Chapter- Three
Equitable Utilisation

3.1 Principles of International Water Law

From the preceding chapter, we can glean at least four principles for resolving conflicts over international watercourses:[1] absolute territorial sovereignty, territorial integrity, prior appropriation and equitable utilisation, it has been widely held that the equitable utilisation is the best principle.[2]

3.1.1 Absolute Territorial Sovereignty

The substance of this principle is that a state is fully free to use the waters flowing through its territory as it pleases and it need not pay heed to any restriction or prohibition on such use. This is the traditional view expressed by upstream states in order to

1 J. Lipper, "Equitable Utilisation" in A. H. Garretson, R. D. Hayton & C. J. Omstead (eds), *The Law of the International Drainage Basins*, New York: Oceana Pub., 1967, pp.16-26; see O. McIntyre, "The Law Relating to the Use of Shared International Water Resources: 4 Tools for Equity" (1998) in 6 *WI*, Chancery Law Pub., pp. 23-24; also see M. Fitzmaurice, "Water Management in the 21st Century" in A. Anghie and G. Strurgess (eds), *A Legal Vision of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, the Hague: Kluwer Law, 1998, pp. 427-429.

2 B. R. Chauhan, *Settlement of International and Inter-State Water Disputes in India*, Bombay: Indian Law Institute, 1992, pp. 21-40. There are some scholars who hold a different view on whether there are only four rules on the subject. Chauhan has argued that there are seven prevailing rules, including the doctrine of riparian rights, prior appropriation, territorial sovereignty, natural flow, equitable apportionment, community of interest, and the equitable utilisation theory.

serve their own interest at the price of other basin states. It is a notorious principle that is heavily objected to by the international community. It is also known as the Harmon Doctrine, based on the legal opinion provided by the then US Attorney General to the Secretary of State in a dispute over the sharing of waters of the Rio-Grande River between the USA and Mexico in 1896. Neither the international community, nor the United States itself, ever accepted this theory. Smith has termed it as radically unsound and as a ground for legality unaccepted.[3] However, its mention has been made by some states; India in 1948, temporarily interrupting the flow of the river from India to Pakistan;[4] China has asserted it even as recently as 1997 during discussions on the UNCIW at the UNGA,[5] Austria made similar reference to the principle.[6] However, it has never been a principle recognised by most nations but rather heavily deplored for its basic foundation.[7]

3.1.2 Territorial Integrity

Despite the semantic similarities with the title of the first principle, this is just the opposite of the earlier rule. It pledges the right of a downstream state on the ground that upstream states cannot diminish, or change the flow of an IWC. This principle was invoked by downstream states such as Argentina, Egypt, Spain, Bangladesh, Syria, and Iraq against their

3 H. A. Smith, *The Economic Uses of Waters*, London: P.K. King and Son, 1931, p. 8.

4 J. Lammers, *Pollution in International Watercourses*, the Hague: Martinus Nijhoff, 1984, pp. 318-319.

5 Press Release, including UNGA vote on the UNCIW 21 May 1997: www.un.org/law/ilc/texts/status.htm Gao Feng has said that the "state had indisputable sovereignty over a watercourse which flowed through its territory."

6 C. B. Bourne, "The Right to Utilize Water of International Rivers" (1965) in III *CYBIL*, p. 205.

7 S. C. McCaffrey, "The Harmon Doctrine One Hundred Years Later: Buried, not Praised" (1996) in 36 *NRJ*, p. 725.

upstream neighbours. As we noted in the Lake Lanoux arbitration, Spain's objection to the French diversion was rejected on the ground that there is no customary international law that prohibits such a diversion, though it could be prohibited through a bilateral treaty.[8] In substance, this rule could be called a veto power of the downstream state because it prohibits any significant use of water by upstream states without the consent of the downstream states. The no harm rule supports this doctrine.

In the context of Indo-Nepal water relations, India objected to several Nepalese irrigation and hydropower projects, i.e., the Sikta, West Rapti (Bhalubang-Deokhuri), Kankai, Babai, and Tamur hydropower projects, stating that these works would violate the principle of territorial integrity.[9] At the end of several studies carried out, donors like the World Bank, ADB and Saudi Fund declined to finance those projects on the ground of downstream objections. It is worthwhile to mention the opposite stand taken by India whilst it was negotiating with its downstream neighbour, Pakistan, in the Ganges case and also with Pakistan during the 1948 dispute over the allocation

8 R. Benhard (ed), *Encyclopaedia of Public International Law: Decisions of International Courts and Tribunals and International Arbitration*, the Hague: North-Holland Comp., 1981, pp. 166-167.

9 B. G. Verghese, *Waters of Hope*, New Delhi: Oxford & IBH Pub., 1990, p. 342. The Rapti-Bhalubhang Project, in which Canadian finance was committed, collapsed as a result of Indian objections. Initially they had agreed with the project and later changed their stand. The Babai irrigation project was also cancelled because of the Indian objections which the Kuwait Fund had agreed to finance. Also see H. M. Shrestha and L. M. Singh, "The Ganges-Brahmaputra System: A Nepalese Perspective in the Context of Regional Co-operation" in B. G. Verghese, & T. Hashimoto (eds), *Asian International Waters: From Ganges-Brahmputra to Mekong*, Oxford: Oxford University, 1996, p. 81-94.

of the Indus river waters.[10] IWL does not support this principle. This issue will be further addressed in Chapter Four.

3.1.3 Prior Appropriation

This is a bit more advanced than the two principles discussed above. Prior appropriation provides that the state which first utilises the waters of an international river acquires the legal right to continue to receive that quality and quantity of water in future and cannot be deprived of it without its consent. In practice, however, the more developed and resourceful countries have had their water appropriation before and often are therefore in a more beneficial position than the weak or poor countries. Therefore, it could be argued that this theory favours more developed states at the expense of weaker states and is not based on a fair and equitable foundation. There are several examples of this.

In the Nile case, downstream Egypt has always laid claim to its historic right over the waters of the river and threatened the poorer and weaker upstream state, Ethiopia, which is not able to use waters that originate and flow from its territory.[11] It is an obvious but notorious disparity against international law norms. Such conduct on the part of a downstream state does not provide equity, and a fair share of waters for such vulnerable states like Ethiopia. In this case, Egypt warned that she would declare war if the waters were utilised by upstream states and also offered the transfer of some water to Israel if she would be ready to resolve the Palestine problems.[12]After the conclusion of the Camp David Treaty between Egypt and Israel, President Sadat talking to the Israeli press, had unveiled a plan for a pipeline to bring the Nile water to the recently returned Sinai.

10 India has now taken opposite stand while dealing with Nepal.

11 N. Kliot, *Water Resources and Conflict in the Middle East*, London: Routledge, 1994, p. 68.

12 *Ibid*.

Later, in negotiation with the Israeli PM, he put forth this proposal officially in 1981.[13] It was reported that Israel refused the proposal.[14]

When Ethiopia, sharply criticised the Egyptian proposal stating that it would be a misuse of its share of the Nile, President Sadat warned Ethiopia in stern words:

> "we do not need permission from Ethiopia or the Soviet Union to divert our Nile water. If Ethiopia takes any action to block the Nile waters, there will be no alternative for us but to use force."[15]

The responsible leaders of the Middle East speak about security, which means water security. President Sadat had once expressed the view that "the only matter that could take Egypt to war is water."[16] Above all, these claims were clearly based on her historic rights over the Nile waters or 'prior appropriation'. On the contrary in the parallel situation over the Tigris and Euphrates, water supply is denied by Turkey to Iraq and Iraq's historic and ancient right over these waters is not safeguarded.[17] The situations in the Jordan, Ganges, Brahmaputra and Indus are quite different. However, most of the above examples are explicitly linked with the idea of prior

13 A. T. Wolf, *Hydro Politics Along the Jordan River: Scarce Water and Its Impact on the Arab-Israeli Conflict*, Tokyo: United Nations University, 1995, p. 57.

14 A. T. Wolf, "Hydro-Political History of the Nile, Jordan and Euphrates River Basins" in A. K. Biswas (ed), *International Waters of the Middle East: From Euphrates-Tigris to Nile*, Oxford: Oxford University, 1994, p. 30; also see *ibid*.

15 *Ibid.* p. 31.

16 D. A. Caponera, "Legal Aspects of Transboundary River Basins in the Middle East: The Al Asi (Orontes), The Jordan and the Nile" (1993) in 33 *NRJ*, pp 631-632.

17 *Supra* note 11, pp. 158-172; see A. Soffer, *Rivers of Fire: the Conflict over Water in the Middle East*, Lanham, Maryland: Rowman & Littlefield, 1999, pp. 88-112.

appropriation or existing use, one of the relevant factors to be taken into account under Article 6 of the UNCIW.

In practice, this rule is most often inimical to the interest of upstream states because ancient civilisations and utilisation of water took place along the banks of rivers in downstream states, for example in ancient Egypt, India, and China. Thus, they benefit from this concept. Conversely, the weaker upstream states, like Nepal and Ethiopia, now have to contend with massive prior appropriation by other downstream neighbours, which hinders them from utilising such common waters. In these circumstances, when a poor and vulnerable country needs co-operation (in finance, technology and skills), it finds itself in the unenviable position of not being able to develop any water projects on account of the objections raised by asymmetrical neighbours. It is, therefore, an obvious injustice and against the spirit of the Charter of the UN and of Articles 5, 6, & 7 of the UNCIW.[18]

3.1.4 Equitable Utilisation

This is the most widely recognised and practiced principle in the resolution of water related problems. It is based on equity, fairness and norms of distributive justice in which the interests of every contestant country are taken into consideration. Equitable utilisation is central to this book and the rest of this chapter is devoted to its study. IWL recognises equitable utilisation as a set of well-established rules, which are also

18 There are numerous instances of projects being cancelled due to the objection of riparian states on such grounds. In the Nile project western funding was cancelled as it was in Ganges, Kanaki, Tamur in Nepal and several other parts of the world. At the same time rich and resourceful states were able to develop any project against the spirit of IWL For example the Farakka, Chicago diversion, Three Gorges and the Nile's case explicitly ignore the right of the nine upper riparian states for which international law and the international community have remained mere spectators.

widely recognised as rules of customary international law and supported by state practice, judicial prouncement and the writing of publicists.

