INTRODUCTION

"THE general principles of law recognised by civilised nations" [1] form part of the law to be applied by the permanent forum of the family of nations, the International Court of Justice. The present work is an attempt to apply the inductive method [2] to the study of such principles and to demonstrate their practical application in the field of international law. It is based on an examination of the decisions of international courts and tribunals, which at the present time constitute the most important means for the determination of rules and principles of international law.[3] A consideration of other law-determining agencies of international law, such as State practice or the writings of publicists, is beyond the scope of the present work.

Article 38 of the Statute of the International Court of Justice 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 recognised by the contesting States;

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

[1] See ICJ Statute, art. 38, para. 1 (*c*).

[2] Mex.-U.S. G.C.C. (1923): *Dujay Case* (1929), *Op. of Com. 1929*, p. 180, at p. 185: "The existence or non-existence of a rule of law is established by a process of inductive reasoning." See Schwarzenberger, "The Inductive Approach to International Law," 60 *Harvard L.R.* (1946–47), p. 539; or the same author, 1 *International Law*, 1949, pp. xliii *et seq.* The Secretary-General of the U.N., in a Memorandum of March 7, 1949, observed that "there is a growing trend towards an inductive approach" (U.N.Doc. A/CN. 4/6, p. 114).

[3] See Schwarzenberger, *op. cit.*, pp. 550 *et seq.*, 9 *et seq.*, respectively on the hierarchy of "law-determining agencies." *Cf.* also the same author, 1 *International Law*, 1st ed., 1945, p. 2: "Compared with the dicta of textbooks and the practice of this or that State, the decisions of international courts have an authority and reality which cannot be surpassed." Sir Arnold D. McNair, now President of the I.C.J., lecturing in 1928 at the *Académie de Droit international* on *La terminaison et la dissolution des traités*, said "We . . . attach more importance in the subject of international law to the practice and decisions of international tribunals than to the opinions of writers. . . . For our part, it is our intention rarely to cite authors" (22 *Recueil La Haye* (1928), p. 459, at p. 463. Transl.).

In view of the fact that some of the international decisions referred to may not be easily, or generally, accessible, actual quotations, instead of mere references, will usually be given. To facilitate reference to writers, a select bibliography is to be found at the end of this volume.

(c) *the general principles of law recognised by civilised 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 æquo et bono*, if the parties agree thereto."

This Article 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 [4] and the addition of a few words of no great practical importance in the introductory phrase.[5] The mention of "general principles of law recognised by civilised nations" ("*les principes généraux 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.[6] Others hold that it would have been redundant for the Statute

[4] In the Statute of the P.C.I.J., the paragraphs were not numbered, while the sub-paragraphs were numbered by arabic figures. The present art. 38 I (*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 P.C.I.J.

[5] The Statute of the P.C.I.J. simply said: "The Court shall apply." The addition is due to the proposal made by the Chilean delegation in Committee I of Commission IV of the San Francisco Conference, 1945 (UNCIO: 13 *Documents*, pp. 284–285, 493). The Report of the Rapporteur of Committee IV/I 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 P.C.I.J. from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court" (p. 392). As the Chilean delegation itself explained, the proposal was only actuated by a desire to see an express mention of the application of international law by the Court and was in accordance with the reiterated jurisprudence of the P.C.I.J. (p. 493). The amendment was, therefore, not intended, nor is it believed, to restrict the power of the new Court in any way as compared with that of the old. As it stands, however, this article removes any doubt, if any ever existed, that general principles of law recognised by civilised nations form part of international law.

[6] Anzilotti, 1 *Cours de Droit international*, 1929, p. 117. Hudson, *The P.C.I.J., 1920–42*, 1943, p. 611. Castberg, "La méthodologie du droit international public," 43 *Recueil La Haye* (1933), p. 313, at pp. 370 *et seq.* Morelli, "La théorie générale du procès international," 61 *ibid.* (1937), p. 253, at pp. 344 *et seq.*

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.[7] Some writers even maintain that the expression is intended to refer exclusively to principles of private law.[8]

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 that they are,[9] others deny categorically that they have any connection with natural law.[10] A leading exponent of the modern doctrine of natural law believes, however, that, while

[7] Strupp, "Le droit du juge international de statuer selon l'équité," 33 *ibid.* (1930), p. 357, at pp. 474–5. Scerni, *I principî generali di diritto riconosciuti dalle nazioni civili*, 1932, pp. 13 *et seq.*

[8] *Cf.* Lauterpacht, *Private Law Sources and Analogies of International Law*, 1927, p. 71: "Those general principles of law are for 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." 54 *Recueil La Haye* (1935), p. 5, at pp. 206–7. 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.

