1. Introduction

It is now practically beyond debate that the principle of “equitable utilisation” is the pre-eminent rule relating to the utilisation of international watercourses. According to this rule, the determination of an equitable regime for the utilisation of an international watercourse must be determined having regard to a number of relevant factors or criteria, including that of environmental protection. Clearly, international law requires some form of weighing or balancing of the interests of watercourse States in order to achieve an equitable sharing of the beneficial uses in the resources of the watercourse. However, it is unclear exactly what process might apply to any such equitable balancing. Generally, references to ‘equity’ are increasingly common in modern watercourse agreements, prompting commentators to conclude, after conducting a thorough survey of African international water agreements signed in recent decades, that ‘equity is now one of the most frequently applied concepts in transboundary agreements, particularly as related to water allocation’ but also that the ‘language of equity provides no practical guidelines for water allocation’. Therefore, it becomes necessary, in the course of any study of international water law, to examine

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1 Faculty of Law, UCC
2 For example, Article 6(1) of the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, (1997) 36 ILM 719 and Article V(2) of the International Law Association’s 1966 Helsinki Rules on the Uses of the Waters of International Rivers, ILA, Report of the Fifty-Second Conference 484, (Helsinki, 1966), both emphasise the following factors as relevant in determining whether the regime of allocation of uses and/or quantum-share of waters of a shared freshwater resource is reasonable and equitable:
   - the social and economic needs of the watercourse States;
   - the population dependent on the watercourse;
   - the existing and potential uses of the waters;
   - the efficiency of actual or planned utilisations;
   - the effects on other watercourse States;
   - the availability of alternative sources;
   - and certain physical geographical characteristics of the watercourse.
the role of notions of equity in relation to the allocation of shared transboundary freshwater resources and, increasingly, in balancing interests in the utilisation of such resources with interests in their protection.

2. Equity in International Law

According to the International Court of Justice ‘[E]quity 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 role of ‘equity’ in international law is nothing if not controversial. This is particularly true in the case of international law relating to shared natural resources where equity can be seen to play an increasingly important role. This role includes the provision of guidelines and equitable principles for the conclusion of treaties establishing regimes of resource sharing and for judicial or arbitral decision-making in resource disputes. The controversy surrounding its role is exacerbated by the fact that there exists no universally accepted meaning of equity in international law. Brownlie has defined equity in this context as ‘considerations of fairness, reasonableness, and policy often necessary for the sensible application of the more settled rules of law’. Lowe, examining the use of the concept by various arbitral tribunals, states that ‘[A] serviceable definition of equity is: general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State’. He also notes that ‘the pervasive influence of equity on legal rules and principles is at least as strong in international law as in other legal systems’. Franck, discussing equity as a means of introducing considerations of justice into shared resource allocation, explains that

‘Equity lends important assistance in this task, affording judges a measure of discretion, within a flexible rule structure, commensurate with the uniqueness of each dispute and the rapid evolution of new resource recovery and management technology’.

4 Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982) 18 at 60, para. 71.
7 Ibid.
8 T. M. Franck, Fairness in International Law and Institutions (Clarendon, Oxford, 1995), at 56.
However, it is apparent that the Statute of the International Court of Justice (ICJ) envisages the application of ‘equity’ in international law in two distinct ways. Firstly, Article 38, paragraph 1, of the ICJ Statute lists ‘general principles of law recognised by civilised nations’ among the sources of international law which the ICJ shall apply. As the concept of equity and particular equitable principles are to be found in many national legal systems, equity can play a role as a component of the corpus of norms that constitute international law. That international tribunals may be entitled to apply equitable principles without the express authorisation of the parties to an inter-State dispute was confirmed by Judge Hudson in the Diversion of Water from the River Meuse case, where he stated that ‘[W]hat 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’. Secondly, under Article 38, paragraph 2, of the ICJ Statute, the Court possesses the power ‘to decide a case ex aequo et bono if the parties agree thereto’. In other words, the Court may disregard existing legal rules and decide according to wider notions of justice if clearly requested to do so by the parties to a dispute. Having regard to the two distinct forms of equity applicable in international law, Goldie provisionally defines ‘international equity’ as ‘the compendium of concepts supporting, promoting and implementing those entitlements, benefits and satisfactions which are validated by society’s contemporary sense of justice and fairness’. He goes on to say that ‘In international law these concepts reflect the basic principles of jurisprudence and legislation which articulate and apply justice, reason, and

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9 Article 38, para. 1, of the ICJ Statute provides:
1. The Court, whose function is to decide in accordance with international law such dispute 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;
   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.

10 See, for example, Lowe, supra, n. 6, at 55, who, referring to R. David and J. E. C. Brierley, Major Legal Systems of the World Today (1968), concludes that ‘[R]ecourse to general principles of justice in order to assist the “just” application of law is a feature common to the major legal systems of the world.’

11 Individual Opinion of Judge Hudson, PCIJ Series A/B, No. 70, at 76-77.

12 Article 38, para. 2 provides:
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

values which are extensively diffused throughout the major legal systems of the world today. International equity … further operates to temper the rigours of positive international law’s application to those specific situations where generalisations would produce anomalies, inequities, or injustices, or, in Aristotle’s terms, “imbalances”.  

It is quite clear that the principle of equitable utilisation, as developed under international water law, is an almost classic case of a characteristically equitable concept. As Lowe argues, ‘the application of abstract norms to concrete cases necessarily involves recourse to principles and techniques often brought under the heading of “equity”’. For the purpose of rendering the principle of equitable utilisation more predictable and in order to better understand its likely application, it is necessary to clarify what is understood as ‘equity’ in international law. In order to do this it is necessary to distinguish clearly between both possible meanings.

2.1 Equity Ex Aequo et Bono

Berber explains that in giving a decision ex aequo et bono, ‘the Court would have to decide according to non-legal principles of justice, of morality, of usefulness, of...

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14 Ibid.
15 Supra, n. 6, at 55.
political prudence, and of common sense’. Cheng refers to ‘equity’ in this context as ‘pure equity’ which could apply ‘not only secundum legem, and praeter legem, but also, if necessary, contra legem’. However, most commentators agree that the ‘equity’ of the ex aequo et bono clause of the ICJ Statute does not refer to rules of law, primary or supplemental, but to the Court’s capacity to settle disputes on the basis of conciliation. For example, Lapidoth states that decisions ex aequo et bono are decisions which ‘do not have to be at all related to judicial considerations’. In arriving at a similar view Goldie builds on the observation of Judge Anzilotti, who, he tells us ‘considered decisions rendered under the ex aequo et bono clause as more properly characterised not as equitable but as the result of compromise’. According to Lauterpacht, a decision ex aequo et bono ‘amounts to an avowed creation of new legal relations between the parties … It differs clearly from application of rules of equity, which form part of international law as, indeed, of any system of law’. This view is shared by Cheng who contrasts the functions of both forms of equity, i.e. that of bringing ‘latent rules of law to light’ under Article 38(1)(c), and that of creating new rules under Article 38(2). Therefore, ‘equity’ ex aequo et bono does not refer to considerations lying within the rules of law and, as such, does not form a component part of the corpus of rules and principles that constitute international law. If we examine statements made by the ICJ it becomes obvious that in applying ‘equity’ it is referring to equity as a general principle of law. For example, in the North Sea Continental Shelf Case, the Court stated ‘Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules … There is consequently no question in this case of any decision ex aequo et bono’.

20 Goldie, supra, n. 13, at 107, commenting on D. Anzilotti, Corso di Diritto Internazionale (1928) at 64.
21 H. Lauterpacht, The Development of International Law by the International Court of Justice (1958), at 213.
22 Cheng, supra, n. 18, at 19.
The Permanent Court of International Justice (PCIJ) was clearly disregarding any general consideration of ‘equity’ *ex aequo et bono* in the *Free Zones Case*\(^{24}\) when it refused to consider this means of finding a solution in the absence of explicit agreement. Despite the fact that an arbitration agreement between the parties arguably permitted the PCIJ to decide the case in this way by empowering it to ‘settle … all the questions’, the Court stated

‘… even assuming that it were not incompatible with the Court’s Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognised by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to the effect, which is not to be found in the Special Agreement….‘ \(^{25}\)

Also, it is instructive that neither the ICJ nor the PCIJ have ever decided a case *ex aequo et bono* as parties to disputes are reluctant to give the Court such wide and unfettered discretion.\(^{26}\)

### 2.2 Equity as a General Principle of Law

The drafters of the ICJ Statute considered the ‘general principles of law recognised by civilised nations’, (hereafter, general principles), ‘as belonging [among the sources of international law] in virtue of their social foundation and rational character to a common legal fund’.\(^{27}\) According to Goldie, Article 38(1)(c) accommodates the evolution of general legal principles as they are formed in national legal systems through the on-going clarification of the central idea of justice and the implementation of this idea into rules.\(^{28}\) Therefore, general principles constitute an important source of international law as they have ‘acquired through recognition *in foro domestico* by civilised nations that positive character that makes them rules of law’.\(^{29}\) Also, such positive recognition ensures that they reflect basic social values. One classic example


\(^{26}\) Though the ICJ has endorsed the *ex aequo et bono* calculation of damages by another UN tribunal after the establishment of liability. See, Judgments of the Administrative Tribunal of the Labour Organization, ICJ Reports (1956) 77, at 100, where the Court stated that ‘As the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal [through resort to calculations *ex aequo et bono*] fixed what the Court … has described as the true measure of compensation’.

See further, Franck, *supra*, n. 8, at 54.


\(^{28}\) Goldie, *ibid.*, at 106.

