.⁶²

In the *Barcelona Traction*⁶³ case the International Court considered inferentially, in the context of diplomatic protection, the application of the equitable principle that equity will not suffer a wrong to be without a remedy. Belgium claimed that Spain was responsible for a denial of justice to Barcelona Traction, a Canadian company with more than 80 per cent of Belgian shareholders. Under ordinary rules of international law Canada as the state of nationality of the company had standing to bring a claim on behalf of the company but had chosen not to do so. Belgium attempted to bring a claim on behalf of shareholders of the company. The question was whether, on the basis of equity, it was entitled to do so as an exception to this general rule. The Court held that 'for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law'.⁶⁴ But in declining standing to Belgium the Court took into account practical difficulties in allowing equity to operate to give the state of nationality of shareholders an automatic right of diplomatic protection and considered that to allow such a claim could create 'an atmosphere of confusion and insecurity in international economic relations'.⁶⁵

It has been suggested that the reasoning of the International Court in *Barcelona Traction* on this point is evidence that equitable considerations cannot be brought in

⁵⁷ (*Nicaragua v United States of America*) [1986] ICJ Rep 14.

⁵⁸ *Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [268] (Schwebel J).

⁵⁹ *Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [269] (Schwebel J).

⁶⁰ *Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [272] (Schwebel J).

⁶¹ (*The Congo v Belgium*) [2002] ICJ Rep 2.

⁶² *Arrest Warrant (The Congo v Belgium)* [2002] ICJ Rep 2, [35] (Van den Wyngaert J).

⁶³ (*Belgium v Spain*) [1970] ICJ Rep 3.

⁶⁴ *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, [92].

⁶⁵ *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, [96].

opposition to the law: here because application of equitable principles would have ‘opened the door to legal anarchy’.⁶⁶

A rather different approach to equity has been taken in the sphere of maritime boundary disputes where a more liberal application has occurred. In the first of the important continental shelf cases decided by the International Court of Justice — *North Sea Continental Shelf*⁶⁷ cases in 1969 — the Court noted that there were two basic legal notions which reflected *opinio juris*⁶⁸ in the area, one being that delimitation must be the subject of agreement between the States concerned and the second, that agreement must be arrived at in accordance with equitable principles.⁶⁹ This suggests that, in relation to the delimitation of maritime boundaries, the notion of equity as a guiding principle had been accepted by States as a rule of customary international law. In the same case, the Court also noted that the acceptance of equity rested on a broader basis, namely, that the decisions of a court of justice must be just, and in that sense equitable.⁷⁰ However the equitable idea of equality which found its expression and application in the equidistance principle in that case soon ceased to be anything more than one method amongst others for ascertaining a disputed maritime boundary.

In the *Continental Shelf (Tunisia/Libya)*⁷¹ case, the Court stated, ‘[Equity] was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law’.⁷² The Court added:

The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal.⁷³

The proposition came to be widely accepted that each maritime boundary was unique and therefore not susceptible to the development and application of general rules of delimitation. The result has been that many decisions of the Court and arbitral tribunals do not demonstrate any systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation.⁷⁴ The comment has been well made that ‘[l]aw is valuable only if it guides the behaviour of its subjects in the real

⁶⁶ Above n 1, 102. See Rossi above n 5, 175.

⁶⁷ (*Denmark v Germany*), (*Netherlands v Germany*) [1969] ICJ Rep 3.

⁶⁸ A sense of legal obligation on the part of States: this is one of the requirements for the existence of a rule of customary international law, the other being general and consistent practice by States.

⁶⁹ *North Sea Continental Shelf (Denmark v Germany)*, (*Netherlands v Germany*) [1969] ICJ Rep 3, [85].

⁷⁰ *North Sea Continental Shelf (Denmark v Germany)*, (*Netherlands v Germany*) [1969] ICJ Rep 3, [88].

⁷¹ [1982] ICJ Rep 18.

⁷² *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, [71].

⁷³ *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, [70].

⁷⁴ *Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* [1984] ICJ Rep 246 [157].

world – a task that is particularly delicate in public international law. If the law is so flexible that any result is possible it fails to fulfil that essential function’.⁷⁵

As Judge D’Oliver Nelson, now the President of the United Nations Tribunal on the Law of the Sea, has commented,⁷⁶ the uniqueness of each maritime boundary has rendered inadequate the application of a global or general rule such as is embodied in the equitable principle of equidistance. This ‘infinite variety’ of maritime situations prevented the United Nations Conference on the Law of the Sea from producing any definitive rules on maritime boundary delimitation thereby investing tribunals dealing with such disputes with wide powers of discretion and, according to Nelson, ‘creating a situation that is closely akin to a grant of *ex aequo et bono* jurisdiction’.⁷⁷

To conclude, there is deep unease amongst international scholars both from the common law tradition and the civil law tradition at the unconfined discretion which would repose in judges were they permitted to have recourse to equity as an unstructured concept. Nonetheless, when considered in the context of specific cases, equity has wide acceptance and is part of the general stock of legal norms of the international order. To return to the *Diversion of Water from the River Meuse*⁷⁸ case, when Judge Hudson identified two maxims of equity to express his approach to the Netherlands’ complaint about Belgium’s breach of the Treaty of 1863 – namely that equality exists between parties and a party who seeks equity must do equity – he was articulating a common understanding of what comprised general principles of equity in international law. Although dissenting, Judge Anzilotti, the Italian jurist who had been the rapporteur of the 1920 Advisory Committee to draft the Statute of the Permanent Court of International Justice, agreed, describing the maxim ‘one who seeks equity must do equity’ as:

so just, so equitable, so universally recognised, that it must be applied in international relations. [It is one of the] general principles of law recognised by civilized nations.⁷⁹

It can not be surprising that the Court has avoided discussing equity as an abstract idea. The discussions in the Advisory Committee demonstrate quite profound differences between the representatives of the different legal systems about the content of equity and the work it can do. Since then the number of independent states has more than doubled and they all wish to join in the economic wealth of the world. The Court has achieved surprising unanimity in cases which have, at heart, an equity issue. It has tended to achieve this by ‘connecting elements of equity with very concrete circumstances’.⁸⁰ To this extent equity is a general principle of law recognised by civilised nations.

⁷⁵ J I Charney, ‘Book Review’ (1995) 89 *American Journal of International Law* 458, 459.

⁷⁶ Above n 33.

⁷⁷ Ibid 11.

⁷⁸ *Diversion of Waters from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4.

⁷⁹ *Diversion of Waters from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70, 4, 50.

⁸⁰ A Wasilkowski *Comments on Professor Rosenne’s paper*, above n 1.