3.2 The Rule of Equitable Utilisation in IWL

In order to share and allocate waters in an IWC, Article IV of the Helsinki Rules on the
Uses of Waters of International Rivers provides:

> "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin". [19]

This article is supplemented by Article V,[20] which provides the factors in determining what uses are reasonable and equitable:

"1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.
2. Relevant factors to consider include, but are not limited to:
   (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;
   (c) the climate affecting the basin;
   (d) the past utilization of the waters of the basin, including in particular existing utilization;
   (e) the economic and social needs of each basin state;
   (f) the population dependent on the waters of the basin in each basin State;
   (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
   (h) the availability of other resources;

19 ILA's Helsinki Rules (1966), pp. 486-488.
20 *Ibid*.

   (i) the avoidance of unnecessary waste in the utilization of waters of the basin;
   (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
   (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.
3. 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 the reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

Thus, from the assessment of Articles IV and V, it can be argued that there is no single definition of what equitable means. Its assessment, however, is to be based on a number of factors. Therefore, the application of equitable utilisation could be different for different drainage basins considering the particular circumstances prevailing in each basin.

Regarding Article 5 on equitable and reasonable utilization and participation, the UNCIW also holds similar attitudes, which stipulate that: [21]

"1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by the watercourse State with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
2. Watercourse States shall participate in the use, development and protection of an international watercourse

21 36 ILM (1997), pp. 700-720.

in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention."

Each watercourse has unique features that demand separate solutions. However, the justifiable principle to address each circumstance is that of reasonable and equitable utilisation. It embraces equity, rationality, fairness, justice, equality and other important elements of sustainability. In determining whether a use is equitable or not, factors relevant to equitable and reasonable utilization as envisaged in Article 6 of the UNCIW should be considered: [22]

"1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all the relevant factors and circumstances, including:
   (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
   (b) The social and economic needs of the watercourse States concerned;
   (c) The population dependent on the watercourses in each watercourse State;
   (d) The effects of the use or uses of the watercourse in one watercourse State on other watercourse State;
   (e) Existing and potential uses of the watercourse;
   (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
   (g) The availability of alternatives, of comparable value, to a particular planned or existing use.
2. In the application of article 5 or paragraph 1 of this article, watercourse states concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

22 *Ibid*.

3. 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."

Again, the role of equity is relevant in fixing the conditions of what is equitable and reasonable use of such waters. In summary, these rules are meant to resolve any conflict or dispute between the contestant states in a fair manner.[23] These rules clearly set out the conditions and prerequisites that need to be taken into consideration when determining whether a use is equitable or not.

The use of an IWC should be undertaken in such a way that it will not prejudice or be harmful to any other watercourse states. The obligation not to cause any harm to the other watercourse state is an inseparable part of equitable and reasonable utilisation. The other aspect of equitable utilisation is to share the benefits and costs of any watercourse project developed by a watercourse state. This implies that if work done by an upstream state yields any benefits for the downstream state, it must be shared on the basis of a cost benefit-analysis; otherwise, it could be a case of unjust enrichment.[24] Furthermore, equitable utilisation requires a continuous process of giving information, negotiation and cooperation among the riparian states for the beneficial use of a shared watercourse.[25] The rule of equitable utilisation was predominantly developed and enunciated for the division, allocation and sharing of marine resources and IWC's among contestant states. Equitable utilisation has emerged as a rule of customary international law and is the cardinal rule in the area of delimitation of the

23 *Supra* note 1, pp. 16-25.
24 *Factory of Charzow case* (1928), PCIJ Reports, p. 47.
25 *Supra* note 4, p. 548; S. C. McCaffrey, *The Law of International Watercourses*, Oxford: Oxford University, 2001, p. 340.

continental shelf, allocation of marine resources and IWC issues. However, the political use of equity and the use of equitable utilisation in legal spheres are different. The political use of these words is always contentious and disputed, whilst the legal sphere recognises it as a customary rule of international law. For example, the use of equity in South-North relations, particularly in respect of international cooperation, entails providing resources and technologies, an issue that is always challenged by the North.[26] The political concept of equity has been used to get unconditional financial resources from the North, whilst the legal use of equity is the application of the Articles 5 and 6 of the UNCIW and the principle enunciated by the ICJ in numerous cases as evaluated in this research. The legal concept of equity is well defined and sufficiently certain for implementation. With regard to the political concept of equity, the North has always maintained that it is not legally or even morally bound to help the South, whilst the South has taken the reverse position on these issues. Hence it is fair to say that the political concept of equity is vague and limited, perhaps to the point of being a slogan, and without compromise between two groups is not achievable. To illustrate this point, CERDS and NIEO are always disputed. Thus the political use of equity remained a disputed whilst its legal use has been unanimously recognised by both camps.

After the prolonged and sustained effort of the ILA in its Helsinki Resolution 1966, the rules of equitable utilisation as determinants of the allocation and sharing of water resources among the riparian countries were adopted, which has become the substantive law ever since.[27] However, they are an early development made by non-governmental organisations. At the same time, it should be borne in mind that the outcome of the

26 R. P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries*, Dordrecht: Martinus Nijhoff, 1987, pp. 111-120.

27 ILA report of the fifty second conference (1966), pp. 478-532.

rules is the result of largely accepted state practices, scholarly writing and case law. That is to say, it is a reflection of the existing customary rules of international law.[28]

There is a set of rules that provide for the rights, duties and responsibilities of watercourse states in matters relating to the sharing of resources. The basic rule is contained within Article IV of the Helsinki rules.[29] The formulation of those rules was undertaken as a collection of general principles drawn from regional treaties, judicial pronouncements and academic writings on the subject. The ILC has been involved in the codification and progressive development of international law since 1970. After sustained efforts, the ILC submitted its draft of rules to the UNGA (Sixth Committee). Subsequently, with necessary debate, modification and negotiation at the UN, adopted the UNCIW on May 20, 1997. The convention is more advanced and refined than the Helsinki rules. It set out the basic rule(s) in its Articles 5, 6 & 7.[30]

The provisions made in the UNCIW describe the factors that need to be taken into account. It is important to define the relevant factors to be considered that will significantly help resolve the dispute during negotiations and other diplomatic efforts to avert and mitigate future conflicts. The socio-economic and demographic aspects of the populations, and the existing and potential uses are given equal weight in order to determine whether or not a particular use is equitable. It is useful to mention here that in the context of rejection of the population factor (huge population was a reason to demand priority) in determining equitable utilisation by the ICJ in its decision of the delimitation of a continental shelf, it was thought essential to define those elements clearly, as mentioned

28 B. R. Chauhan, *Settlement of Disputes in International Drainage Basins*, Berlin: E. Schmit, 1981, p. 457; also see *supra* note 4, p. 548.

29 ILA report of the fifty second conference, Helsinki (1966), p. 486.

30 36 ILM (1997), p. 700.

in Article 6 of the UNCIW.[31] In order to give emphasis to the population factor it was essential to put it expressly to avoid any confusion created by the above judgment. In the case of the allocation of resources between two developing countries, the less developed country, for example as between India and Nepal, Nepal, should get priority according to the rule of equity. This is by analogy with the tradition of developed countries providing finance to the development effort of developing countries, to less developed countries at different stages of development.

It can be argued that developing and vulnerable nations could benefit from socio-economic, and population factors stipulated in Article 6 of the UNCIW, whilst sharing and allocating the benefits from common water resources.[32] The next significant development is the interpretation of equitable utilisation in the context of the Gavcikovo-Nagymoros case by the ICJ, which clearly recognised equitable utilisation as a basic rule in international law that gives impetus to Articles 5 and 6 of the UNCIW.[33] In this case, the court held the view that according to the treaty of 1977, Hungary had agreed to share the benefits from the Danube River. Non-implementation of the treaty, however, did not mean that it had forfeited its right over the reasonable and equitable sharing of the benefits from there on.[34]

31 Judge Weermantry's opinion in the Maritime Delimitation in the Area between Greenland and *Jan Mayen* case (Den.v.Nor.) ICJ Reports (1993), p. 268: "no general proposition can be laid down that the population factor is in all cases irrelevant."

32 X. Fuentes, "Sustainable and Equitable Utilisation of International Watercourses" (1998) in 69 *BYBIL*, p. 119; also see principle 6 of the Rio Declaration proclaiming that the special situation and needs of developing and those most environmental vulnerable, shall be given special priority.

33 In the *Gavcikovo-Nagymaros* case interpretation of equitable utilisation has been construed as a skeleton rule of shared natural resources between the states, in 37 ILM (1998), para. 85, p. 191.

34 *Ibid*. p.190.

The equitable utilisation rule reciprocates with the no harm rule in Article 7, the obligation not to cause significant harm and to take appropriate measures to prevent significant harm to the other watercourses states:

> "2 where significant harm is nevertheless caused to other watercourses States, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."[35]

Article 8 prescribes the general obligation to cooperate. Similarly, Articles 20 and 21 oblige states to prevent, reduce and control pollution. Non-compliance with those provisions could be alleged as a breach of Articles 5 and 6, implying inequitable use of water resources.[36]

In practice, however, there have been very bitter experiences of non-co-operation, which have led to a situation of war.[37] The Arab decision to build an all-Arab diversion of the Jordan headwaters to preclude the Israel National Water Carrier ended three years later when Israeli tank and air strikes halted

35 UNCIW: Article 7(2).

36 *Ibid*. Article 20/21.

37 *Supra* note 13 p. 173; also see *supra* note 17, pp. 639-641: During the 1948 war, the Rutenberg Electricity generating plant was destroyed by Israel to avoid exclusive control of the Jordan and Yarmuk waters by Arabs. Arab states in 1964, had taken a steps to build dams in order to utilise water from the Wazzani, Hasbani and Banyas rivers, for irrigation in Lebanon, Syria and Jordan, after conveying water to the Jordan valley through the East Ghor canal. Israel considered this is an aggressive action that threatened its water resources and destroyed its work site in an attack.

construction on the diversion. It was in June 1967 that the six-day war changed the regional riparian positioning: by annexing the Golan Heights of Syria, Israel acquired two of the three Jordanian river headwaters and the recharge zone for mountain aquifers that currently supply about 40% of Israel's fresh water supply.