\(^{29}\) De Visscher, *supra*, n. 27.
of an equitable principle that has found its way through widespread acceptance among national legal systems into international law is that of the Roman law maxim, *inadimplenti non est adimplendum* (he who fails to fulfil his part of an agreement cannot enforce that bargain against the other party). Goldie points out that this maxim is reflected in Anglo-American equity in the Rule in *Cherry v. Boulthee*[^30] which has been restated many times[^31]. In the *Diversion of Water from the River Meuse Case*, Judge Anzilotti said of the principle that it is ‘so just, so equitable, so universally recognised, that it must be applied in international relations also’.[^32] In the same case, Judge Hudson observed 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’.[^33] Indeed, Judge Hudson’s separate opinion cites several of the traditional maxims found in Anglo-American equity jurisprudence which are potentially of direct relevance to transboundary resource disputes, including ‘he who comes to equity must come with clean hands’, ‘he who seeks equity must do equity’ and ‘equality is equity’.[^34] The first of these could obviously apply to require that a party to a dispute seeking a remedy under international law ought to have acted in good faith and have discharged all relevant procedural and substantive obligations. However, Lowe cautions generally about ‘the difficulty of drawing equitable principles from national legal systems and applying them in the international system’ and, in relation to this particular maxim, asks, *inter alia:*

> ‘how should the “clean hands” operate in the context of successive governments within a State? Should the dirty hands of one infect all? In what circumstances should the wrongdoing of any government operate to deprive the people of the State concerned of the benefit of rights under international law?’[^35]

In the context of a transboundary resource, the second maxim could be interpreted to mean that the State that exploits the shared resource first may not object when the neighbouring State begins to do so and, conversely, that the State that succeeds in preventing the exploitation of the shared resource by a neighbour may itself be stopped from exploiting the resource.[^36] This was effectively what occurred in the

[^31]: *Supra*, n. 13, at 106.
[^34]: *Ibid.*
[^35]: *Supra*, n. 6, at 80.
River Meuse Case, where the Netherlands’ complaint against Belgium’s diversion of their shared River Meuse was dismissed mainly because the Netherlands itself had done the same.\textsuperscript{37} The third equitable maxim cited by Judge Hudson suggests that there ought to be a proportionate distribution of benefits and burdens in the use of shared resources and might, in practical terms, ensure that ‘equality would promote equity by the reliance on objective criteria that correspond with need, capacity, and symbiotic mutuality’.\textsuperscript{38} Botchway suggest that application of this maxim might mean that

‘A country that sacrifices its exploitation of the shared resource may be compensated by generous supply of the exploited resource. At the same time, the country that generates greater benefits from the resource must be responsible for the externalities even if they do not manifest on its territory’.\textsuperscript{39}

Other equitable maxims which may be of relevance to the establishment of equitable regimes for the utilisation of shared resources include ‘equity will not suffer a wrong to be without a remedy’, which may influence the application of rules on State responsibility and liability, and ‘equity imputes an obligation to fulfil an obligation’, which may influence the application of rules on the enforcement of conventional obligations. However, one should be wary of assuming the relevance of traditional equitable maxims to transboundary resource disputes under international law. For example, the maxims ‘where the equities are equal, the first in time shall prevail’ and ‘delay defeats equity’ would appear to support the doctrine of prior appropriation which, in the case of international watercourses, has largely been rendered redundant by Article 6 of the 1997 UN Watercourses Convention\textsuperscript{40} and had anyway not been supported in State practice\textsuperscript{41} and had been widely criticised as wasteful, not conducive to the optimal economic development of the watercourse and potentially environmentally damaging.\textsuperscript{42} Similarly, the maxim ‘where there is equal equity, the law shall prevail’ might incorrectly be assumed to suggest that the established status

\textsuperscript{37} Supra, n. 32. See Botchway, \textit{ibid.}
\textsuperscript{38} See Botchway, \textit{ibid.}
\textsuperscript{39} \textit{Ibid.}
quo in transboundary resource regimes must not be disturbed. Other concepts having their origins in notions of equity developed in domestic jurisdictions have found their way into the rules of international law. For example, the principles of good faith and non-discrimination are now central to many procedural rules and substantive principles of international law.

International courts have used equitable principles to resolve resource disputes on a number of occasions. Notable examples include: the 1969 North Sea Continental Shelf Cases, where the ICJ resorted to the formulation of equitable principles concerning the lateral delimitation of adjacent areas of the continental shelf in the absence of customary or treaty law rules which bound the State parties to the dispute; the 1974 Fisheries Jurisdiction Case (United Kingdom v. Iceland), where the ICJ outlined the elements of an ‘equitable solution’ to a dispute over fishing rights and directed the parties to negotiate accordingly; the 1975 Anglo-French Continental Shelf Arbitration, concerned with the division of the English Channel; the 1982 Tunisia-Libya Continental Shelf Case; the 1984 Gulf of Maine Case, which concerned the delimitation of fisheries zones and the sub-soil of the continental shelf; the 1985 Libya-Malta Continental Shelf Case; the 1985 Guinea–Guinea-Bissau Arbitration; the Burkino-Faso v. Mali Case, where the Chamber of the ICJ used equity to decide on the division of a frontier pool, and the Maritime Delimitation in the Area between Greenland and Jan Mayen Case.

43 See Botchway, supra, n. 36, at 218.
44 See I. Brownlie, ‘Legal Status of Natural Resources in International Law (Some Aspects)’, (1979-I) 162 Recueil des cours 249, at 287.
46 Supra, n. 23.
48 Continental Shelf (UK v. France), 54 ILR 6 (Ct. Arb. 1975).
49 Supra, n. 4.
52 Maritime Delimitation (Guinea v. Guinea-Bissau), 77 ILR 636 (Ct. of Arb. 1988).
The ICJ has been particularly careful to distinguish between the application of equity as part of the general principles of law and its application *ex aequo et bono*, and, in so doing, it has emphasised that equitable considerations in the former sense lie within the rules of law. According to the Court’s judgement in the *North Sea Continental Shelf Cases*,

‘it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas that have always underlain the development of the legal regime …’.  

The Court has also distinguished between the application of equity in international law and the use of the term in the context of some domestic legal systems where equity serves to ameliorate the rigorous application of rules of law in order to do justice. In the latter context it can be contrasted with rigid rules of law. In the case concerning the *Continental Shelf (Tunisia / Libyan Arab Jamahiriya)*, the ICJ stated that ‘in general, this contrast has no parallel in the development of international law’ and that ‘the legal concept of equity is a general principle directly applicable as law’.  

Once again the Court emphasised that international equity must lie within the rules of law.

However, not all commentators are convinced that the distinction between equity as a general principle and equity *ex aequo et bono* can be easily maintained. For example, Brownlie, though content with Judge Hudson’s application of the principles of equity as a natural part of legal and therefore judicial reasoning in the *Diversion of Water from the River Meuse Case*, is highly critical of later applications. According to Brownlie, the equitable principles laid down by the ICJ in the *North Sea Continental Shelf Cases* and further developed by the Court of Arbitration in the *Western Approaches Arbitration* ‘amount to no more than a bundle of highly impressionistic ideas…’ and when ‘[E]mployed in this way “equitable principles” become highly faint indications of the reasoning … on which judicial discretion has been exercised

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55 *Supra*, n. 23, at 47, para. 85.
56 *Supra*, n. 1, at 60, para. 71. See F. Yamin, ‘Principles of Equity in International Environmental Agreements with Special Reference to the Climate Change Convention’, (unpublished paper).
57 See Brownlie, *supra*, n. 44 at 287 concerning Judge Hudson’s application of the principle that equality is equity and of the corollary that a State seeking the implementation of a treaty must itself have completely fulfilled the obligations of that treaty, *supra*, n. 32 at 77.
58 *Supra*, n. 23 at 46-52.
and may be exercised in other cases’.  

He further concludes that, whatever ‘the particular and interstitial significance of equity in the law of nations, as a general reservoir of ideas and solutions for sophisticated problems it offers little but disappointment’.

His principal concern is that ‘with little or no clear content a direction to apply equitable principles is a conferment of a general discretionary power upon the decision-making body’. Such a general discretionary power begins to resemble the wide discretion envisaged under Article 38(2) of the ICJ Statute, though the prior consent of the parties to the dispute is not required for its application. Much of the controversy surrounding the applicability of equitable principles in international law, however, may stem from uncertainties in the relevant terminology. Brownlie states that ‘the terminology of the subject is not well settled’ and, to illustrate, he contrasts Article 28 of the General Act of Geneva 1928, which seems to regard the power to decide *ex aequo et bono* and equity as synonymous, with the decision in the *Norwegian Shipowners Claim*, which regards equity as an equivalent to the general principles of law.

### 2.3 Application of Equity

Theoretically, the application of equitable principles can occur in three different ways, having regard to the operation of the principles vis-à-vis the more strictly substantive norms of international law, *i.e.* equity *infra legem*, *praetor legem*, and *contra legem*.

#### 2.3.1 Equity *infra legem*

The application of equity *infra legem* occurs where several different interpretations of the law are possible and equitable principles permit a court to choose among them according to the requirements of justice. It has been defined as ‘that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes’, or as equity ‘used to adapt the law to the facts of individual cases’. This is the least controversial application of equity as ‘[T]he making of such choices
is inherent in the function of the judge and, as such, needs no special consent of the parties in dispute’. The ICJ appear to have applied equity in this manner in the *Tunisia-Libya Continental Shelf Case*, saying that ‘[W]hen applying positive international law, a court may choose among several possible interpretations of the law the one that appears, in the light of the circumstances of the case, to be closest to the requirements of justice.’ Another example concerns where a tribunal attempts to make an equitable estimate of quantum of compensation once the right to recover under a specific head of damages is established. For example, the Iran-US Claims Tribunal stated in *Starrett Housing Corp. v. Iran* that

‘the practice of the Tribunal supports the principle that when the circumstances militate against calculation of a precise figure, the Tribunal is obliged to exercise its discretion to “determine equitably” the amount involved.’