Grapin, *Valeur internationale des principes généraux du droit*, 1934, pp. 64–6. Ripert, "Règles du droit civil applicables aux rapports internationaux," 44 *Recueil La Haye* (1933), p. 569. Ripert believed that they were principles of municipal law (p. 580) or civil law (pp. 582–3). While he used the term "civil law" first in the sense 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.

[9] Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht*, 1928, pp. 20 *et seq.*, 56. *Cf.*, however, his *Théorie générale du droit international*, 1930, pp. 106–7, and *Traité théorique et pratique du droit international public*, 1933, p. 33, where he said that it was only a question of classification whether "general principles of law" were called principles of positive or natural law.

Salvioli, "Observations," 37 *Annuaire* (1932), p. 315. Cavaglieri, "Règles générales du droit de la paix," 26 *Recueil La Haye* (1929), p. 311, at p. 544 (see *infra*, p. 4, note 14).

[10] Strupp, *op. cit.*, p. 452. Maintaining that these principles did not form part of existing international law, although applicable by the Court in virtue of its Statute, Strupp believed that they were principles contained in the positive laws of the various States, and were, therefore, not natural law (pp. 452–74). Strupp did not, however, deny the existence of a natural law with variable content, identifiable with justice or the juridical ideal of a legal community, although he denied it any force of law, either as a source or as a means of interpretation (pp. 457–60).

Wolff in his "Les principes généraux du droit applicables dans les rapports internationaux," 36 *Recueil La Haye* (1931), p. 479, at pp. 485, 496–7. went further. Conceiving law as *quod principi placuit* (p. 492), he denied altogether the possible existence of natural law.

they are not actually principles of natural law, they are derived from it.[11]

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,[12] or because there exists a rule of customary international law according to which such principles are applicable in international relations.[13] Moreover, some writers maintain that "general principles of law" do not form part of existing international law at all, but only form part of the law to be applied by the World Court by virtue of the enabling provision in its Statute.[14]

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

[11] Le Fur, "La coutume et les principes généraux du droit comme sources du droit international public," 3 *Recueil Gény*, 1936, p. 362, at p. 368. The relevant passage was almost textually reproduced in the same author's "Règles générales, etc.," *loc. cit.*, p. 205.

[12] Scerni, *op. cit.*, pp. 29 *et seq.* F. A. v. der Heydte, "Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze," 33 *Die Friedenswarte* (1933), p. 289, at p. 290. v. der Heydte distinguished two categories of "general principles." He believed that certain "general principles" necessarily formed part of any legal system and, therefore, also of international law (see further, *infra*, p. 5, note 17).

[13] Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, 1926, p. 59. Lauterpacht, *Private Law Sources, etc.*, 1927, p. 63. Balladore-Pallieri, *I Principii generali di diritto reconosciuti dalle nazioni civili*, 1932, pp. 48 *et seq.*, 60 *et seq.* In his *Diritto internazionale pubblico*, 1937, p. 138, Balladore-Pallieri changed his opinion and derived their validity from the very constitution of the international community. Wolff, *op. cit.*, p. 483.

[14] Cavaglieri, *op. cit.*, p. 323, and particularly at p. 544: "These principles do not, in our opinion, belong to international law. They are rules of justice, of natural law, which, being to a great extent observed in the municipal law of civilised countries, are declared applicable by the Court, in the absence of actual rules of international law, conventional or customary" (Transl.). The above statement seems a rather dangerous one for a positivist like Cavaglieri to make; for he thereby admitted that principles of justice and natural law were to a great extent followed in the municipal law of civilised nations. And if it were shown that these general principles of law were in fact part of existing international law and not merely the law to be applied by the Court in virtue of art. 38 I (*c*), it would mean that, in international law also, principles of justice and natural law were applicable.

Strupp, *op. cit.*, p. 474. In his "Règles générales du droit de la paix," 47 *Recueil La Haye* (1934), p. 263, at pp. 332 *et seq.*, Strupp said that there had been no customary law admitting these general principles of law *in toto*, although a few had been individually adopted.