3.3 Procedural Law

In order to attain the notion of equitable utilisation of an IWC, agreements are generally regarded as the best means of avoiding disputes between co-basin states. Thus, states are required to consult and negotiate about the utilisation in question. If there were any adverse effects on the other riparian, mutual consultation and discussion are required so that any harm is mitigated, averted or even compensated for through concluding an agreement to this effect. The Helsinki Rules in Articles XXIX to XXXVII provide such a procedure, i.e., mediation, consultation, negotiation, the use of joint agencies and good offices and, ultimately, arbitration as a means of preventing and settling the disputes.[38]

These procedural rules are incorporated in Article 4 of the Convention relating to the Development of Hydraulic Power affecting more than one State and Protocol of the Signature - Geneva 1923.[39] Ever since, this has always been asserted in major publications, treaty regimes and instruments. Besides this provision, from the perspective of the ICJ, it has been firmly asserted in numerous judgements, e.g., *the North Sea*

38 Chapter Six, Articles 26-37 of the Helsinki Rules stipulates procedures for the settlement of disputes.

39 "If a contracting state desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other contracting state, the states concerned shall enter into negotiations with a view to the conclusion of agreement which will allow such operation to be executed."

Continental Shelf Cases 1969[40] and the *Fisheries Jurisdiction Case* 1974.[41] In both cases, the former was concerned with the delimitation of the Continental Shelf and the latter with the apportionment of shared fisheries. In these cases, the court held that the parties were under the duty not to act unilaterally but to negotiate in good faith in an attempt to reach an equitable settlement of those issues in dispute.

3.3.1 The Duty to Consult and Negotiate

Bourne has observed that similar to other disputes in international law, international drainage basin disputes are to be settled in one of three ways:

> "by the agreement of the parties, reached after consultations and negotiations and perhaps aided by the mediation and conciliation of a third party; by submission to third party determination; by the use of force" as ensured under chapter VII of the UN Charter.[42]

Numerous instruments have been adopted to consult and negotiate in case of disputes in the execution of any project, e.g., the Declaration of the Seventh Inter-American Conference held in Montevideo in 1933, the resolution adopted by the Inter-American Bar Association at Buenos Aires in 1957, Article 6 of the Salzburg resolution in 1961 of the Institute of International law, and the document of the Committee on Electric Power of the Economic Commission of Europe in 1954.[43] The Lake Lanoux Tribunal, in its decision in a case

40 ICJ Reports 3, (1969) pp. 45-52.

41 ICJ Reports 3, (1974) pp. 1-70.

42 C. B. Bourne, "Procedure in the Development of International Drainage Basins: the Duty to Consult and to Negotiate" (1972) in X *CYBIL*, p. 212; also see Bourne, "Mediation, Conciliation and Adjudication in the Settlement of International Drainage Basin Disputes" (1971) in X *CYBIL*, pp. 114-158.

43 *Ibid*.

between France and Spain held a similar view (already discussed above). However, it rejected Spain's contention that under customary international law, France is compelled not to initiate any work on the disputed watercourse until it has received the consent from Spain.[44] The ICJ has explicitly supported the view in numerous cases that states are under the obligation to consult and negotiate in the event of any conflict whatsoever in undertaking any project on an IWC.[45]

There are some extreme instances, however, where the duty to consult has been explicitly ignored or knowingly violated. For instance, the Jordan River Diversion scheme of 1953 unilaterally proposed by the Arabs and aiming to harm provoked a war in 1967, with Israel military damaging the Arabs diversion work.[46] The Chicago diversion that involved the transfer of waters from the Great Lake Basin to the Mississippi River basin by the USA in Chicago caused significant harm to Canada.[47] The Farakka Barrage unilaterally constructed by India in 1961,[48]caused much harm to East Pakistan. Besides, which India's temporary interruption of the Indus waters to Pakistan was also against those laws.[49] Turkey temporarily interrupted the entire flow of the Euphrates and

44 *Supra* note 8, pp. 166-167.

45 *North Sea Continental Shelf* Cases (1969), *Fisheries Jurisdiction* (1974) and *Gavcikovo-Nagymaros* case (1997).

46 *Supra* note 13, p. 57; also see *supra* note 11, p. 68.

47 *Supra* note 6 p. 221; also see P. K. Wouters, "Allocation of the Non-Navigational use of International Watercourses: Efforts at Codification and the Experience of Canada and the United States" (1992) in XXX *CYBIL*, pp. 60-63: This diversion has remained a bitter experience for the two nations.

48 *Supra* note 9, p. 379, also see C. K Sharma, *Water and Energy Resources of the Himalayan Block*, Kathmandu: S. Sharma, 1983, p. 278; also see B. Crow, A. Lindquist & D. Wilson, *Sharing the Ganges, The Politics and Technology of River Development*, New Delhi: Saga Pub., 1995, p. 66.

49 Y. Claude Acceriez, "The Legal Regime of the Indus" in R. Zacklin & L. Caflisch (eds), *The Legal Regime of International Rives and Lakes*, Dordrecht: Martinus Nijhoff Pub., 1981, pp. 396-397.

Tigris for 27 days in order to fill up the Ataturk Reservoir, which escalated the tension with further downstream countries, Syria and Iraq in 1990. However, a trilateral meeting held later in Ankara was able to sort out the problem.[50]

Apart from these exceptional instances, watercourse states are usually willing to try to settle their disputes through consultation and negotiation. State practices suggest this notion.[51] The UNCIW stipulates in its Article 8, the general obligation to cooperate; Article 9, the regular exchange of data and information; and, Article 10, the relationship between different kinds of uses. In the event of conflict on the uses of an IWC, it shall be resolved with reference to Articles 5 to 7, with special regard to the requirement of vital human needs. Part III on planned measures, from Articles 11 to 19, explicitly asserts the procedural underpinnings of negotiation, exchange of data and statistics. The aim of those procedural rules are to inform about the proposed project in detail, notify, and respond to the possible effect of such use, the time being fixed as six months for completing the notification and making objections (if any), and replying to notification. The consequence of not responding to notification is that the state in default cannot raise objections to the proposed scheme. The process of consultation and negotiation concerning planned measures and urgent implementation of planned measures is also dealt with. The core of these procedural underpinnings is to encourage the transparency of a proposed project and to ensure that it is for maximising the benefits with no significant adverse effects to

50 J. Kollars, "Problems of International River Management: The Case of the Euphrates" A. K. Biswas (ed), *International Waters of the Middle East From the Euphrates Tigris to Nile*, Oxford: Oxford University, 1994, pp. 48-49: GAP (Turkish acronym), Turkey's South Anatolia Development Project, which incorporates construction of 21 dams and 19 hydropower projects. One million hectares of land are scheduled to be irrigated with water from the Euphrates and 625,000 hectares from the Tigris river waters, a total of 7500 MW installed capacity of hydroelectricity with an average annual production of 2.6 billion kwh. This in turn represents 19% of the 8.5 million ha of the economically irrigable land in Turkey and 20.5% of the country's hydropower.

51 *Ibid*.

the other watercourse states. Other elements include cooperation between watercourse states in the event of any injury, the obligation to mitigate, avert or eliminate such injury or, alternatively, the payment of reparation in case of injury inflicted. Excluding some exceptional instances, co-basin or watercourse states are usually willing to try to settle their water disputes by consultation and negotiation.[52]

3.3.2 Discharge of Duty

The basic element of the Law of Treaties is to ensure that the parties will implement the provisions of a treaty in good faith.[53] Judge Lauterpacht adopted the good faith concept in the *Norwegian Loan* Case, where he propounded: "unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law." [54] Similarly, in *Interhandel* he spoke of "the abiding duty of every state is to act in good faith."[55] In *the North Sea Continental Shelf* judgement the ICJ accepted this view, it was based on the equitable principle for delimiting the Continental Shelf between adjacent states on "a foundation of very general precepts of justice and good faith."[56] It further states:

> "… the parties are under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation; … they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modifications of it…"[57]

52 Of the 253 treaties on the non-navigational use of international rivers included in the volume prepared by the Secretariat at the United Nations and published in early 1960 at least 116 indicate that no undertaking will be carried out which make any change in the regime of a river without the consent of the other country. E. Fano," Brief Comments on the United Nations Water Conference" in Albert E. Utton and L. Teclaff (eds), *Water in Developing World,* Colorado: Westview Press, 1978, pp. 267-269.

53 Article 26 of the Vienna Convention on Law of Treaties, 8 ILM (1969) p. 685.

54 ICJ Reports 9, (1957) p. 53.

55 ICJ Reports 6, (1959) p. 113.

56 ICJ Reports 3, (1969) pp. 46-47.

The principle of good faith requires states subject to this duty to continue consultation and negotiation until they reach an agreement. The PCIJ in its advisory opinion of October 18, 1931 concerning *the Railway Traffic* case between Poland and Lithuania stated:

> "… an obligation to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an agreement, and is in consequence obliged to conclude the … agreements."[58]

Later, in a case where the same approach was taken by the ICJ, in its advisory opinion on *The Status of South-West Africa*, the court denied that a state which has assumed an obligation to make an agreement with another state was in fact under an obligation to reach an agreement with it. The court had further made it clear that the parties must be free to accept or reject the terms of a contemplated agreement. No party should impose its terms on another party.[59]

The ICJ in the *Gavcikovo-Nagymoros* case again endorsed the principle.[60] Articles 8 & 9 of the UNCIW state the same provision between watercourse states. Whilst carrying out any project in an IWC, Articles 11-19 have stipulated detailed provisions, as briefly discussed above. These provisions spell

57 *Ibid.* p. 47.