Higgins is concerned that a ‘requirement of justice’ concept is inherently subjective, and, that its use, to influence the interpretation of legal rules ‘is merely to avoid justifying and making specific certain policy objectives’.

2.3.2 Equity *praetor legem*

Equity is applied *praetor legem* where it functions to fill lacunae which exist among the positive rules of international law or where it is necessary to elaborate on the specific content of vague or general rules. The ICJ, however, has made it clear that equity *praetor legem* refers to equity used ‘not … with a view to filling a social gap in law, but … in order to remedy the insufficiencies of international law and fill its logical lacunae’. Many would disagree that there can exist gaps in international law. Commentators, or at least those who accept that lacunae can exist in

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68 *Supra*, n. 4, at 60, para. 71.
70 R. Higgins, *supra* n. 67, at 220.
71 Separate Judgment of Judge Ammoun in the *Barcelona Traction (Second Phase)* Case, (1970) ICJ Reports, at 3 (emphasis added).
72 See for example, the observations of Sir Gerald Fitzmaurice on the development of international law in G. Fitzmaurice, ‘Judicial Innovation – Its Uses and Its Perils’, in *Cambridge Essays in International Law* (1965) 24, at 24-25, cited by Lowe, *supra*, n. 6, at 61, who suggests that lacunae do not exist in international law:

‘In practice, courts hardly ever admit a non liquet. As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound a new one by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precept.’
international law, disagree on whether this application of equity is acceptable. Some take the view that it can never be acceptable as the role of an international court is merely to pronounce law a *non liquet*, while others maintain that it requires the consent of the parties. Due to legal uncertainty about the application of equity *praetor legem*, the use of equitable principles in reaching a decision will rarely, if ever, be expressly characterised as such. This is true of ICJ cases on continental shelf delimitation where, as Higgins points out, '[T]he reality is that there are few substantive norms to guide decision-making on shelf delimitation' and, that ‘the specifying by the Court of criteria … closely resembles equity *praetor legem*’. She goes on to explain that the ICJ, ‘with its insistence that it was applying an “actual rule of law” (i.e. one which itself requires the application of equitable principles)’, [as opposed to *equity praetor legem*], ‘achieved two results: it avoided taking a stand on the controversy about whether lacunae can properly be filled by reliance on equitable principles; and it maintained the fiction that the judge always decides on the basis of pre-existing norms.’

In relation to the same litigation, Lowe concludes that ‘[E]quity was used, not to fill a gap in the law, but because a gap-free law prescribed the application of a rule pegged to a standard based in equity’, though he does refer to the remarks of Judge Morelli arguing that the Court was engaged in a *renvoi* to equity which necessarily put it outside the scope of the law. The case of *Harza v. Iran*, decided by the Iran-US Claims Tribunal, however, provides a quite clear example of a tribunal using equity to fill gaps in the law. In deciding on the circumstances, not expressly covered by the Claims Settlement Declaration, in which shareholders could raise corporate claims, the Tribunal stated that ‘equity requires that they take such claims subject to the defences and counterclaims that could have been raised against the corporation’. The same is likely to be true of judicial application of the principle of equitable utilisation as the content of the rule can be described as general and consisting of

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75 Higgins, *ibid.*, at 244.
77 Higgins, *ibid.*, at 224.
78 *Supra*, n. 6, at 61.
80 (1986) 11 Iran-US Claims Tribunal Reports 76.
lacunae. This is clear from an examination of the formulation of equitable utilisation contained in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses,82 (and the International Law Commission’s Draft Articles which preceded its adoption83), which provides a non exhaustive list of relevant criteria and no guidance as to the priority to be given to each.

2.3.3 Equity contra legem

The application of equity contra legem, i.e. in direct contradiction with applicable legal norms, is never acceptable except to the extent that all parties concerned agree to the application of equity ex aequo et bono, though this has never occurred throughout the history of the ICJ or PCIJ.84 This application of equity has been characterised as equity used in derogation from the law, to remedy the social inadequacies of the law85 and such decisions ‘do not have to be at all related to judicial considerations’.86 One commonly cited example of the application of equity contra legem is the Iran-US Claims Tribunal case of Foremost Tehran Inc. v. Iran, where Article 40 of the Iranian Commercial Code made the nominal registration conclusive on the question of ownership of shares but the Tribunal applied equity to overcome the effect of this apparently unequivocal rule.87 However, Lowe argues that this decision may be an anomaly and that ‘similar results could be obtained by the dexterous application of legal rules and principles … such as piercing the veil, beneficial ownership and perhaps an extended version of estoppel’.88 Indeed, he concludes generally that

‘To the extent that broad principles which will do the work of equity can be found within the legal system, there is no need to apply equity contra legem: equity may motivate the decision, but the decision will be based on an interpretation and application of the law.’89

3. Equity and Shared International Water Resources

3.1 Functions of Equity

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82 Supra, n. 40.
84 See Cheng, supra, n. 18, at 20, Goldie, supra, n. 13, at 107.
85 See the separate judgment of Judge Ammoun in the North Sea Continental Shelf cases, supra, n. 23, at 139.
86 Lapidoth, supra, n. 19, at 172. See Lowe, supra, n. 6, at 56.
88 Ibid., at 66.
89 Ibid., at 67.
Various writers advance different roles for equity in international law with the result that it could be argued to fulfil a great many purposes. However, in this work we are concerned with examining the possible roles to be played by equity in the application of the principle of equitable utilisation. These would appear to be threefold: equity as a means of achieving a desired equitable result; equity as a process of taking account of all the relevant circumstances; and equity as a means for rendering specific laws of general application.\(^9\)

One of the most commonly perceived roles of equity is that, in choosing among possible interpretations of the law, it allows a court to reach a just or equitable solution. This approach is taken by the ICJ in the *Tunisia-Libya Continental Shelf Case*,\(^9\) where the Court focused on achieving what it regarded as an equitable result. However, in this case the Court insisted that the search for an equitable result was not an operation of distributive justice but merely an operation of equity in a corrective role.\(^9\) This corrective function can only take place in a manner consistent with the rules of law and would never be acceptable *contra legem*. In the *Libya-Malta Case*,\(^9\) the ICJ again reiterated the distinction between this role of equity and the operation of distributive justice, where it listed as an example of an equitable principle, the principle that there can be no question of distributive justice.\(^9\)

According to some commentators,\(^9\) equity in international law is a concept lacking specific content and is one which operates rather as a means for considering all the relevant circumstances in a particular case. In the *Tunisia-Libya Continental Shelf Case*, the ICJ seems to have given support to this view saying that it was ‘virtually impossible to achieve an equitable solution to any delimitation without taking into account the particular relevant circumstances of the area’.\(^9\) In this context, it would appear that ‘there are few, if any, constraints upon the factors which may form the basis of an argument in equity’.\(^9\) According to the ICJ, ‘there is no legal limit to the

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\(^9\) *Supra*, n. 4.


\(^9\) *Supra*, n. 51, para. 46.

\(^9\) See Higgins, *supra* n. 67, at 221.

\(^9\) For example, Huber (1934) 46 *Annaire de l’Institut de Droit International* 233. See Higgins, *supra*, n. 67, at 221

\(^9\) *Supra*, n. 4, at 60, para. 72.

\(^9\) Lowe, *supra*, n. 6, at 72.
considerations which States may take account of for the purpose of making sure they apply equitable procedures’.  

Emphasising the potential flexibility of equity in this role, Lowe further observes that ‘once the relevant factors have been considered the person making the decision is freed from the necessity of making the reasoning consistent with established legal rules and principles’, 99 though he does concede that ‘even equity must be consistent’. 100 The principle of equitable utilisation, as formulated under the ILA’s 1966 Helsinki Rules, 101 the ILC’s Draft Articles and the 1997 UN Convention, provides a non-exhaustive checklist of factors which are to be considered. However, neither formulation offers any guidance as to the weight or priority to be given to the various factors listed as relevant to equitable utilisation, giving rise to the complaint that the principle gives little normative guidance as to what should happen in a particular situation. Instead, each provides, rather unhelpfully, that all the factors must be balanced with other factors and a decision made on the basis of the whole. 102 Due to its normative vagueness, some writers have tended to be pessimistic about the principle’s usefulness, though some feel it retains a measure of merit as a procedural approach. 103

The third commonly perceived role for equity of relevance to the application of the principle of equitable utilisation is that of establishing the specific content of rules which are too general or vague to be applied directly in certain circumstances. In this way, equity permits the application of general legal rules to specific, concrete situations. De Visscher envisages equity in this role suggesting that, ‘l’équité est la norme du cas individual’. 104 Therefore, equity might be expected to play a useful role in elaborating the substantive content of the equitable utilisation principle through the use of equitable principles in the third-party settlement of international watercourse disputes. In this way, equity could play a vital role in the development of a body of relevant normative rules and, consequently, in the wider application of the principle.

98 North Sea Continental Shelf cases, supra, n. 23, at 50.
99 Lowe, supra, n. 6, at 72-73.
100 Ibid., at 73.
102 Article 7, ILC Draft Articles, supra, n. 83; Article 6, 1997 UN Convention, supra, n. 40.
Franck recognises three distinct approaches to equitable allocation of shared resources: ‘corrective equity’, ‘broadly conceived equity’ and ‘common heritage equity’.