Gihl, *International Legislation*, 1937, p. 107. and "Lacunes du droit international," 3 (1) A.S.J.G.(N.T.I.R.) (1932), p. 37, at pp. 47 *et seq.*

Morelli, *op. cit.*, pp. 344 *et seq.*, 348 *et seq.* Although Morelli believed that some of these general principles were deducible from rules of international law, he maintained that it was not possible for an international tribunal, in the absence of a special permissive rule, to resort to them.

law,[15] and others consider them as no more than a subsidiary source of international law,[16] some modern authors look upon "general principles" as the embodiment of the highest principles —the "superconstitution"—of international law.[17]

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

[15] Salvioli, "La Corte permanente di Giustizia internationale," 15 *Rivista* (1923), p. 11; 16 *ibid.* (1924), p. 272, at pp. 278–84. Makowski, "L'organisation actuelle de l'arbitrage international," 36 *Recueil La Haye* (1931), p. 263, at pp. 360–1.

[16] Lauterpacht, *Private Law Sources*, 1927, p. 69. Scerni, *op. cit.*, 1932, pp. 40–1. Verdross, *op. cit.*, p. 57. The same author as *Rapporteur* of the Institut de Droit International, 37 *Annuaire* (1932), p. 292. *Cf.* next footnote.

[17] Scelle, *Cours (Manuel) de droit international public*, 1948, p. 580.

Härle adopted a rather curious view in his "Les principes généraux de droit et le droit des gens," 3 (16) R.D.I.L.C. (1935), p. 633. He started from the premise that the general principles of law mentioned in art. 38 I (c) were of a subsidiary character (pp. 679–80). When, however, he discovered that there were some general principles of law "auxquels . . . en droit international comme dans tous les autres systèmes de droit . . . est accordée une importance primordiale," he said: "These principles have in fact acquired such an *absolute* and *indisputable* authority that States *can no longer elaborate rules which are opposed to them.* This particular category of general principles of law . . . (one has only to think . . . of the duty to interpret all obligations deriving from a treaty in good faith, . . . of the nullity of promises obtained through fraud, of the prohibition of the abusive exercise of rights, etc.), . . . does not, however, belong any more to those 'general principles of law' of a subsidiary character mentioned in art. 38, para. 3, but, on account of their inherent legal validity, to *jus cogens*, absolute and valid *vis-à-vis* all States" (p. 680. Transl. Author's italics). It may be pointed out that some of the examples of the special category of general principles of law which, according to Härle, do not belong to the "general principles" mentioned in art. 38 I (c) are precisely those which the framers of the article regarded as typical of this provision, *e.g.*, principle proscribing the abuse of rights (*Procès-verbaux*, p. 315), principle of good faith (*Procès-verbaux*, p. 335). Härle refused, however, to accept v. der Heydte's division of these "general principles" into two categories.

F. A. v. der Heydte distinguished, in art. 38 I (c), between (1) certain legal principles recognised by States as an essential part of any legal order, and (2) certain positive rules of municipal law which, though not forming an essential part of every legal order, were recognised by practically all States *in foro domestico* (*op. cit.*, p. 290, c. 2). He believed that those who maintained the subsidiary character of general principles of law had confused these two distinct kinds of principles (p. 297, c. 1). The first category of "general principles" was considered *jus cogens*, the second category as of a subsidiary character (pp. 297, c. 2; 298, c. 1).

Verdross in his "Les principes généraux dans la jurisprudence internationale" (52 *Recueil La Haye* (1935), p. 191) revised his previous views by accepting the view of Heydte. He now held that "general principles of law take precedence of (*ont la précellence sur le*) positive international law. In effect, they are at the foundation of positive law, from which the rules of the latter cannot derogate" (p. 205. Transl.).

C. de Visscher, "Contribution à l'étude des sources du droit international," 3 *Recueil Gény*, 1936, p. 389, at p. 397.

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.[18]

As an introduction to this study, the genesis of Article 38 I (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 the Permanent Court of International Justice provided for in Article 14 of the Covenant of the League of Nations. This Advisory Committee[19] held its meetings from June 16 to July 24, 1920,[20] 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.[21] 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[22] or voluntarist[23] view. Besides treaties and established rules, the Court was according to these various drafts

[18] *Cf.* Memorandum submitted by the Secretary-General of the U.N., *Survey of International Law*, 1949, A/CN. 4/1/Rev. 1, p. 22. While the Memorandum recognised that in any future codification of international law, no useful purpose would be served by any modification of art. 38 of the Statute of the I.C.J., it added: "A distinct element of usefulness might, however, attach to any commentary accompanying the definition and *assembling the experience of the International Court of Justice and of other international tribunals in the application of the various sources of international law*."