58 PCIJ Ser.A/ NO 42, (1931), p. 116; also see Bourne, *supra* note 42, pp. 225-226.

59 ICJ Reports (1950) pp. 128 &139.

60 37 ILM, (1998), para. 78, p. 190.

out how to discharge and dispense the requirements of these Articles. Compliance with these Articles enhances cooperation, prevents conflicts and encourages the notion of equity.

Therefore, international law imposes on a basin state the obligation to consult and negotiate in good faith with co-basin states. As Bourne advocates, the international legal obligation imposed on watercourse states is the same: that is, not to cause any harm from their own work.[61] The view is established by the UNCIW and pronouncements of courts and tribunals as evaluated earlier.

From the legal viewpoint, the UNCIW is applicable to all member states equally under all circumstances. However, in practice, it is applied against those that are weak, vulnerable and poor. For instance, the construction of the Aswan dam on the Nile was not legally right as per the notion of the above rule that the construction must not adversely affect other riparian countries. In this case, Egypt had not fulfilled its duty to consult and negotiate. Even then, the mammoth work was undertaken by the Soviet Union when the western nations refused to get involved because of the dubious legality of this construction project.[62] Even though the western countries and UN agencies refused to get directly involved, the construction of the Aswan Project was carried out against interests of eight other co-riparian countries. Similarly, India also undertook the

61 C. B. Bourne, "Procedure in the Development of International Drainage Basins: Notice and Exchange of Information"(1972) in 22 *UTLJ*, p 205; also see R. Rosentock, "Current Development: Forty Sixth Session of the International Law Commission- International Watercourses" (1995) in 89 *AJIL*, p. 392.

62 A. K. Biswas, "Indus Water Treaty: The Negotiating Process" (1992) in 17 *WI*, p. 201. He asserted that international funding agencies have also declined to provide loans for development of international waters, unless the countries concerned reach a mutually acceptable treaty. Without external financial assistance, developing countries have been unable to construct capital intensive water development projects on international rivers.

construction of the Farakka dam by means of her own resources when foreign involvement was denied, regardless of Pakistan's objection.[63] Such a notorious "might is right" attitude was also exhibited in the Chicago diversion case.[64]

It is the argument of the author that if recourse to international law were taken to seek riparian clearance, the proposed undertakings mentioned above would have been judged illegal. In such circumstances, states are able to carry out such illegal work only if they are financially and technically self-reliant and international law cannot prevent them from doing so (or at least has not done so to date). As poor nations with their weak economic and power base cannot carry out such works, their plight is one of victimisation through discrimination. What needs to be done is that illegal work must be stopped, whether through the use of economic sanctions, trade restrictions, or any suitable means as stipulated by the UN, including by Security Council resolution.[65] If the international community were willing to do so, it would lead to the realisation by all peoples of the world that IWL has relevance and can be implemented. Otherwise, the creation of a system for encouraging the implementation of the legal rules and discouraging the breach of its provisions would be the most desirable option.

63 *Supra* note 6, p. 221; also see *supra* note 48 (Ganges), p. 64-68: India temporarily interrupted Indus waters to Pakistan in 1948, against Pakistan's historic and consumptive right.

64 *Ibid*. Also see D. C. Piper, "International Law and Environment for Municipal Litigation: The Chicago Diversion Case" (1968) in 62 *AJIL*, p. 451.

65 D. J. Harris, *Cases and Materials on International Law*, London: Sweet & Maxwell, 1998, pp. 1057-1060. Appropriate measures are stipulated in chapter 7, Articles 39-51 of the UN Charter. Economic blockades were imposed on Iraq and Libya; such blockades may be appropriate to ensure compliance with these laws.

3.4 Origin and Development of Equity

Equity can be described as synonymous to the basic notion of fairness and natural justice. It is also directly related to the idea that human behaviour is directed by common moral, ethical and cultural principles. Equity can also be regarded as a constructive, positive and liberal concept that helps resolve conflicts and tensions through the reconciliation of conflicting interests. Thus, it has become a significant element of the political, economic and legal spheres of modern society,[66] reflected in democratic ideals as well as in the common and civil law systems of the world.[67]

An attempt has been made to provide an analytical description of the development of equity in terms of national and international political as well as legal systems. In the legal sphere, equity has played a crucial role in resolving conflicts in the sharing and allocation of water and is regarded as the best tool to reconcile the interest of each contending party to its satisfaction. The role of equity in shared natural resources and its relation to IWL will be dealt with. Finally, the ICJ's jurisprudence on equitable utilisation shall be critically assessed based on the study commensurate with state practice and its relevance i.e., for future posterity. The interpretation of inter-generational (right of present and future generations) equity and the need of a NIEO in order to bridge the gap between the

66 S. Chowdhary, "Intergenerational Equity: Substratum of the Right to Sustainable Development" in S. Chowdhary et al (eds), *The Right to Development in International Law*, Dordrecht: Kluwer Academic Pub., 1992, p. 241.

67 D. A. French, "The Role of International Law in the Achievement of Intergenerational Equity" (1999) in 31 *ELR*, p. 10469; also see J. Kokolt, "Equity in International Law" in F. L. Tooth (ed), *Fair Weather? Equity Concerns in Climate Change*, London: Earthscan, 1999, p. 173.

North and the South will also be evaluated in the context of the demand for an equitable society in the modern era.[68]

Equity developed in part due to shortcomings in the common law. Frank and Sughrue have argued that the development of equity in municipal legal systems (civil and common law) has evolved in three stages:

> "First, the sovereign granted dispensations to subjects exposed to inordinate hardship in a specific situation. Second, precedents accumulated, evolving into a system of equitable norms parallel to the main body of the law and displacing the system of royal dispensation. In the last stage, equitable principles became a part of the law."[69]

Equity acts in this sense to provide a fair solution to disputes by reconciling conflicting interests where there is no clear law. To equity as a 'softener' of the common law, we can add the notion of distributional equity, although it is as yet only an emerging norm, with a good deal of political content. Distributional equity suggests that richer states are normally bound to distribute at least some of their resources to poorer states so as to ensure a more equal world. It may be useful to distinguish between the overlapping meanings of the term equity. As stated earlier, in the common law, the concept of equity has been used to bridge the lacunae, remove the rigidity of law for fairness and to select one of the best interpretation of law for ensuring justice. But the expression 'distributional equity' refers more to the concept of providing a better life for the people of the developing world. The present gap in the

68 U. Baxi, "The New International Economic Order, Basic Needs and Rights: Notes towards Development of the Right to Development" (1983) in 23 *IJIL*, pp. 225-245.

69 T. M. Frank and D. M. Sughrue, "The International Role of Equity-as-Fairness" (1993) in 81 *GLJ*, p. 564; see M. Akehurst, "Equity and General Principles of Law" (1976) in 25 *ICLQ*, pp. 801-825; also see R. A. Newman, *Equity and Law: A Comparative Study*, New York: Oceana Pub, 1961, p. 34.

development and life standards of the North and South is huge and the poverty in the South is terrible. There are billions of people who are living below the $ 1 daily income and they are deprived of the minimum amenities of life. The concept of achievement of the target of halving world poverty by 2015 is based on the idea of distributional equity in which it is certainly possible to justify the notion of preferential treatment for developing states.[70] As described below, the notion of environmental protection and sustainable development in which the developed world is required to provide more funding and technology to developing countries to carry out sustainable development stresses the idea of distributive justice.

Equity has developed into a major legal system encompassing the civil and common-law systems, albeit the two system's approaches differ. The common law system developed in England as a separate system of law with its own normative status. Equity is not only a principle but also a collection of rules. As described by Rossi

> "the common law eventually freed equity from its restrictive function 'as a means of correcting specific laws' and in so doing, made equity 'an independent source of fresh rules of law' and, indeed, a new system of law".[71]

Equity provides international tribunals with a discretionary (widely accepted) means of avoiding negative effects and some lacunae in the law.[72] Equity has become an indispensable part of modern democracies and their judicial, political and social

70 Department of International Development (DFID), *Halving World Poverty by 2015*, London: 2000, pp.20-22. Also see *supra* note 67, pp. 10469-10484.

71 C. Rossi, *Equity and International Law*, New York: Transnational Pub., 1993, p. 32; this above quotation refers to the writing of the jurist Gustav Radbruch.

72 *Ibid*. p. 38; also see D. Browne (ed), *Ashburner's Principles of Equity*, London: Butterworth, 1933, p. 10

systems in order to ensure greater fairness and justice. It is imbued with such elements as are needed for the achievement of broader goals in order to abate hindrances to the common aspirations of the people in a modern liberal world. Equity is not to be construed as Statutes, but rather as a general basis around which much of the law of it has been formed. It frequently appears as part of reasoning in judgements, and has relevance to the law of trusts.[73] Equity should be considered not only as an individual rule but also as a collection of principles which are often referred to as rules of equity.

3.5 Types of Equity

Aside from distributive equity, which is perhaps best described as an emerging norm, the use of equity in jurisprudence has often been divided into three types, equity *infra legem*, equity *praeter legem* and equity *contra legem*.[74] Some commentators have argued that a decision *ex aequo et bono* is a fourth category, which is envisaged in Article 38(2) of the Statute of the ICJ.[75] The notion of equity has evolved and become an indispensable part in the major legal systems of the world. As a result, it is now widely recognised as a source of international law. Article 38 of the ICJ provides:

> "the court whose function is to decide in accordance with international law such as are submitted to it, shall apply:
>
> c. The general principles of law recognised by civilised nations;"

73 P. Todd, *Cases and Materials on Equity and Trusts*, London: Blackstone, 1996, p. 1.

74 V. Lowe, "The Role of Equity in International Law" (1992) in 56 *AYBIL*, p. 56-57.

75 *Supra* note 69, p.570. Frank and Sughrue have correctly argued it as fourth type of equity.

Higgins[76] argues that Equity *infra legem* refers to the situation faced by a court that has to choose between more than one interpretation of a legal rule; each interpretation being acceptable from the legal point of view. In this circumstance, equity *infra legem* allows the court to determine which interpretation is the most just, considering the circumstances and balancing the rights and obligations of the contending parties.