Under the ‘corrective equity’ approach, equitable considerations are only exceptionally invoked and function to ameliorate the gross unfairness which might occasionally result from the strict application of legal rules. This is the most conservative approach, confining the exceptional application of equitable principles within a dominant rule of resource allocation. Under the ‘broadly conceived equity’ approach, equity itself comprises a rule of law and is the dominant applicable rule for resource allocation. This approach affords tribunals a great deal more discretion than corrective equity and tends to be more openly distributive. Franck regards the principle of equitable utilisation as incorporated into the 1997 UN Watercourses Convention to be an example of broadly conceived equity and as indicative of a recent trend to include similar equitable mechanisms in natural resource and environmental treaty regimes. ‘Common heritage equity’ applies to the allocation of resources which are the patrimony of all humanity, such as outer space, Antarctica or the mineral resources of the deep seabed, and often involves a ‘trust’ model in which conservation is the first or sole priority. Such an approach may come to enjoy increasing significance in relation to international watercourses with the advent of common management regimes and institutions, whereby several or all riparian States undertake to collectively administer a shared freshwater resource for the common good. Generally, Franck identifies a trend, exemplified by the adoption of Article 83(1) of the 1982 UN Convention on the Law of the Sea, towards the introduction of broadly conceived equity into conventional provisions relating to the allocation of shared natural resources, which will increasingly compel courts and tribunals to apply broader notions of distributive justice.

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105 Supra, n. 8, at 57.
106 Supra, n. 40.
107 Supra, n. 8, at 74-75.
108 See the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, (1979) 18 ILM 1434.
111 Article 83(1) provides:
‘The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution’. (Emphasis added).
112 See, Franck, supra, n. 8, at 61-75.
Under the principle of equitable utilisation, the desired result would be an arrangement whereby each State is entitled to a reasonable and equitable share in the beneficial uses of a transboundary water resource. According to the Experts Group on Environmental law (EGEL),

‘[T]he principle of equitable use of a transboundary natural resource must be regarded as a well-established principle of international law’ which ‘has been applied in many international agreements, especially those concerning the use of the waters of international watercourses.’

The EGEL Final Report goes on to list examples of such agreements, including: the 1906 and 1944 Water Treaties concluded between Mexico and the United States; the 1954 Convention concerning Water Economy Questions relating to the Drava concluded between Austria and Yugoslavia; the 1959 Nile Waters Agreement concluded between Egypt and the Sudan; the 1960 Indus Waters Treaty concluded between India and Pakistan; and, the 1966 Agreement Regulating the Withdrawal of Water from Lake Constance concluded between Austria, the Federal Republic of Germany and Switzerland. It also cites Recommendation 51 of the 1972 Stockholm Declaration on the Human Environment which provides that ‘[T]he net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations concerned’ and Recommendation 91 of the 1977 Mar del Plata Action Plan which declares that ‘[I]n relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State … to equitably utilize such resources.’ Therefore, the desired result inherent in the principle of equitable utilisation has been clearly articulated.

However, in applying equity to achieve this result, existing formulations of the principle of equitable utilisation provide little or no guidance as to the different weight to be given to alternative interpretations of law, competing legal provisions or competing pre-existing rights. Indeed, under the 1997 UN Convention (and the ILC
Draft Articles which preceded it) it is expressly provided that no use or category of uses is inherently superior to any other use or category of uses,116 except perhaps those relating to the requirements of vital human needs.117 Therefore, the question of whether States’ shares in the beneficial uses of watercourses are reasonable and equitable can only be determined through consideration of all the relevant factors in a particular case. Neither are any of the factors to be considered given any priority or order of importance. Indeed, Article 6(3) of the 1997 Watercourses Convention provides

‘The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole’.

From the above examination of the potential roles of equity in the application of the equitable utilisation principle, it becomes apparent that equity can, and usually will, play a combination of two or of all three roles identified by Higgins.118 For example, Bardonnet links the ‘concretisation’ of law in a particular case with the consideration of all relevant circumstances in that case. He combines ‘l’appréciation individualisée d’un cas concret’ with taking account of ‘des faits, des situations, et notamment des situations géographiques (milieu physique spécial, environnement particulier), des intérêts ou des prétentions des Parties’.119 The view that equity, in the context of equitable utilisation, may perform a number of roles is compatible with the classic statements regarding the function of equity in international law made by, inter alia, Degan, de Visscher, Huber and Sorensen.120 Higgins paraphrases these writers as saying that ‘every rule has various interpretations, all acceptable from the legal point of view, and equity allows the judge to choose in accordance with justice, having regard to the circumstances and balancing the rights and obligations of the parties’.121 However, she also points out that nowhere is it made clear how this is to be done,

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116 Article 10.
117 Article 10(2).
118 See, supra, n. 90.
121 Ibid.
whether ‘[B]y the use of compromise, or by giving different weight to alternative interpretations of law, or by focusing on the desired result …’. 122

If we accept that equity plays a combination of roles in the application of equitable utilisation, it appears axiomatic that equity is applied at several stages, i.e. in the identification of a just and equitable solution, in the consideration of all relevant factors and circumstances, and in the elaboration of vague normative rules. However, no formulation of the principle offers guidance as to the order in which equity would perform each function. For example, would a court identify a just result and go on to achieve such a result by giving appropriately weighted consideration to each relevant factor, or, would a just result be determined by prior consideration of the relevant factors. The former approach would afford a court a greater degree of discretion in arbitrarily establishing what constitutes an equitable result. This result would necessarily be subjective. Similarly, where equity functions to elaborate specific rules for a particular case, it is unclear whether these rules determine the priority to be given to each relevant factor or whether prior consideration of the factors is necessary in order to determine the rules to be applied. What is clear is that equitable utilisation can only effectively function as a procedure. Yamin supports this view stating that

‘[T]he essence of this principle of equitable utilization is that it prescribes a procedural technique aimed at reaching an equitable result in each concrete case rather than laying down a substantive norm with more or less specific content.’123

She goes on to explain that ‘[T]he implementation of the principle thus requires negotiations between the States concerned in determining the equitable delimitation of the rights and obligations of each State’.124 This, however, tells us little about the sequential order in which equity would perform each of its roles, either in treaty negotiations or judicial proceedings.

An examination of ICJ practice relating to continental shelf delimitation suggests, controversially, that the practice of the Court, in recent years, has been to begin by identifying what it considers to be an equitable result. Franck notes that ‘[A]s this relatively recent practice matures, courts will increasingly be compelled to apply

122 Ibid. at 219-20.
123 F. Yamin, supra, n. 56, at 17.
124 Ibid.
broader notions of distributive justice …’.

Initially, in the *North Sea Continental Shelf Cases*, the ICJ asserted that it was a customary rule of international law that delimitation should be determined by reference to equitable principles, saying that ‘it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires that application of equitable principles…’.

The Court further stated that the delimitation must be ‘effected in accordance with equitable principles … taking account of all the relevant circumstances’ and that ‘there is no legal limit’ to the factors which can be considered relevant. However, in this particular case, it only considered three, including:

1. **geology, *i.e.* the similarity of an area of shelf to State territory;**
2. **the desirability of maintaining the unity of natural resource deposits;** and
3. **proportionality, which it defined as the attainment of a reasonable relationship between the extent of a State’s continental shelf and the length of its coastline.**

In the circumstances, the Court found consideration of geology unhelpful and of the unity of deposits irrelevant and so considered only proportionality, on the basis of which it adjusted the delimitation to account for the concavity of the West German coastline. At all times the Court presented its deliberations as entirely normative in character and thus suggested that it would begin with and concentrate on equitable principles. This approach reflects the conventional provisions then applying. Article 6(2) of the 1958 Geneva Convention on the Continental Shelf had provided that States that could not manage delimitation of their continental shelves by agreement should do so by reference to the equidistance line but also that they could depart from the equidistance line where ‘special circumstances’ so warranted. Therefore, while the equidistance rule predominated, it could be overridden where it would produce demonstrably unfair results. Similarly, in the *Anglo-French Continental Shelf* arbitration, the arbitral tribunal took equitable factors into account where it concluded that application of the equidistance rule under the 1958 Geneva Convention radically distorted the boundary along the English Channel on account of the UK Channel…

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125 Supra, n. 8, at 57.
126 Supra, n. 23, at 46-7.
127 Ibid., at 53.
128 Ibid., at 50.
129 See further, Franck, supra, n. 8, at 61-63.
130 499 UNTS 311.
Islands being much closer to the French mainland than to the coast of England.\textsuperscript{131} In this instance, factors considered in order to ‘balance the equities’ included defence considerations\textsuperscript{132} and the size of the population as well as the political and economic importance of the Channel Islands.\textsuperscript{133} The tribunal also employed the equitable principle of proportionality to arrive at an equitable delimitation. However, it emphasised its reliance on Article 6(2) of the 1958 Convention and thus that it was applying normative principles of justice rather than a more discretionary concept of distributive justice.\textsuperscript{134} The ICJ emphatically affirmed this approach in the \textit{Fisheries Jurisdiction Case}, stating that ‘[I]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law’, thereby rejecting the equitable solution as a starting point.\textsuperscript{135}

However, the Court subsequently adopted the very opposite approach in the \textit{Tunisia-Libya Continental Shelf Case}. It held that it was ‘bound to decide the case on the basis of equitable principles’\textsuperscript{136} but, in giving an account of what equitable principles entail, the Court stated that

‘The result of the application of general principles must be equitable … It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution … “equitable principles” … refers back to the principles and rules which may be appropriate in order to achieve an equitable result.’\textsuperscript{137}

This position reflects the approach adopted under the then new UN Convention on the Law of the Sea,\textsuperscript{138} itself opened for signature in 1982, Article 83(1) of which provides that

‘The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.’