[19] Members: Mineichiro Adatci, Rafael Altamira, Clovis Bevilaqua (owing to impossibility of attending the meetings, subsequently replaced by Raoul Fernandes), Descamps (Baron), Francis Hagerup, Albert de La Pradelle, Loder, Phillimore (Lord), Arturo Ricci-Busatti, Elihu Root (assisted by James Brown Scott). Secretary-General of the Committee: Dionisio Anzilotti.

[20] The minutes of the meeting were published under the title *P.C.I.J.: Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920, with Annexes*, 1920. Herein cited as *Procès-verbaux*.

[21] PCIJ: 1 *Documents*.

[22] 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 (*cf.*, *infra*, p. 23).

[23] 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.

directed to apply "general principles of law,"[24] "general principles of law and equity,"[25] "general principles of justice and equity,"[26] or even "rules which, in the considered opinion of the Court, should be the rules of international law."[27]

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),[28] 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.*"[29]

Mr. Elihu Root, the American member of the Committee, while not objecting to the application by the Court of conventions and recognised custom (*i.e.*, 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."[30]

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

[24] Draft Scheme of Denmark, Norway and Sweden, art. 27 II.
[25] German Draft Scheme, art. 35. Clovis Bevilaqua's Draft Scheme, art. 24 II. Bevilaqua's second category of rules is in fact customary international law. See his Explanatory Notes *ad* art. 24 (PCIJ: 1 *Documents*, p. 371).
[26] Art. 42 of the Swiss Draft Scheme establishes the following three categories: conventions, principles of international law, and the general principles of justice and equity. Art. 12 of the Draft of the Union Juridique Internationale directs the court to apply "law, justice and equity."
[27] 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, Netherlands, Norway, Sweden, Switzerland), art. 2 II.
[28] Translation of the Secretariat.
[29] The proceedings of the Advisory Committee were conducted in French, except in the case of Elihu Root, who used English. "The English text of the *Procès-verbaux* is to be looked upon as a translation, except in so far as concerns the speeches and remarks of Mr. Root" (*Procès-verbaux*, p. iv).
[30] *Procès-verbaux*, pp. 293–4.

languages so that literal transposition becomes impossible. Thus the word "*conscience*," which exists both in English and in French, while it often conveys the same meaning in both languages, does not invariably do so. "Conscience" has 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*.[31]

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 religieuse*" 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."[32]

[31] *Cf. The Oxford English Dictionary, sub voce* "Conscience": "4. The internal acknowledgment or recognition of the moral quality of one's motives and actions; the sense of right or wrong as regards things for which one is responsible; the faculty or principle which pronounces upon the moral quality of one's actions or motives, approving the right and condemning the wrong." *Ibid.*, Note on etymology: "The word is etymologically, as its form shows, a noun of condition or function, like *science*, *prescience*, *intelligence*, *prudence*, etc., and as such originally had no plural: a man or a people had *more* or *less* conscience. But in sense 4 [quoted above] it came gradually to be thought of as an individual entity, a member or organ of the mental system, of which each man possessed *one*, and thus it took *a* and *plural*. So *my* conscience, your *conscience*, was understood to mean no longer our respective shares or amounts of the common quality *conscience*, but to be two distinct individual consciences, mine and yours."

[32] It has to be remembered that the word "*conscience*" in French stands for both "consciousness" and "conscience," and, even when used in the latter sense, it does not *necessarily* bear many of the connotations of the word "conscience" in English. Used in the locution "*conscience juridique*," "*conscience*" in fact conveys an idea covering both its meanings in English.

"*Conscience juridique*" first conveys the meaning of the consciousness, or inward knowledge, of the objective law, or, if preferred, of a standard of judgment of human behaviour which has come to be specified as juridical, as distinct from the moral, religious or similar disciplines of human thought or conduct.

Secondly, it denotes, as a consequence of this knowledge, the sentiment, rising sometimes to conviction, of what is right and wrong according to law (*jus*), *i.e.*, the general principles of the legal system.

The expression "*conscience juridique*" was often used by other members of the Committee coming from Latin countries, as well as by Descamps. Thus Ricci-Busatti, of Italy, used the expression during the discussion of this very article. He said that his "*conscience juridique*" rose against the mention of teachings of writers as a source of law and against the establishment

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.[33]

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[34] of what is juridically right or wrong," or as "the *opinio juris communis* of civilised mankind."[35]

of a hierarchy among the various sources of law referred to in the draft (see *Procès-verbaux*, p. 332).