With regard to equity *praeter legem*, Lowe has argued that it is similar to the *ratio decidendi* in municipal law, but completely differs from international law.[77] However, its application is to fulfil the lacunae in the elaboration of rules, the content of which are too general. But, it is debatable whether or not such lacunae exist in certain circumstances. Cheng takes the view[78] that such authorisation is indeed required, but there are others who disagree with him on the acceptance of equity *praetor legem*. Even if the lacunae exist, the judge has the authority to fill them by his or her interpretation. Higgins held the view that equity *contra legem* is "a softenening of the applicable norm for extra-legal reasons."[79] It is apparent from the analysis that the role of equity as a means of correcting the application of a legal rule is still a moot point.

The use of equity *contra legem* is to soften the application for an extra-legal reason. Higgins argues that the very purpose of using equity is that it is fulfilling the basic objectives as a tool. For some, equity allows the decision rather than embrace a just solution. That is to say, equity does not only provide a solution; but rather, it gives broader discretion for having a fair and acceptable solution to the dispute. It is based on the idea that a

76 R. Higgins, *Problem and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994, p. 219.
77 *Supra* note 74, pp. 58-59.
78 *Supra* note 76, p. 220.
79 *Supra* note 66 p. 220.

court has the right to decide a case contrary to the relevant legal rules when it considers such rules to be 'unjust' in the delivery of a fair verdict in tune with equity *contra legem*. Unlike the other two forms of equity, equity *contra legem* can go beyond the ambit of legal rules in order to obtain the required and expected result. In this sense, equity *contra legem* could be very similar to the *ex aequo et bono* principle, which does not work under the legal rules but rather contrary to the confines of the rules of law. In essence, it works beyond the legal regime. Conversely, within this rule, the court is free to apply such principles, as it deems suitable in the interest of fair justice. There are many examples in international arbitral tribunals where *infra legem* has been applied and decisions made. For example, the Iran-US claim tribunal decided a series of disputes between the parties by its application.[80] In ascertaining the amount of compensation against nationalisation, there is no proper rule as such, that explicitly stipulates a certain amount as compensation. In such circumstances, equity provides the arbitrator with a principle to ensure the fair amount be awarded.[81]

The general notion of equity is designed to be an aid to decision-makers in order to ensure greater justice and fairness. It is not possible by the application of the rigid provision of law but by the application of other factors such as socio-economic, cultural or political ones. Moreover, the achievement of a fair resolution of a dispute always requires the application of equity. In this light, its invocation is essential. It should, however, not be understood that equity falls beyond the legal ambit or allows decision makers to decide as they please. It has

80 16 Iran-US Claims 1987, 112, p. 221: in *Starrett Housing Corp v. Iran* case, 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. Also see II Iran-US Claims 1986, *Harza v. Iran*, T. R. 76, p. 11.
81 *Supra* note 74 p. 57-58.

its own procedure that regulates its application in an effective manner. In this connection, equity operates within a sphere of settled regulations.[82]

3.6 The Role of Equity in International Law

The role of equity in international law concerning general and shared natural resources in particular is paramount because, without it, a fair justice is not achievable. As each watercourse is unique and the law in the area is still in the developing stage,[83] it is impossible to adjudge any disputes without the aid of equity. As the population has increased along with the rise in the standard of living brought about by innovation and scientific discoveries, the voracious appetite for more and more resources has became the common ground for increasing competition among states.

In the process of dispute resolution arising from shared natural resources such as the IWC agreement among nations, the ICJ and its predecessor PCIJ have developed a very rich stock of jurisprudence in this area.[84] French has argued:

> "the role of equity in the jurisprudence of the ICJ, and before that, in the Permanent Court of International Justice has had an uneven and inconsistent history."[85]

82 R.A. Newman, *Equity and Law: A Comparative Study*, New York: Ocena Pub., 1961, p. 20.

83 *Supra* note 4, pp. 40-45.

84 S. Rosenne, "The Position of the International Court of Justice on the Foundation of the Principles of Equity in International Law", in A. Boyle and P. Van Dijik (eds), *Forty Years: International Court of Justice*, the Hague: Europa Institute Utrecht, 1988, pp. 85-108.

85 *Supra* note 67, p. 10471, he argued that "numerous meanings can be given to the legal notion of equity. However, the subdivision into various 'forms' of equity is rather artificial, as, in practice, the ICJ will usually utilise the principle without referring to any particular conceptual understanding of the term. Moreover, … the ICJ has been neither consistent nor uniform in its approach to equity."

From the study of judgements rendered by the court, it appears that the court is not consistent and several approaches have been adopted. For example, before 1982, the court held the view that delimitation should be decided:

> "in accordance with equitable principles, and taking into account all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory under the sea."[86]

But, after 1982, the court took a broader approach on the issue, holding that the ultimate aim in delimiting the continental shelf was to arrive at an equitable result.[87] In the later case, equitable utilisation was regarded as a customary rule of international law whilst, in the earlier case, it was not.

In the Meuse diversion case of 1937, the PCIJ came to the conclusion that the principle of equity is part of international law. However, there were differing opinions on the issue between judges.[88] Afterwards, the world court resolved several cases relating to the delimitation and sharing of benefits accruing from the utilisation of shared resources between the contestant states.

86 ICJ Reports, (1969) Germany v. Denmark and the Netherlands, p. 53.

87 ICJ Reports, (1982) Tunisia v. Libya, p. 59.

88 37 PCIJ (ser.A/B) Nos. 70, 77: the principles of equity are principles of international law, and as such they have often been applied by international tribunals. However, it was the dissenting opinion of Judge Hudson, and the majority decision did not dealt with equity.

The other aspect of equity as envisaged in the Charter of Economic Rights and Duties of States and NIEO[89] provided that the rich nations were obliged to give full economic and technological support to enhance the lives of the people of developing countries. The crusade of the newly independent states of the third world, undertaken as a movement in demanded from the North sufficient technological as well as financial help to obviate the grip of poverty. However, the North stating that there is no such law in this area compelling it to help the South always challenged this notion.[90] The author does support the notion that the North should cooperate with the South in order to alleviate the poverty of the latter. However, it should be on moral grounds rather than legal duty. Whatever contribution the nations of the North are making through their Overseas Development Aid is based on moral grounds and at their sheer discretion. The reasons given for such co-operation from the South is that the present international monetary as well as trading system is unfair and inequitable to the developing nations in which the developed nations are benefited at the price of the former.[91] It was revealed in the 1997 UN review meeting at Rio de Janeiro that

89 *Supra* note 26, pp. 112-130: The group of 77 has called two special sessions of UNGA to discuss and adopt the resolution for achieving greater justice and economic parity to them by eliminating unfair trade, and the monetary policy developed by the North. Two resolutions were also adopted, but heavily criticised by the developed nations, such as Australia, France, Italy Japan, UK and USA stating that a 'tyrannical majority' and 'growing tendency … to adopt one sided, unrealistic resolutions' that cannot be implemented at all, further, they were also blamed that these one sided resolutions destroy the authority of United Nations. Moreover, the comment of Julius Nyerere to the reaction of the North was: "I am saying that is not right that the vast majority of the world people should be forced into the position of beggars, without dignity. We demand change, and the only question is whether it comes by dialogue or confrontation".

90 M. Jacobs, *The Politics of the Real World,* London: Earthscan Pub., 1996, p. 63.

91 *Supra* note, 26, p. 108.

the developed nations did not fulfil what they had promised at UNCED, i.e., to contribute 0.7% of their income to the South.[92] The other fundamental aspect of intergenerational equity (entitlement of future generations) is that it imposes a duty to fulfil the needs of developing countries in order to get rid of poverty and to do this in a sustainable and ecologically sound manner so that the rights of present or future generation are protected. There is not a clear definition on intergenerational equity but it generally refers to the notion that the international community is under a moral, even possibly a legal, obligation to protect and preserve the environment and its natural resources for present and future generations. Being a part of equity this topic has an inherent links with this research. The idea is that the present generation in seeking its own prosperity through exploitation of watercourses, must not jeopardise the right of future generations to a clean environment.

3.6.1 Unjust Enrichment

Unjust enrichment is when someone obtains property or gets rich without sufficient reason. From the preliminary meaning of it, it points to unreasonable, illegal and unjust ways of getting richer. Unjust enrichment indicates the proposition that a party should not enrich itself, without legal cause, at the expense of others.[93] Whilst equity stands for greater justice and fairness, unjust enrichment underscores exactly the reverse position and therefore the concepts are closely linked.

92 G. Brown, "An Assault on Poverty is Vital too", *The Guardian* 13 February 2003, p. 23.

93 *Supra* note, 69, p. 565. Also see R. Boyes, "Poles enraged by memorial to expelled Germans" *The Times,* 24 September, 2003, p. 14: Poland fears a flood of compensation demands from Germans, whose property was taken after the Second World War when it joins the EU next year. The row centres on proposals to commemorate the 12 million people displaced when Europe's border were redrawn.

When nations expropriate foreign property without giving sufficient reparation, the principle of unjust enrichment allows justice to be obtained through courts and tribunals. The principles were interpreted in *Factory at Chorzow* in 1928. Until that decision, at general international law, damages in expropriation cases has been assessed on the book value of the property at the time of its disposition plus interest. The court held that reparation should reflect not merely the book value of property at the time of disposition, but all the loss sustained by expropriation.[94] Thus, the role of equity has greatly assisted securing fairer justice against expropriation. The other case that the Permanent Court of International Arbitration (PCIA) decided by applying the principle of unjust enrichment was the 1932 *Norwegian Claim* relating to the USA's decision to expropriate ships being built in US shipyards for foreign parties. Once the ships had been requisitioned, the US failed to pay all the compensation due. This was interpreted as a breach of the terms of US contractual obligations and the USA's submission was rejected on the basis of unjust enrichment.[95]

94 PCIJ Reports, (1928) pp. 183-195.

95 After entering the First World War, the USA decided to expropriate ships being built for foreign parties in US shipyards. The dispute was not settled and was forwarded to the PCIA. The Tribunal's decision held the view that after requisition of the ships the US failed to pay the remainder of the commission was a violation of contract. A private firm sought to blame the Norwegian Government for this lapse, arguing that the purchaser's assignee was contractually bound to pay the remainder. The Tribunal rejected a claim for the fulfilment of obligations holding that the expropriation had terminated the relationship between the firm and the Norwegian purchaser and crystallised damages. Had the US paid the due amount to the broker, that amount would have been deducted from the fair market value of the contract. The court wrote "it appears to be equitable … to give the US the right to retain (the amount due the firm) out of the amount awarded", on condition that the US pay that sum to the broker-Norwegian claims (Nor. V. US) Hague, Ct. Rep, 2nd, Scott, 39, 65 Permanent Court of Arbitration (1922), pp. 41-79.