The Court held that the omission by the Third United Nations Conference on the Law of the Sea of any reference to equidistance meant that there was no longer any formal textual guidance as to the content of an equitable solution and, therefore, that the goal

\textsuperscript{131} \textit{Supra}, n. 48, at 102.
\textsuperscript{132} \textit{Ibid.}, at 98.
\textsuperscript{133} \textit{Ibid.}, at 101.
\textsuperscript{134} See further, Franck, \textit{supra}, n. 8, at 64.
\textsuperscript{135} \textit{Supra}, n. 47, at para. 78
\textsuperscript{136} \textit{Supra}, n. 47, at para. 78
\textsuperscript{137} \textit{Ibid.}, at para. 70.
of reaching an equitable result must determine the means for achieving it. The Court stated that ‘[T]he equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result’. The Court exercised considerable discretion and took into account a wide range of factors, including the general configuration of the coastlines, the existence and position of various islands, the configuration of the land frontier and the conduct of the parties in the granting of petroleum concessions. However, it expressly refused to attach legal significance to economic need, reasoning that delimitation should not be based on as transient a factor as the relative prosperity or poverty of the States at a particular point in time. The Court also took account of proportionality. This decision to apply what Franck refers to as ‘broadly conceived equity’ was not without its critics. Judge Oda, in his dissenting opinion, expressed the view that the decision was suffused with ‘an implicit purpose of apportionment’ while Judge Evensen likened the Court’s reasoning to the application of equity ex aequo et bono. It appears therefore, that the Court will now first decide upon an equitable outcome and will then achieve that outcome by selecting and applying appropriate principles and rules. According to Higgins, ‘[P]utting North Sea Continental Shelf and Tunisia-Libya together, we are left with the proposition that there is an actual rule of law that requires one to apply those principles that lead to an equitable result …’.

Also, in the Gulf of Maine Case, which involved delimitation of fisheries zones and the subsoil of the continental shelf, the Chamber once again emphasized the requirement of an equitable solution and adopted proportionality as ‘the primary tool for the application of broadly conceived equity’. It held that ‘delimitation should be effected by the application of equitable criteria capable of ensuring … an equitable result’. The Chamber refused to accord great significance to economic factors, such

139 Supra, n. 4, at 49. See further, Franck, supra, n. 8, at 68.
140 Ibid., at 59.
141 Ibid., at 86-87.
142 Ibid., at 88-89.
143 Ibid., at 84-85.
144 Ibid., at 83-84.
145 Ibid., at 77-78.
146 See Franck, supra, n. 8, at 57.
147 Supra, n. 4, at 270 (Oda J., dissenting).
148 Ibid., at 296 (Evensen J., dissenting).
149 Higgins, supra, n. 34, at 225.
150 Supra, n. 50, at 246. See Franck, supra, n. 8, at 69.
151 Ibid., at 300.
as the special dependence of certain Nova Scotia communities on fishing as advanced by Canada, but it did assign a subordinate, corrective role to such factors which would be allowed to provide a post hoc check on the equitableness of a result achieved by other means. It stated:

‘What the Chamber would regard as a legitimate scruple lies … in concern that the overall result … should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned … Fortunately, there is no reason to fear that any such danger will arise in the present case.’\(^{152}\)

The ‘broadly conceived equity’ approach was followed in the *Libya-Malta Continental Shelf Case*, where the Court affirmed the primacy of the equitable result over those equitable principles used to achieve it. The Court referred to the equitable result as ‘the primary element in this duality of characterization’\(^{153}\) and stressed the role of proportionality in achieving such a result, describing it as ‘intimately related … to the governing principle of equity’.\(^{154}\) The Court considered itself free to take account of a range of factors but once again refused to attach significance to economic needs and so rejected Malta’s claim that its lack of energy resources, its requirements as an island developing State, and the range of its fisheries should be considered.\(^{155}\) In the 1985 *Guinea-Guinea-Bissau* arbitration, the arbitral tribunal, which was comprised of three ICJ judges, delimited the continental shelf by having regard to two new equitable considerations, namely the need ‘to ensure that, as far as possible, each State controls the maritime territories opposite its coasts and in their vicinity’, and the need to ensure that other maritime delimitations in the area, whether actual or future, are given their due regard.\(^{156}\) Indeed, in recent years, it appears that the Court is increasingly likely to consider economic factors to some extent in determining an equitable delimitation. In the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, the Court considered the commercial value of the relevant fisheries in deciding that an equitable result required a larger area of the common shelf and fisheries zone, not strictly proportionate to the respective coastlines, to be allocated to Greenland.\(^{157}\)

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\(^{153}\) *Supra*, n. 51, at 29.

\(^{154}\) *Ibid.*, at 43.

\(^{155}\) *Ibid.*, at 41.

\(^{156}\) *Supra*, n. 52, at 676-677.

\(^{157}\) *Supra*, n. 54, at 58-59, 71-73. See Franck, *supra*, n. 8, at 73.
the 1982 UNCLOS provisions relating to access to the exclusive economic zone. For example, the Convention confers on land-locked States the right to participate ‘on an equitable basis, in exploitation of an appropriate part of the coastal States in its sub region or region’ and requires States to determine the terms of such participation by taking into account, inter alia, ‘the need to avoid damaging the fishing communities of coastal States’ and ‘the nutritional needs of the populations of the respective States’. Indeed, this latter provision might be argued to correspond to the priority given to consideration of ‘vital human needs’ under Article 10(2) of the 1997 UN Watercourses Convention.

The Court’s approach to the application of equity in continental shelf delimitation disputes i.e. that of focusing on the desired result, has been almost universally criticised by commentators, most of whom fear it allows too great a degree of judicial discretion. Higgins, for example, concedes that ‘[D]ecisions will in reality, and necessarily reflect policy preferences’ but takes the view that ‘[T]hese policy preferences should be articulated and tested against stated desired outcomes. In this way the objectives would be transparent and the methods objectively verifiable’. Instead, she feels that the result-oriented approach taken by the Court ‘has allowed the Court to insist it is applying “an actual rule of law” – but one that is opaque and not capable of scrutiny or review’. Judge Sir Robert Jennings has also expressed concern, stating that

‘the doctrine of the “equitable result”….if allowed its head, leads straight into pure judicial discretion and a decision based upon nothing more than the court’s subjective appreciation of what appears to be a “fair” compromise of the claims of either side.’

Jennings almost goes so far as to question whether such an application of equity can be distinguished from equity ex aequo et bono, asking ‘[I]s equity then just the lawyers’ name for subjective judicial decision …’. Judge Gros, in his dissenting opinion in the Gulf of Main Case, expressed his concern that equity must be controlled if it is to be predictable. In the Tunisia-Libya Continental Shelf Case, the

158 See further, Franck, ibid., at 74.
159 Higgins, supra, n. 67, at 224.
160 Ibid.
162 Ibid.
163 Supra, n. 50, at 368-377. See Higgins, supra, n. 67, at 227 and Franck, supra, n. 8, at 71.
Court itself acknowledges that there are problems with the equitable result approach saying that it ‘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 obtain this result’. However, despite such criticism, recent ICJ practice appears clearly to answer Jennings’ questions ‘of where do the mental processes of the judges begin? Do they begin with a boundary line they assume to be “equitable” and then select supporting principles to lead to this result?’ Therefore, it is important to examine which criteria the Court has used and to what extent each has been relied upon in deciding what constitutes an equitable result.

In the North Sea Continental Shelf Cases, the Court’s conclusion that equidistance was inequitable appears to have been based principally on consideration of the natural or physical characteristics of each State’s coastline. In particular, the Court placed great importance on the length of States’ coastlines, saying

‘three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two.’

Critics have questioned the validity of coastline length as a determining factor in continental shelf delimitation. For example, Rothpfeffer points out that the ‘Court’s criterion for qualifying the three States as equal, namely the length of the coastlines, has no other apparent theoretical basis of validity than the fact that the Court classified this criterion as being determinative of equalness’. Similarly, Friedmann appears to regard the elevation of coastline length over coastline shape as an anomaly when he writes that, by this reasoning, the Court

‘regards the inequalities caused by the differences between coastal and landlocked states, or between states with long and short coastlines, as facts of nature which have to be accepted while the fact that one state’s coastline is straight or convex, and another’s is concave is “unnatural”.’

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164 Supra, n. 4, at para. 70.
165 R. Jennings, supra, n. 161, at 31.
166 Supra, n. 23, at 50.

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Despite such criticism, the placing of emphasis on the length of a State’s coastline has much to recommend it in terms of simplicity and predictability. It would appear to involve a simple delimitation of continental shelf in a manner proportionate to each State’s length of coastline. Also, it might easily be argued that the extent of a State’s coastline would often mirror the extent of its coastal population dependent on marine resources. In the *Libya-Malta Case*, the ICJ listed among the equitable principles to be considered the principle that there is no question of refashioning geography or seeking to make equal what is unequal.\footnote{\textit{Supra}, n. 51, at para. 46.} Higgins asserts that this amounts to a rejection of the notion of ‘proportionate share’\footnote{Higgins, \textit{supra}, n. 67, at 227.} though it can be argued to be more a rejection of the possibility of the equitable result doctrine operating as a form of distributive justice. Higgins herself points out that ‘in the area of maritime delimitation the task before the Court of determining whose claim is well founded is only the preliminary to the real task of allocating resources between claimants’.\footnote{\textit{Ibid.}, at 224.} The fact that coastline length has recently played a determining role in this allocation suggests the application of a type of proportionality test.

### 3.2 Proportionality

In order to examine what is meant by the concept of proportionality in international law it is first necessary to distinguish between proportionality as it applies to the law relating to the use of force and as it applies to the law of resource delimitation. In the former context, the requirement of proportionality places a limitation on the lawful use of force in self-defence. In the latter it has been described as ‘one technique among many to achieve an equitable outcome in the face of special geographic circumstances’.\footnote{\textit{Ibid.}, at 230.} Although the concept of proportionality as a factor in resource delimitation has been articulated and primarily developed through continental shelf disputes, there remains widespread disagreement among scholars as to its status and applicability, prompting Higgins to conclude that ‘[T]he concept of proportionality in maritime delimitation remains, for me, full of uncertainties and problems’.\footnote{\textit{Ibid.}.} For the purpose of this work it is necessary first to trace the development of the concept.
through various continental shelf disputes and then to speculate on its potential role in determining what constitutes equitable and reasonable utilisation of watercourses.