Clovis Bevilaqua, of Brazil, also used the expression in his Explanatory Notes to his draft Statute of the P.C.I.J. (see PCIJ: 1 Documents, p. 370). The context in which it was used shows, moreover, that "*conscience juridique*" was identified in nature with the *opinio juris* in a custom. Indeed, *opinio juris communis* is often a suitable translation of the term.

[33] *Dictionnaire Larousse du XXe Siècle* defines "*Conscience publique*" as follows, *sub voce* "Conscience": "Sentiment commun à un groupe, à une classe de personnes: La Conscience *publique*."

Dictionnaire de l'Académie française, *sub voce*, "Conscience": "La Conscience publique, Le sentiment qu'un peuple a du bien et du mal. La Conscience du genre humain, Le Sentiment que tous les hommes ont du bien et du mal."

Cf. the following instances where "*conscience publique*" was used. Montesquieu, *Lettres persanes*, 129. Speaking of laws with which one disagrees, Montesquieu said: "Whatever may be these laws, one must always follow them and consider them as '*la conscience publique*,' to which that [*i.e.*, 'la conscience'] of the individuals must submit." (Transl.) See also the Preamble to the Hague Conventions Concerning the Laws and Customs of War on Land, 1899 and 1907, which speaks of "the rules and principles of the law of nations resulting" from the "*exigences de la conscience publique*."

These quotations demonstrate the intimate connection that is considered to exist between the law and the "*conscience publique*." "*Conscience juridique*" is that part of the "*conscience publique*" which is specifically juridical in nature. It is regarded as the "material source" of the law.

[34] It should be noticed that the original proposal of Descamps referred to "peuples civilisés," *i.e.*, "civilised peoples" or "civilised mankind." This is important, because the expressions "civilised nations" and "nations civilisées" which are now to be found in the English and French text of Art. 38 I (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 I (c) should be understood not in its politico-legal sense, as it is used in "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* (see *Texte adopté en Ière Lecture*, Art. 35, *Procès-verbaux*, p. 659, at pp. 665–6).

[35] These translations are borne out by Descamps' "Speech on the Rules of Law to be Applied," delivered at the 14th Meeting of the Advisory Committee of

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 and wrong possessed by each civilised nation as regards things for which it is responsible."[36] 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 difficult to understand, as, indeed, Mr. Root found it.[37]

The reason why Mr. Root at first objected to the Descamps proposal was certainly more substantial than one arising from a linguistic misunderstanding,[38] 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.[39]

Jurists (*Procès-verbaux*, pp. 322–5). "*La conscience juridique des nations civilisées*" was considered as the reflex of "objective justice" in man (p. 323), it was "the law of what is just and what is unjust that has been indelibly written and engraved upon the hearts of civilised peoples" (p. 325. Transl.). See also Descamps, *Procès-verbaux*, p. 318, where he identified it with what "*l'opinion universelle*" recognised as "justice."

See *supra*, p. 8, note 32, *in fine*. *Cf. infra*, note 36, *in fine*.

[36] *Cf.* the use of the phrase in Oppenheim: *International Law*, Vol. 1, 4th ed., by McNair, London, 1928, p. 14: "The heads of the civilised States, their Governments, their Parliaments, and the public opinion of the whole of civilised humanity, agree and consent that the body of rules for international conduct which is called the Law of Nations shall, if necessary, be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the *conscience of nations*." "Conscience of nations" is thus clearly recognised as a moral concept and stands in contradistinction to "external power," as morality does to law. "Conscience" is *in pectore* in each nation regulating its own actions. The quotation also shows the contradistinction between the "conscience of nations" and "the public opinion of the whole of civilised humanity." "*La conscience juridique des peuples civilisés*" in fact resembles the latter much more than the former. *Cf. supra*, note 35.

[37] See *supra*, p. 7.

[38] See *infra*, pp. 12 *et seq.*

[39] La Pradelle, following the proposal of the Union-Juridique Internationale, proposed that the Statute should merely provide: "The Court shall judge in accordance with law, justice and equity." He considered that while the judge had to decide according to law, "it was not necessary to define law for him" (*Procès-verbaux*, pp. 295–6). Phillimore was also inclined not to specify the law to be applied by the Court but only to insert in the oath which the judge was to take all that might be considered necessary concerning the law to be applied (*ibid.*, p. 320). Previously he had pointed out that in the English system, the judge took an oath "to do justice according to law" (*ibid.*, p. 315).