The concept is explicitly related to IWL issues, particularly the sharing of downstream benefits between riparian states. Where benefits accrue to a downstream country on account of the work undertaken by an upstream country without contributing to the cost, there is unjust enrichment. Furthermore, the application of this principle has significantly contributed to the resolution of water conflicts between numerous countries and has provided significant guidelines for resolving other conflicts. It is now an established doctrine of equity that no one can enrich themselves at the price of another without legal justification.[96]

3.6.2 Estoppel

The doctrine of estoppel also forms a part of equity. It was dealt with for the first time in international law in the context of the *Diversion of Water from the Meuse* case decided by the PCIJ,[97] in which estoppel was held to impose a duty on a state to refrain from acting inconsistently with the interests of other states. Belgium's construction of a lock to extract water from the River Meuse violated a convention governing access to the river water. A few years earlier, the Netherlands had constructed a lock remarkably similar to the one subject to its complaints against Belgium. The court found no violation of any terms of the convention. The action of the Netherlands in this case was akin to estoppel that compelled the Court to reject the Dutch claim. However, the claim of estoppel by Costa Rica, in the case of the *Tinoco claims*, was rejected by Chief Justice Taft of the US Supreme Court sitting as a sole arbitrator, on the ground that Britain's failure to recognize the Tinoco regime caused no detriment to that arrangement.[98] The Tribunal further

96 R. A. Newman, *The Principles of Equity As a Source of World Law*, (1966) 1 *Isr. LR*, p. 630.

97 *Diversion of water from the Meuse*, PCIJ (1937), p. 139.

98 *Tinoco claims*-Gr. Britain v. Costa Rica, 18 *AJIL* 147, (1924) pp. 148-157.

maintained that the burden rests with the party seeking to rely on estoppel both with regard to the evidential burden and that the loss shows such facts. This was not demonstrated by the claimant in the *Tinoco claims* case.[99]

Even in the absence of equity, detrimental reliance as a notion may bar, under an implied principle of 'good faith', a party from contesting the legally binding effect of its terms of promise. In the *Nuclear Test Case* of 1974, Australia and New Zealand v. France, the ICJ held that the French official announcement that it would no longer undertake Nuclear tests after 1974 amounted to an obligation to act in good faith, conferring an internationally binding character on a unilateral declaration.[100] Successful invocation of equitable estoppel is tantamount to ensuring that the applicant's concerns are met and that the apprehended injury will be averted. There was nothing to prove that the French declaration would not be implemented, but nevertheless, the declaration led the other parties to believe that France would refrain from carrying out further nuclear tests. It is a wider principle of IWL that states are bound to accept those principles which have elsewhere been recognised by them. If India has recognised that riparian neighbour cannot cause harm to her, she also cannot harm to her neighbours. For example, following India's objection that East Pakistan's reservoir project on the far eastern border of Assam project would submerge its land, the project was cancelled.[101] The reverse position maintained by India in the construction of reservoirs that have caused the inundation of Nepalese land must be stopped under the principle of estoppel. If similar constructions have been exists in Indo-Bhutan and Indo-Bangladesh border such activities should be stopped.

99 *Ibid*.
100 ICJ Reports, (1994) pp. 110 & 118.
101 *Supra* note 4, p. 311.

3.6.3 Acquiescence

Acquiescence stands out as another form of equitable estoppel recognised as a general principle of law-as-fairness, in which silence or the absence of protest may preclude a state from challenging another state's claim. However, it must be mentioned here that in order to succeed in a defence of acquiescence, a state must prove that the second state had knowledge of its claims.[102]

Use of acquiescence was made in the 1951 *Anglo-Norwegian Fisheries case* between Norway and Britain. Norway had for decades used a straight baseline to delimit its fisheries zone, rejecting the general practice of using a line based on the coastal low water mark. The court favoured Norway's contention and rejected Britain's argument that it had not known of this system of delimitation by Norway on the ground that Britain, as a maritime power with a strong interest in Norwegian waters, must have known about the Norwegian practice and, therefore, could not excuse itself for its failure to protest on time.[103]

The *Temple of Preah Vihear* case followed the principle of acquiescence, and in doing so, brought an equitable dimension to the notion of finality.[104] The principle of equity precluded a state initiating a border dispute which had long been settled. The case relates to a border dispute between Thailand and Cambodia in which two Franco-Siamese Commissions over a period of sixty years delimited the frontier between French Indo-China and Siam. After receiving appropriate maps, the Thai Government registered no objection. The court held that the Siamese failure to object to the content of the maps

102 *Supra* note 69, p. 568; also see I. C. Gibbon "The Scope of Acquiescence in International Law" (1954) 31 *BYIL*, pp. 147-148.
103 ICJ Reports, (1951) pp. 31-34.
104 ICJ Reports, (1962) pp. 14-37.

amounted to acquiescence, adding that when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.[105] Reasoning for that argument is right in view of the fact that if once settled border issues be allowed to arise after a long period of time, the finality of the border would remain forever unresolved. The principle of acquiescence does not apply generally to IWL. Under the rule of equitable utilisation envisaged in Article 6 of the UNCIW, even if one riparian state has been utilising a huge volume of water, it would be unfair to prevent another riparian state from objecting simply because of that state's acquiescence, as such use is just one of the factors in the determination of equitable utilisation, and one which can be displaced by other factors.[106] However, it is not the argument of the author that equity may itself be a factor to be considered as part of equitable utilisation: equitable utilisation is a principle of equity.

3.6.4 Ex Aequo Et Bono (in Fairness and Right)

Ex aequo et bono stands outside the framework of law. If the use of a set of legal rules is unable to deliver justice, or if there are no such applicable rules to allow the dispensing of justice, *ex aequo et bono* provides both its own ends, means and justification for use. Under Article 38(2) of the ICJ's Statute, the ICJ is empowered, with the consent of parties appearing before it, to decide the case not by the application of law but rather by consideration of socio-economic, cultural and political factors. Until now, no case has been decided on such a basis by the ICJ or PCIJ, but the decision of an administrative tribunal of the International Labour Organisation based upon the application of the principle of *ex acquo et bono* and not based on any specific rule of law was upheld by the ICJ. The tribunal decided a case by examining the appropriate level of damages, *ex aequo et bono* to fix what the court described as

105 *Ibid*.
106 Article 6, 36 ILM (1997) p. 704.

measures of compensation.[107] The failure to use this clause 38(2) demonstrates the reluctance of states to confer unbridled discretion on tribunals to avoid wholly arbitrary decisions. In order to invoke this Article specific consent from the party is required.

Ex aequo et bono was also evaluated by the PCIJ in *the Free Zone* case (1929) between Switzerland v. France, on the issue of free trading zone rights under the Treaty of Versailles 1919. France challenged such a right on the basis that a clause abrogating those parts of the Treaty was agreed to by Switzerland. Under the arrangement, Swiss citizens were able to do business in French territory surrounding Geneva without payment of customs duties. The parties formed a special agreement whereby the PCIJ would first determine the meaning of the clause, failing a private resolution of the dispute, and "settle" all outstanding questions. The Court found that the clause did not abolish the regime in regard to the opportunity to settle disputes if the disputants failed to settle the dispute by themselves. The court rejected the French claim that a special agreement empowered the court "to settle all questions".[108] However, it seems that recourse to this branch of equity is ignored by the community of nations.

3.7 Equity for Scarce Resource Allocation

Increasing innovation in science and technology enables states to harness resources from the deep ocean, the Continental Shelf and EEZ, which eventually gave birth to new international conflicts. There were no specific rules applicable in such complicated circumstances, so equity embraced a new dimension to accommodate the interests of all concerned in a careful manner. Equity brings important advantages to this task,

107 *Supra* note 69, p. 570; also see ICJ Reports 77, (1956), pp. 56-100.
108 *Free Zone Upper Savoy and the District of Gex*, PCIJ Reports, (1930) pp. 10, 34, 40.

affording judges a measure of discretion, within a flexible structure and commensurate with the uniqueness of each dispute of scarce resource allocation. As will be illustrated below, the ICJ has advocated the formula for equitable results and equitable sharing in the interpretation of equitable utilisation. It has been said that without the principle of equity, the allocation and sharing of such resources is not possible, and a great disaster of conflicts has been prevented by its application. So far, three models of equitable allocation have emerged to this end.[109] The first model is that of corrective equity, and the second that of broadly conceived equity. Both of these models displace strict law but are still rule based, evolving into a set of principles for the accomplishment of equitable allocation. The third model of common heritage equity sets out rules for the exploitation of resources by ensuring the conservation of humankind's common patrimony. Application of equity in this area will make it easy to understand and apply equity in IWL.