The concept of proportionality was articulated by the ICJ in the *North Sea Continental Shelf Cases* where it was expressed as an element of equity, or in other words, as an equitable principle. In this instance the States were called upon to recognise a reasonable degree of proportionality to determine ‘the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines’. The Court took pains to emphasise that proportionality was distinguishable from the argument put forward by the Federal Republic of Germany that

‘An apportionment of the continental shelf of the North Sea … could not be achieved by determining the boundary lines … as an isolated act. The boundary problem must rather be considered as a joint concern of all North Sea States, taking into account the effect of each boundary on the apportionment as a whole.’

Rejecting this argument as an example of distributive justice, the ICJ held that the role of equity, and of proportionality as an element of equity, was to correct anomalies rather than to ensure fair or equal shares. The Court stated

‘Equity does not necessarily imply equality … equity does not require … rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline … it is not such natural inequalities as these that equity could remedy.’

Therefore, the Court did not see its function as the apportionment of a just and equitable share of the divisible area, but merely the demarcation of boundaries in the continental shelf, where equidistance is not to be used, on the basis that there should exist a relationship between the amount of shelf awarded and the relative length of coastlines. Equity, and the equitable principle of proportionality in particular, justified ‘abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result’. In a definitive statement of the role of proportionality as a factor to be considered in determining an equitable solution to continental shelf disputes, the Court stated:

\[\text{\textsuperscript{174}}\text{Supra, n. 23, at 52. See Goldie, supra, n. 13, at 118-119.}\]
\[\text{\textsuperscript{175}}\text{Reply of Federal Republic of Germany, 1 North Sea Continental Shelf Cases, ICJ Pleadings 389 at 423 (1968). See Goldie, \textit{ibid.}, at 119.}\]
\[\text{\textsuperscript{176}}\text{Supra, n. 23, at para. 70.}\]
\[\text{\textsuperscript{177}}\text{\textit{Ibid.}, at 50.}\]
‘A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines - these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.’\(^{178}\)

The Court, therefore, did not suggest that proportionality should form a rule of general applicability under which any coastal State could claim a share of continental shelf proportionate to the length of its coast, but instead limits its application as an aid to delimitation to where a balance must be struck between States with ‘markedly concave or convex’ or ‘very irregular’ coastlines.\(^{179}\) Generally, in accordance with Article 6(2) of the 1958 Geneva Convention, the Court would seek to adhere to the equidistance line except where special circumstances would radically distort the boundary. Also, it is clear that the Court did not view proportionality ‘as a distinct principle of delimitation, but as one of the factors to be considered in ensuring that equitable procedures were applied’.\(^{180}\)

The Tribunal in the \textit{Anglo-French Continental Shelf Arbitration} was a little less enthusiastic when it examined the role played by the concept of proportionality in this area. It found that it was ‘not a general principle providing an independent source of rights to areas of the continental shelf’.\(^{181}\) The Tribunal expressed the view that the concept of proportionality was relevant only in negative terms, saying that ‘[I]t is disproportion rather than any general principle of proportionality which is the relevant criterion or factor’.\(^{182}\) The Tribunal sought to elaborate on the particular role of proportionality in continental shelf delimitation, stating that

“‘Proportionality’ in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal states concerned, its role being that rather of a criterion to assess the distorting effects of particular geographic features and the extent of the resulting inequity. In the present instance, “proportionality” comes into account only in appreciating … the extent of the adjustment appropriate to abate the inequity.”\(^{183}\)

\(^{178}\) \textit{Ibid.}, at 52.
\(^{180}\) Higgins, \textit{ibid.}
\(^{181}\) (1979) 18 ILM 397 at 427. See Higgins, Supra, n. 67, at 229-230.
\(^{182}\) \textit{Ibid.}
\(^{183}\) \textit{Supra}, n. 48, at 124.
Therefore, the proportionality principle would not determine the delimitation but could act as a *post hoc* check on the equity of a proposed solution and correct it where anomalies or distortions occurred. According to Franck, ‘the tribunal seemed to adopt a notion of distributive justice, yet to contain it within the then-legitimate rule of equidistance’.

The ICJ gave its strongest endorsement to the principle in the 1982 *Tunisia / Libya Continental Shelf Case*, which reflected the elevation of the achievement of an equitable result as the key objective of relevant conventional law, and where the Court revisited its earlier application and analysis of proportionality in continental shelf cases. It stated that the question is one of ‘proportionality as a function of equity’ and that ‘the element of proportionality is related to the lengths of the coasts concerned’. According to Higgins, the Court, in this instance, ‘is essentially using proportionality as a substantive principle of delimitation’ rather than confining its application to a *post hoc* check on the equitableness of a result reached by other means. Furthermore, the Court appeared to suggest, in reply to a question raised by Tunisia, that where delimitation is based on proportionality, the court is entitled to take a very flexible approach, thus enhancing its discretion generally. The Court stated

‘The question raised by Tunisia: “how could the equitable character of a delimitation of the continental shelf be determined by reference to the degree of proportionality between areas which are not the subject of that delimitation?” is beside the point; since it is a question of proportionality, the only absolute requirement of equity is that one should compare like with like.’

However, the Court would also appear to have devalued this application of proportionality as a basis for predictive principles by concluding its judgment by saying that

‘Each Continental Shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt

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184 Supra, n. 8, at 65.
185 UNCLOS, Article 83(1), see supra, n. 110.
186 Supra, n. 4, at 76.
187 Higgins, supra, n. 67, at 230.
188 Supra, n. 4, at 76. See Goldie, supra n. 13, at 121.
should be made here to over-conceptualize the application of the principles and rules relating to the Continental Shelf.\footnote{189}

In the 1984 \textit{Gulf of Maine Case}, the Chamber appeared to return to a more restrictive application of the proportionality principle, finding that it was not an autonomous method of delimitation, though it expressly stated that it did not preclude ‘the justified use of an auxiliary criterion serving only to meet the need to correct appropriately … [the] … inequalities noted’.\footnote{190} In effect, however, proportionality became the primary legal principle for the equitable delimitation with the Chamber concluding that the delimitation should reflect the ‘particularly notable’ difference in the lengths of the parties’ coasts\footnote{191} and proceeding by means of an adjusted provisional median line determined using a calculation based on all of the Gulf’s coasts.\footnote{192} Significantly, proportionality applied to the delimitation in the absence of any significant distorting geographical feature. Similarly, in the 1985 \textit{Libya-Malta Case}, the Court appeared to confirm that proportionality was not a substantive delimitation rule in its own right. It was merely an element of equity which functioned to correct the situation where broadly comparable coasts might otherwise be treated differently due to ‘quirks of configuration’.\footnote{193} However, as in the \textit{Gulf of Maine} case, it was nevertheless the dominant consideration despite the absence of any distorting natural feature and the Court held that the principle enjoyed two roles: both as a factor to be considered in the initial delimitation and as a \textit{post hoc} check on the equitableness of the solution proposed, however that proposal was reached.\footnote{194} According to Franck,

‘The former confers upon the court the discretion to allocate resources according to considerations of fairness, while the latter allows the court to ensure that the result, achieved by reference to a range of considerations, is not unfairly influenced by the effect given to any one of them.’\footnote{195}

It is worth noting, however, that proportionality, ‘although now evidently the preferred means by which to reify the abstract notion of equity’, need not be indispensable to all delimitations.\footnote{196} In the 1985 \textit{Guinea-Guinea-Bissau} case, proportionality played no role whatever as the parties enjoyed relatively equal

\footnote{189} \textit{Ibid.}, at 92. See W. M. Reisman and G. S. Westerman, \textit{Straight Baselines in International Maritime Boundary Delimitation} (Macmillan, 1992), at 204.

\footnote{190} \textit{Supra}, n. 50, at para. 218.

\footnote{191} \textit{Ibid.}, at para. 232.

\footnote{192} \textit{Ibid.}, at para. 236. See further, Franck, \textit{supra}, n. 8, at 70.

\footnote{193} \textit{Supra}, n. 51, at paras. 55-58. See further, Higgins, \textit{supra}, n. 67, at 230.

\footnote{194} \textit{Ibid.}, at 49. See further, Franck, \textit{supra}, n. 8, at 71.