3.7.1 Corrective Equity in Trading Arrangements

Corrective equity has played a substantial role in providing judicious treatment and justice to all nations. It seeks to provide fairness in the sharing of resources underneath the sea, the continental shelf and from the open sea.[110] The use of equity has been long executed in order to get a fair benefit and protecting the interests of developing nations in international trade and commerce area. Similarly, it seeks to protect the right of developing nations in the international trading system, within the framework of GATT (now WTO), by providing the basic rules of world trade.[111] The GATT includes a mechanism for a generalised system of preference (GSP) in order to introduce the notion of fairness into the international trading

109 *Supra* note 69, p. 572.
110 *Ibid*.
111 *Ibid*. See GATT document in 55 UNTS, (1947) p. 187.

regime. The other provision is that of the Most Favoured Nations (MFN) clause, which guards against any negative impact of trade on the legitimate rights of developing nations. The Lome Convention[112] sought to inject equity into the global commodity market to protect the interests of developing and weak nations through the creation of a compulsory fund for the stabilization of export earning called STABEX. Under this system, a country is eligible for the international stabilisation of the price of a product representing at least 5% of its total export earnings in the year preceding the application for STABEX assistance. Such export earnings from the product must drop at least 4.5% from the average value calculated over a six-year reference period for STABEX aid to become operative.[113] From the point of view of protecting the interests of developing and weak nations, the above mentioned arrangements are paramount in promoting the integration and participation of nations in a fairer international trade system. Equity is at its heart. The European Union and the US have provided special rights and facilities to developing nations as trading partners.[114] Hence, the notion of equity favours weak and vulnerable nations that are not fully able to compete in the international arena.[115] Special consideration is given to such nations in order to safeguard their interests, and this concept can be utilised in IWL issues by providing priority to the poorest countries. In the

112 *Supra* note 69, p. 573-574.
113 There are four versions of the Convention, i.e., Lome I, II, III, IV, for the enhancement of fairer trading regime.
114 *Ibid*. Also see Fourth ACP-EEC Convention and Final Act in 29 ILM (1989), p. 783.
115 "The EU has provided special quotas for sugar exports from the least developed states", *The Rising Nepal*, August 9, (2002); also see staff, "Trade is Aid" *The Kathmandu Post* 25 February, 2003. The United States has provided 38 sub-Saharan African states a duty free quota on their exports of Apparels and Textile Products under the provision of the African Growth and Opportunity Act, 2000. Nepal is also expecting such facility on its garments in the US market and Australia has made its market duty free and quota free for 49 landlocked countries and East Timor from June 2003.

absence of a law protecting the interests of developing countries in the above situation, equity has played a vital role in strengthening their interests in international trade and business.

3.7.2 Corrective Equity as Analysed to Continental Shelf Allocation

In the equitable delimitation of the continental shelf under special geographical and hydrological circumstances, corrective equity has been a milestone in ensuring fair justice and the protection of the national interests. Initially, such disputes were resolved by application of the conventional rule of equidistance, under article 6(2) of the 1958 Geneva Convention of the Law of the Continental Shelf. The application of this rule requires states to render agreement applying the equidistance formula. This rule, however, also contained an 'escape clause', allowing delimitation to depart from the equidistant line under 'special circumstances'. This is an example of corrective equity.[116] Such a formulation of equity was implemented in the 1969 *North Sea Continental Shelf Cases* between Germany v. Denmark and the Netherlands.[117] The court, in its decision rejected the contention of the Danes and the Dutch, which were based on the equidistance principle. The German contention based on a just and equitable share of the shelf was that equidistance has no inherent link either to the nature of the shelf or to any principle of absolute proximity or adjacency, and was too sparse and inconclusive to merit a conclusion on that principle alone. Corrective equity has since crystallized into a customary norm. The court in a similar vein wrote,

> "such delimitation must be affected by agreement in accordance with the equitable principle … by taking into account all the relevant circumstances..."[118]

116 Convention on Continental Shelf (1959) 15 UNTS, p. 471, 499 UNTS, p. 311.
117 3 ICJ Reports (1969) pp. 47-53.
118 *Ibid*.

> Considerations of equity form part of the underlying moral basis for rules of law. In this sense equity may be regarded as a material source of law, but not as a formal source, nor in itself constituting a legal rule. Some circumstances relate to the nature of geology, the desirability of maintaining the unity of deposits of natural resources, and proportionality, (which is defined as the attainment of a reasonable relationship between the extent of a state's continental shelf and the length of its coastline).[119] In another case decided by an arbitration tribunal, the *Anglo-French Continental Shelf case*, the Tribunal, in seeking to maintain equity, held the view that in the particular circumstances, departure from the equidistance rule was essential in order to ensure equity. It stressed that the proportionality principle should not govern, but merely correct the delimitation.[120] The Tribunal seemed to adopt a notion of fairness and yet still contain it within the guiding rule of equidistance.[121]

In *the Fisheries Jurisdiction Case* of 1974, (UK v. Iceland), a dispute had arisen on account of Iceland's unilateral prolongation of her fisheries zone to 50 nautical miles from the base line. ICJ Reports, (1974) pp. 1-70.[122] The British Government submitted the case to the ICJ asking the court to adjudge and declare such action illegal and safeguard the UK's rights of fishing in that area. Iceland objected to the court's jurisdiction. In its decision,[123] the court declared that the Icelandic Regulation of 1972 constituting a unilateral extension of

119 *Ibid*. pp. 50-52.
120 *Continental Shelf Case*, (Arbitration Tribunal) 54 ILR, (1975) pp. 6-124.
121 *Supra* note 69, pp. 578-580.
122 ICJ Reports, (1974) pp. 1-70.
123 *Ibid*.

Iceland's exclusive fishing rights to the 50 nautical mile limit was illegal. The court held that:

> "the most appropriate method for the solution of the dispute was clearly that of negotiation with a view to delimiting the rights and interests of both parties and regulating equitably such questions as those of catch-limitation, share allocations and related restrictions. The obligation to negotiate followed from the very nature of the respective rights of the parties and corresponded to the provisions of the UN Charter concerning the peaceful settlement of disputes. The court could not accept the view that the common intention of the parties was realised by negotiating throughout the whole period covered by the 1973 interim agreement. The task before them would be to conduct their negotiations on the basis that such must be in good faith by paying due regard to the legal rights of the other and to the facts of the particular situation and to the interests of other states with established fishing rights in the areas."[124]

This judgement lends credence to the view that cooperation, good faith and good neighbourly relations are the best means to ensure maximum benefits from shared resources. The judgment corresponds to the obligation of a watercourse state endorsed by Articles 5 and 7 of the UNCIW.[125]

3.7.3 Broadly Conceived Equity in Continental Shelf Application

The states negotiating the third Law of the Sea Conference (LOSC) in 1973 studied the jurisprudence so far developed by the international courts and tribunals and found that the basic tenets of equity had been applied. Taking note of this, the

124 *Ibid*.
125 36 ILM (1997), 162, para. 67-71, p. 189.

Conference went somewhat further than the ICJ, and developed a formula of equitable principles for the delimitation of maritime zones. In so doing, during difficult and protracted negotiations the parties attempted to[126] maintain a balance between equity and equidistance. The Informal Single Negotiation Text (ISNT) of 1975 proposed that:

> "delimitation of the continental shelf between adjacent or opposite States shall be affected by agreement in accordance with the equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all relevant circumstances."[127]

The attainment of an agreement on this median line formula by all member states was still a formidable task, because numerous island nations were sceptical, suspecting that the preference for equity would jeopardise their position in shelf delimitation. According to their view, the median line formula is the best way to serve their interests. They argued instead for greater emphasis on equidistance, but conceded that the method could not be applied in the event of special circumstances.[128] As a result of more negotiations to arrive at a broader agreement on the text, several revisions were made to the text to accommodate and reconcile the interest of those nations. Finally, the Ninth session (1980) produced a balanced formula:[129]

> "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be affected by

126 *Supra* note 69, p. 581.
127 127 14 ILM, 682, (1980), 728, Single Negotiating Text; also see B. H. Oxman," The Third United Nations Conference on Law of the Sea: the Eight Session" 74 *AJIL*, (1980) p. 32.
128 *Ibid*. p. 30-32.
129 B. H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session" 1980, 75 *AJIL*, (1981) pp. 211& 231.

> agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistant line, where appropriate, and taking into account all circumstances prevailing in the area of concern."[130]

However, following some tension, the proponents of equity finally prevailed at the Tenth Session. Article 83(1) of the LOSC, when opened for signature in 1982, read:

> "the delimitation … shall be affected by agreement on the basis of international law… in order to achieve an equitable solution."[131]

Since then the ICJ, in deciding cases relating to the continental shelf and its allocation, have gone further than this earlier stance. Equity has become the core rule of LOSC as applied by the ICJ on issues of equitable delimitation and allocation of resources. This doctrinal shift, in which a remarkable degree of discretion was exercised, can be seen in the case of *Tunisia v. Libya* and will be analysed below.[132] The decision was based on the equitable principles stating:

> "the delimitation is to be effected in accordance with equitable principles and taking into account of all the relevant circumstances, so as to arrive at an equitable result. … the area of continental Shelf to be found to appertain to other Party not extending more than 200 miles from the coast of the party concerned, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense."[133]

130 UN conference on the Law of the Sea, Draft Convention of Law of the Sea, 19 ILM, pp. 1129, 1174, July 28-August 29, (1980).
131 *Ibid*.
132 ICJ Reports, (1982) pp. 58-62.
133 *Ibid*.

In consequence, an equitable result may be arrived at by drawing, as a first stage in the process, a median line, every point of which is equidistant from the low-water mark of the relevant coasts of the disputing parties. The initial line is then subject to adjustment in light of the above mentioned circumstances and factors.[134]

In the decision in the *Tunisia v. Libya* case, the court made a forward leap. It also rejected socio-economic factors in determining the case. Tunisia's argument was that Libya earned a huge and unfair income from offshore oil. The court refused the contention and held the view that a "country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource."[135]

In 1984, a case arose concerning the delimitation of the maritime boundary in the *Gulf of Maine area*, the USA v. Canada, over how to share the benefits of the exclusive economic zone and areas beyond in the high seas. In this case, the court ruling on the applicable principles and rules of international law states:

> "no maritime delimitation between states with opposite or adjacent coasts may be affected unilaterally by any one of those states. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with a genuine intention of achieving a positive result. Where, however, such an agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence. In either case, delimitation is to be affected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic

134 ICJ Reports, (1984) pp. 31-34, para. 76-79.
135 ICJ Reports, (1982) pp. 77-78.

configuration of the area and other relevant circumstances, an equitable result".[136]

The ICJ again adhered to the same concept of equitable allocation as in the case of *Libya v. Malta* (1985), emphasising the need to arrive at an equitable result along with proportionality as one of the governing principles of equity. The court rejected Malta's claim regarding its lack of energy resources, the needs for fishery resources, and its requirements as a developing island state. It also rejected Libya's contention that the vastly larger size of its landmass was a factor relevant to the delimitation, and held that equitable utilization was the appropriate rule in the case.[137]

The word 'proportionality' has also become one of the fundamental elements of equity. From its use, the idea of broadly conceived equity can be achieved. For example, in an arbitration case1985 the *Guinea v. Guinea-Bissau Maritime Delimitation*, the Tribunal held to two equitable considerations. Firstly, to ensure that, as far as possible, each state controls the maritime territories opposite its coasts and their vicinity. Secondly, the Tribunal cited the need to ensure that other maritime delimitations already made or those still to be made in the area be given due regard.[138] This decision is capable of taking into consideration the interests of both states so that the application of the principle of broadly conceived equity results in significant redistribution of resources.