\footnote{195} \textit{Ibid.}

\footnote{196} Franck, \textit{ibid.}
coastline lengths adjacent to the maritime zone in dispute and the arbitral tribunal
decided the issue exclusively by reference to other equitable considerations.\textsuperscript{197}

The approach taken by international tribunals to the role of proportionality in
continental shelf delimitation, which is in some regards quite narrow and restrictive,
does not necessarily preclude the concept from playing an even more fundamental
role with regard to shared water resources. It must be remembered that, prior to the
\textit{North Sea Continental Shelf Cases}, many commentators had advocated
proportionality as the fundamental equitable factor acting on shelf delimitation. For
example, Sir Francis Vallat suggested in 1946 that ‘where a bay or gulf is bounded by
several states … The most equitable solution would be to divide the submarine area
outside the territorial waters among the contiguous states in proportion to the length
of their coastline’.\textsuperscript{198} Of more relevance to the utilisation of an international
watercourse in ‘an equitable and reasonable manner’\textsuperscript{199} is the suggestion by Professor
J. P. A. Francois, in his 1950 \textit{Memorandum} on the \textit{Regime of the High Seas},\textsuperscript{200}
presented for the International Law Commission, that the extent ‘des eaux
“juridictionelles”’ of each State be proportionate to population density, the extent of
the national territory, and the length of its coastline.\textsuperscript{201} This view of a principle of
proportionality to be applied to shelf delimitation strongly resembles the principle of
equitable utilisation as formulated by the ILA and the ILC. Where the law on non-
navigational uses of international watercourses differs from that on continental shelf
delimitation is that thorough codification has actually occurred, thereby giving a legal
basis, if only as yet in customary law, to those considerations against which
proportionality, as a function of equity, can be measured. It should also be
remembered that similar formulations of equitable utilisation, complete with
indicative lists of relevant considerations, have received considerable and widespread
support in state practice.\textsuperscript{202}

\textsuperscript{197} \textit{Supra}, n. 52. See Franck, \textit{ibid}.
\textsuperscript{198} (1946) 23 \textit{British Yearbook of International Law}, 333 at 355-56. See Higgins, \textit{supra}, n. 67, at 229.
\textsuperscript{199} Article 5, 1997 UN Convention, \textit{supra}, n. 82.
\textsuperscript{201} \textit{Ibid} at 10-11, citing Azzacrraga, ‘Los Derechos Sobre la Plataforma Submarina’, (1949) 2 \textit{Revista
Espanola de Derecho Internacinale} 47. See Goldie, \textit{supra}, n. 13, at 120.
\textsuperscript{202} For example, ‘Legal aspects of the use of systems of international waters’, Memorandum of the US
State Department of 21 April 1958, 5th Congress, 2nd Session, Senate Document No. 118 (Washington
D.C., 1958), at 90; Asian-African Legal Consultative Committee, Report of the Fourteenth Session,
para. 3, proposition III (10-18 January 1973) (New Delhi), at 7-14, (text reproduced in Yearbook ILC,
3.3 Proportionality and International Watercourses

International watercourses share their own, peculiar set of physical and geographical characteristics and it would be unreasonable to expect that ICJ practice relating to continental shelf delimitation could or should be translated directly onto watercourse utilisation disputes. However, important parallels exist between shared watercourses and contested continental shelf territory or, more correctly, between the problems of utilising the resources of both. Higgins points out that ‘[I]t is not coincidental that it is in the area of resource allocation – [the] law of the sea, the law of international watercourses – that such frequent reference is made to equitable considerations’. 203

Put simply, a coastline is not entirely unlike a river or drainage area in that it may include the territory of several States and these may make competing and incompatible claims to the utilisation of the resources of each which require an equitable resolution. Having regard to the continental shelf experience, it is not unreasonable to suggest, at first glance, that the ICJ, in identifying an equitable solution, i.e. that which constitutes utilisation of an international watercourse in an equitable and reasonable manner, would emphasise the importance of the natural and physical characteristics of the watercourse within each State. If this were the case, it seems reasonable to assume that the principal factors would be the extent of the drainage area in each State and the quantum contribution of water by each State to the watercourse or, more probably, a combination of both. The indicative list of factors relevant to equitable and reasonable utilisation given in the 1997 Convention hints that this may be so as the first set of factors listed includes ‘geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character’. 204

The Commentary to Article 6 of the ILC Draft Articles tells us that

‘Paragraph 1(a) contains a list of natural or physical factors’ … which inter alia … ‘determine the physical relation of the watercourse to each watercourse State. “Geographic” factors include the extent of the international watercourse in the territory of each watercourse State; “hydrographic” factors relate generally to the measurement, description and mapping of the waters of the watercourse, and “hydrological” factors relate, inter alia, to the properties of the water, including water flow, and to its distribution, including the contribution of water to the watercourse by each watercourse State.’ 205

203 Supra, n. 67, at 229.
204 Article 6(1)(a).
The International Law Association’s 1966 Helsinki Rules suggest more strongly that these factors would be of paramount importance. Under the Helsinki Rules, the first two factors listed as relevant in determining ‘a reasonable and equitable share’ include:

a. the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

b. the hydrology of the basin, including in particular the contribution of water by each basin State.\(^{206}\)

Though the Commentary to the ILC Draft Articles clearly states that ‘the weight to be accorded to individual factors, as well as their very relevance, will vary with the circumstances’,\(^{207}\) the ICJ and other international tribunals might reasonably be expected to have regard to the ICJ’s experience on continental shelf delimitation and to opt for an approach that rendered the law somewhat transparent and predictable. This would presumably involve the allocation of water uses or share in a manner roughly proportionate to the drainage area in, and contribution of water by, each State. The other factors listed in the various codifications would, therefore, be secondary and serve to ameliorate the rigid application of such a proportionality rule and ensure that any negotiated solution or judicial decision would meet the requirements of justice in the light of the circumstances of each case.

However, on the basis of a very comprehensive survey of State practice and the decisions of arbitral and judicial tribunals relating to the allocation of shared freshwaters, Fuentes has persuasively concluded that the significance attributed to the physical characteristics of the drainage basin, in particular the extent of the drainage area lying in the territories of the parties and their contribution of water to the flow of the river, is relatively low.\(^{208}\) She points out, for example, that the Narmada Tribunal made a \textit{prima facie} equitable apportionment on the basis of the needs of the parties which was then modified slightly after consideration of the physical characteristics of the drainage basin.\(^{209}\) The Tribunal arrived at its provisional division by allocating the waters in a manner proportional to the ratio between the water requirements of the two States but declined to consider the criteria of drainage area and contribution of...
water, used to adjust the provisional division, in the mathematical manner associated with proportionality. Fuentes concludes that

‘In the light of this jurisprudence, it is possible to assert that the rejection of the mathematical perspective in relation to a particular factor, which at least in principle has the potential of serving as a basis for a proportional division of the disputed object, shows that the role ascribed to that criterion is low in the hierarchy of relevant factors’.  

She goes on to assert that this practice of attributing a low significance to the physical characteristics of a drainage basin as factors in establishing an equitable regime for the utilisation of shared water resources ‘is consistent with the rule of equitable utilization, because to admit these factors to function as a direct basis for the allocation of waters would not be in keeping with the principle of equality between the basin States’. At any rate, by attaching more significance to the water needs of watercourse States than to the physical characteristics of the drainage basin, equity as applied in international freshwater law is more distributive in nature than equity as applied in the law of continental shelf delimitation.

4. Equity and Environmental Protection

4.1 Sustainable Development

As the notion of sustainable development has its origins in conventional and declaratory instruments of international environmental law and has always sought to reconcile protection of the natural environment with the requirements of economic and social development, it is to be expected that environmental considerations would figure strongly in any application of the principle. The 1987 Bruntland Report, which brought the concept to centre-stage, elaborates on its substantive content, stating that ‘[I]t contains two key concepts: the concept of “needs” … and the idea of limitations imposed by the state of technology and social organizations on the environment’s ability to meet present and future needs’. Indeed, Fuentes, in an examination of the relative priority accorded to environmental and developmental values respectively under the concept of sustainable development, concludes that ‘[T]he balance seems to tip in favour of the protection of the environment’, and that ‘environmental protection

210 Ibid.
211 Ibid.
212 Ibid.
has developed to a certain extent at the expense of international economic law relating to development'. 214 In relation to the use of shared freshwater resources, it has been suggested that the principle of equitable and reasonable utilisation ‘operationalises’ the notion of sustainable development. 215 Brunée and Toope point out that

‘[A] link between equitable use and sustainability would promote common environmental interests of states in several respects. First, the linkage emphasises the need to consider the environmental context when balancing competing use interests. Below the threshold of transboundary harm, and even where there may be no current interference with the equitable share of another state, a sustainability criterion would articulate long-term environmental limits to water use. Second, the notion of sustainable development ties a state’s resource use into a broader international context. Because the concept applies both in the “micro” and “macro” context of environmental management, a state’s performance will be measured against local, regional, and even global sustainability criteria. The concept thus acknowledges the commonality of environmental concerns and the indivisibility of ecosystems.’ 216

Therefore, universal recognition of the application of the overarching objective of sustainable development to the law relating to the utilisation of international watercourses may be regarded as making applicable to this area of law the plethora of international rules and standards relating to environmental protection in general and to the protection of water quality and watercourse ecosystems in particular. Indeed, as authoritative a commentator as Charles Bourne, in the course of an analysis of the principles of equity, no harm and sustainability as included in the 1997 Convention, concludes that sustainability is a goal or objective which could only be attained by reliance on equity. 217 Similarly, Lowe concludes, in relation to the flexibility inherent in the application of equitable principles, that

‘These characteristics make equity particularly suitable for discussions in contexts where there are competing interests which have not hardened into specific rights and duties. This will be true primarily in areas where the law is

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216 Supra, n, at 67-68.
not highly developed. The nascent concept of intergenerational equity, and of equitable principles in environmental law, are examples.  

Despite criticism to the effect that the principle of equitable utilisation as articulated in the 1997 Convention does not go far enough in terms of achieving sustainability, Botchway concludes that ‘the Watercourses Convention does represent an advance on the previous judicial texts, especially the Helsinki Rules’. He points out that the doctrine of equitable utilisation adopted under the Convention, if considered in conjunction with the obligations to notify and co-operate, includes many of the features of sustainable development, noting that ‘[I]n many ways, the Watercourses Convention incorporates the concepts of polluter pays, integration of environmental concerns into economic planning, the precautionary principle, and EIA’. Further, he goes so far as to suggest renaming the concept borne of the marriage of sustainable development and equitable utilisation, stating that ‘[A]ll this can be recast in a modified version of sustainable development and equitable development, a hybrid concept – sustainable equity.’

It is also of great significance that the second sentence of the final version of Article 5(1), adopted under the 1997 Convention, refers expressly to the goal of ‘attaining optimal and sustainable utilisation’ of the watercourse ‘consistent with adequate protection of the watercourse’. When one considers the parallels between the principle of equitable utilisation and ‘the doctrine of “equitable principles – equitable result” consistently developed and applied by the ICJ in continental shelf delimitation

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218 V. Lowe, supra, n. 6, at 73.  
221 Ibid., at 223.  
222 Ibid., at 222 (original emphasis).
cases’; 223 it is clear that sustainability, along with all the environmental protection values inherent therein, is one of the key imperative ‘equitable results’. Equally, the jurisprudence developed by the ICJ on the principle of ‘proportionality’ as a function of equity should help to ensure that any uses of an international watercourse, no matter how beneficial in terms of socio-economic or other factors, would not be permitted where they result in a disproportionate adverse impact on environmental values and objectives.

In the Gabčíkovo-Nagymaros case, 224 it is clear that the International Court of Justice was concerned to ensure that, in the development of the Danube, environmental factors were to be given full consideration and accorded considerable significance in the determination of an equitable regime for the utilisation of the river. The Court referred to ‘this need to reconcile economic development with protection of the environment … aptly expressed in the concept of sustainable development’, 225 which Judge Weeramantry, in his separate opinion, considered to be ‘more than a mere concept, but a principle with normative value crucial to the determination of this case’. 226 Therefore, in the context of the utilisation of international watercourses, the ICJ is prepared to have regard to the evolving principle of sustainable development in order to identify and give effect to the environmental obligations inherent in the principle, as expressed in Article 5 of the 1997 UN Convention, of equitable and reasonable utilisation of an international watercourse ‘with a view to attaining optimal and sustainable utilization thereof’. However, of the various substantive and procedural elements which together constitute the concept of sustainable development, 227 the requirement that States conduct a transboundary EIA of projects or activities likely to cause significant harm to other States enjoys the clearest support in State and judicial practice, and so the clearest independent normative status, and can, in practical terms, exert the greatest influence on the attainment of sustainability and the discharge of the environmental obligations inherent in equitable utilisation.

225 Ibid., at 67, para. 140.
227 On the elements of sustainable development, see further, P. Sands, ‘International Law in the Field of Sustainable Development’, (1994) 65 British Yearbook of International Law, at 379. See also, Botchway, supra, n. 220, at 204-214.
4.2 Proportionality

It is apparent that the more specific concept of proportionality may impact upon the process of establishing an equitable and reasonable regime for the utilisation of shared transboundary waters in yet another way. It plays a significant role in identifying the nature of the environmental obligations contained in Articles 20-23 of the 1997 Watercourses Convention and thus in enabling States to discharge these obligations.\(^{228}\)

If, as seems certain, the obligations set out in Articles 20-23 to protect ecosystems and to prevent, reduce and control pollution harm are, like that contained in Article 7, subordinated to the principle of equitable and reasonable utilisation as set out under Articles 5 and 6, it becomes necessary to determine when pollution harm caused by utilisation of an international watercourse is to be considered *prima facie* or inherently inequitable and unreasonable and the principle of proportionality has an obvious and acknowledged role to play in such a determination. Also, it may be argued that a watercourse State’s general lack of compliance with its environmental obligations may be considered as a factor in the allocation of uses and share of international waters. For example, watercourse States are required under Article 20 to take joint action, where appropriate, to protect and preserve the ecosystems of international watercourses on the basis of the principles of co-operation and equitable participation and the International Law Commission’s Commentary to the 1994 Draft Articles provides that

> ‘the general obligation of equitable participation demands that the contributions of watercourse States to joint protection and preservation efforts be at least *proportional* to the measure in which they have contributed to the threat or harm to the ecosystems in question.’\(^{229}\)

Similarly, the Commentary to Article 20 further notes that a watercourse State’s share in the causing of environmental degradation has to be *balanced* against the benefits to be gained from mitigation of the problem by States suffering harm.\(^{230}\) Most significantly, the Commentary to Draft Article 21 notes that

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‘[State] practice indicates a general willingness to tolerate even significant harm, provided that the watercourse State of origin is making its best efforts to reduce pollution to a mutually acceptable level. A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to the watercourse State of origin was grossly disproportionate to the benefit that would accrue to the watercourse State experiencing the harm’.  

Therefore, the concept of proportionality may be employed to determine whether pollution harm caused or liable to be caused by certain uses of an international watercourse is inequitable within the meaning of the principle of equitable utilisation and therefore unacceptable in any equitable regime. Alternatively, it may be used to determine whether a watercourse State is acting in compliance with the various environmental obligations potentially applying to international watercourses, a factor which may be considered in allocating uses and shares in the waters, pursuant to equitable utilisation.  

Indeed, the two roles for proportionality identified in the Gulf of Maine case, i.e. as a factor to be considered in the delimitation itself and as a post hoc check on the equitableness of the result, each offer scope for the consideration of environmental factors in the determination of an equitable regime for shared watercourse utilisation. The former role is explicitly acknowledged in the formulation of equitable utilisation adopted under the 1997 UN Watercourses Convention in that several factors relevant to environmental protection are expressly included in the indicative list of factors to be taken into account pursuant to Article 6. The latter role allows the diplomatic or judicial decision-maker to ensure that the resulting utilisation regime fairly reflects the significance of various relevant environmental obligations found in conventional or customary law, in particular those contained in Articles 7 and 20-23 of the 1997 Convention.  

5 Conclusion  

There can be little doubt that equity has an increasingly significant role to play in the law relating to the allocation of shared natural resources. Franck puts forward a compelling explanation for this general development, stating that … justice has a tempering role to play when the apportionment of goods (as in a continental shelf) occurs in the context of an almost infinite  

\footnote{Commentary to Article 21, (1994) ILC Report, ibid., at 292 (emphasis added).}  

\footnote{Supra, n. 50, at 49.}
number of possible geographical, geological, topographical, economic, political, strategic, demographic, and scientific variables. In such cases “hard and fast” rules of apportionment can be applied only at the risk of achieving results which lead to moral outrage and law’s reductio ad absurdum.\textsuperscript{233}

He also argues that the speed of technological and scientific progress requires that legal systems seeking to impose principles of general application to State utilisation of shared resources must possess ‘a corresponding degree of flexibility’ and, further, that the great and widening inequality between developed and developing States requires that ‘the formal equality of states before the law must be made actual by recourse to notions of justice’.\textsuperscript{234} Most significantly for the purposes of this work, he asserts that ‘[J]ustice, as an augmentation of law, is also needed to protect those interests not ordinarily recognised by traditional law, such as the well-being of future generations and the “interests” of the biosphere’.\textsuperscript{235} Similarly, in relation to the inherent flexibility of equitable principles and their ability to allow a broadening of the scope of enquiry, Lowe observes that

‘equity also represents a fruitful approach to questions concerning access to shared resources, such as international watercourses, where it is more important to secure a solution which can be sustained in the future than one based upon a strict vindication of legal rights and duties which arose in the past. These contexts are in combination in cases where the need is not for a once-and-for-all allocation of rights, but rather for the establishment of an elastic framework for the building of a continuing relationship between the parties.’\textsuperscript{236}

This clearly demonstrates the suitability of equity as the cornerstone of modern international water resources law. In addition, as an ancillary benefit of the application or studied consideration of equitable principles in the context of water resource disputes, he points out that

‘Equity buttresses legal argument. A decision based on technical rules [which a decision on water resource allocation may, in some circumstances, appear to be] may be shown to be consistent with principles of justice and fairness. … It is in this manner that the flexibility which the law contains … can be directed so as to lead to a just conclusion.’\textsuperscript{237}

In relation to the rule of equitable utilisation of international watercourses in particular, Fuentes concludes that this rule

\textsuperscript{233} Supra, n. 8, at 79.
\textsuperscript{234} Ibid.
\textsuperscript{235} Ibid.
\textsuperscript{236} Supra, n. 6, at 73 (emphasis added).
\textsuperscript{237} Ibid., at 69.
‘cannot be interpreted as authorizing international tribunals to decide a dispute \textit{ex aequo et bono}. The rule has a normative content and its application requires weighing up all the prospective relevant factors which create equities in favour of the States concerned.\textsuperscript{238} While States are free to agree to any resolution they consider appropriate or expedient, judicial and arbitral decision-makers are required to follow precedent and other sources of guidelines in the selection and application of the criteria to be taken into account in deciding an equitable apportionment. With the ongoing elaboration of conventional guidance and increased judicial recourse to equity, the equitable principles guiding decision-making will become clearer and more predictable. Already, it is abundantly clear that in international water resource disputes, the factors to be considered most relevant will relate to the water needs of the States concerned, and vital human needs in particular, with factors related to the physical and geographical characteristics of the drainage basin relegated to secondary considerations.\textsuperscript{239} It is interesting to note that, although the ILA’s recently adopted 2004 Berlin Rules on Water Resources\textsuperscript{240} first list ‘[G]eographic, hydrographic, hydrological, hydrogeological, climatic, ecological, and other natural features’\textsuperscript{241} among the factors relevant in determining an equitable and reasonable use, they immediately go on to state that:

1. In determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs.
2. No other category of uses shall have an inherent preference over any other use or category of uses.\textsuperscript{242}

The application by the ICJ and arbitral tribunals of equitable principles, and of the principle of proportionality in particular, in the course of maritime delimitation disputes demonstrates the potential role for equity in the protection of environmental interests in the determination of equitable utilisation regimes for international watercourses. Despite the uncertain normative status of the various environmental protection obligations expressly included in the 1997 UN Watercourses Convention, application of the principle of proportionality should ensure that these obligations may not be completely ignored or dismissed out of hand in the course of judicial determination of such a regime of water utilisation.

\textsuperscript{238} \textit{Supra}, n. 41, at 411.
\textsuperscript{239} See further, Fuentes, \textit{ibid.}, at 412. See also, Chapter 6, \textit{infra}.
\textsuperscript{241} Article 13(2) (a).
\textsuperscript{242} Article 14.