3.7.4 Broadly Conceived Equity in Conventional Arrangements

The principles used to delimit and allocate the resources of the sea and the UNCIW are similar. Both instruments have taken

136 ICJ Reports, (1984) para. 112.
137 ICJ Reports, (1985) pp. 13-41.
138 *Maritime Delimitation*, 77 ILR, pp 636-685, (1988) (Ct. of Arb.).

the notion of broadly conceived equity a step further than the jurisprudence relating to continental shelf delimitation, explicitly calling on states to take socio-economic needs into account whilst they are allocating such resources.[139] Further radical steps are being taken in respect of access to exclusive economic zones and the issues of reasonable and equitable share for beneficial use of an IWC.

The LOSC in its provisions dealing with state access to EEZs, seeks to provide for the distribution of an area surplus resources in accordance with equitable principles that take into account, *inter alia*, economic need. The provisions relate to the rights of a landlocked state to participate, on an equitable basis, in the exploitation of an appropriate part of the EEZ of coastal states of the same region or sub-region.[140] States participating in resource utilisation should take into account the following matters:[141]

"1. The need to avoid effects detrimental to fishing communities or fishing industries of the coastal state;
2. The extent to which the land-locked state is already entitled, through agreement, to exploit the living resources of the exclusive economic zone of the coastal state;
3. The need to avoid disadvantaging any one coastal state in particular; and
4. The nutritional needs of the populations of the respective states."

The Convention also provides preferential rights of access, to geographically disadvantaged states determined by the same criteria. On the other hand, the UNCIW provides that the right to use such water is coupled with an obligation to participate in the "use, development, and protection" of the watercourse in

139 36 ILM (1997), pp. 700-720.
140 21 ILM- 1982, LOSC, p. 1283.
141 *Ibid*. p. 1284.

"an equitable and reasonable manner", which should take into consideration the geographic, hydrographic, hydrological, climatic and other factors of a natural character (as explained above in Article 6 of UNCIW). These include the social and economical needs of the watercourses states, existing and potential uses of resources, the effects of the use in one watercourse system, conservation, protection, development and economic use of the water resources and the availability of alternatives.[142]

3.7.5 Common Heritage Equity

The common heritage of mankind is related to the rights of patrimony, not only to a certain state or group of states but to all nations and peoples. This includes natural and geographical elements, such as clean environment, water, ocean, airspace, Antarctica, and the Moon, which are required for the existence and sustenance of human beings and nature, and are to be protected, preserved and sustained for the present as well as future generations. There are conventional arrangements, the LOSC provision relating to the seabed authority and the UN Moon Agreement,[143] explicitly seeking to regulate this field of international law.

The LOSC established (Article 156) an International Deep Seabed Authority to manage and distribute equitably the benefits derived from exploitation of the common heritage element of marine resources.[144] The Authority is analogous to a corporation, having been established to facilitate exploitation of an asset (the deep seabed) for the benefit of mankind. Recognising the right of a coastal state in its EEZ, the Convention requires the coastal state to contribute to the Authority at least a fraction of the benefit derived from mining

142 Article 5, 6, 7, 8 & 20-25 of the UNCIW.
143 18 ILM (1979), pp. 1434- 1441.
144 *Supra* note 140, p. 1298.

in these areas. After five years of production, this amounts to 1% of the value of the production escalating by 1% each subsequent year until the twelfth year. It stabilises at 7%, the amount being disbursed to the parties to the convention according to 'equitable sharing criteria', taking into account the interests and needs of developing states, particularly those of the least developed and land locked states.[145] This system simply seeks to regulate the EEZ and a certain proportion of the accrued benefits are to be distributed to all nations equitably; particularly to economically weak, developing, and landlocked nations. It is a good example of distributive justice in sharing the benefit from a common heritage.

The UN Moon Agreement, which opened for signature in 1979, also includes elements of common heritage equity.[146] The agreement emphasises the conservation of the Moon, and seeks to facilitate the exploitation and equitable allocation of its resources. It states:

> "the moon and its natural resources are the common heritage of mankind … exploration and use of the moon … shall be carried out for the benefit and interest of all countries".[147]

The agreement calls on states to devise a regime to govern the exploitation of the moon with the purpose of facilitating the orderly development, rational management, and equitable sharing of its resources. States are prohibited from causing pollution or any other acts disturbing the moon's environment, and are obliged to 'pay due regard' to the needs of future generations.

145 Article 82, LOSC, *Ibid.* p. 1286.
146 18 ILM (1979) p. 1434, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies- hereafter the Moon Agreement.
147 *Ibid*. pp 1435- 1438.

The 1991 Madrid Protocol to the Antarctica Treaty, signed by twenty-four states, provides that the environmental or scientific interest in the continent represents a form of common heritage equity, in which conservation is paramount.[148] The pact departs from the mercantile model of common heritage equity, assuming the role of a trustee pledged to hold this asset in trust for the benefit of human kind. This concept is taken from a protocol to the 1959 Antarctica Treaty that banned nuclear and military activity, suspended competing claims by seven southern hemisphere states and established rules for scientific research.[149] This Protocol seeks protection of the environment as a 'fundamental consideration' in planning and conducting all activities on the continent, and bans all mineral exploitation for at least fifty years, as such activities would severely damage the sanctity of the Antarctic environment.[150]

The right of the yet to be born is not an idea of recent origin in international law. Such feelings have emerged and been developed in the international arena for over a hundred years. The idea was evident in the Bering Sea Fur Arbitration where the USA had argued that it was conserving the seals in the common interest of mankind.[151] French has argued since then that the notion of protecting the environment for present and future generations has appeared occasionally in international environmental law, for example the International Convention for the Regulating of Whaling 1946,[152] the 1968 African Convention on the Conservation of Nature and Natural Resources,[153] and the 1972 World Heritage Convention.[154] Each instrument stipulates a requirement to protect

148 *Supra* note 69, p. 593.
149 *Ibid*.
150 *Ibid*. Also see 29-30 ILM (1991), pp. 1462-1486.
151 *Supra* note 67, p. 10478.
152 161 UNTS, 1946, p. 72.
153 1001 UNTS, 1968, p.4.
154 11 ILM 1973, p. 1358.

environmental resources for present and future generations.[155] Since then, the notion has become an almost indispensable part of major environmental instruments.[156] For example, the preamble of the 1998 Statute of the International Criminal Court states,

> "an international criminal court is required for the sake of present and future generations."[157]

The goal of the ICC is to protect present and future generation from cruel and inhuman brutality.

3.8 Equity: an Integral Aspect of Sustainable Development

The Brundtland Report is commonly viewed as the point at which sustainable development became a broad global policy objective. Equity has been a milestone in the preservation and protection of the environment by strengthening the idea of sustainable development. The main achievement of the United Nations Conference on Environment and Development (UNCED) was the adoption of the equitable principle at the

155 *Ibid.*
156 a. the World Charter for Nature 1982 in its fifth paragraph provides ' … man must acquire knowledge … which ensures the preservation of species and eco-systems for the benefit of present and future generations'.
b. the Madrid protocol on Antarctica, 1991 provides in the seventh preambular paragraph: "convinced that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated systems is in the interest of mankind as a whole …".
c. the 1972 Stockholm Declaration in principle 1 states that very notion.
d. whilst in the Rio Declaration in principles 3 provides, "present and future generations have both developmental and environmental needs; apart from this, every document adopted at Rio, bear this notion explicitly . Birnie and Boyle, pp. 11, 16 & 4.
157 37 ILM (1998), p. 999.

heart of the negotiation process. That phrase appears in each (UNCED) document. The main achievement of the entire process is the victory of the principle of equity in major negotiations between the rich and poor nations. Weiss has rightly observed that

> "the dominant issue in international environmental law for the 1990s is likely to be the one of equity. … who pays whom, how much to clean up the environment or to develop in an environmentally sustainable way".[158]

There were altogether five texts at the Rio Conference in 1992, of which two (Framework Convention on Climate Change, United Nations Convention on Biological Diversity) are legally binding. It is notable that all the documents refer to the term 'equity'.[159] It is apparent that the international community relied heavily on the word 'equity' in all its meanings, and it was taken as an umbrella concept to effectively pave the way for agreements in the area of providing finance and technology to the South from the North within a comprehensive and global framework of recognition and commitment to complete development work in a sustainable manner. Moreover, recent environmental treaties have relied heavily on the element of equity. For example, Articles 3 (1), 4 (2) a and 11 (2) of the framework Climate Change Convention, 1992,[160] contain similar references to equity in securing the contribution of

158 28 ILM (1989), p. 1362: introductory note.

159 P. W. Birnie and A. Boyle, *Basic documents on International Law and the Environment*, Oxford: Clarendon Press, 1995, pp. 395-405 & 252-274. The Rio Declaration talks of a new and equitable partnership, and the right to development having to be fulfilled so as to equitably meet the development and environmental needs of present and future generations: principle 3 Rio Declaration. Agenda 21 highlights the fact that the development of a new global partnership was 'inspired by the need to achieve a more equitable world economy' paragraph 2.1,Agenda 21. The Forest Principles states that benefits should be shared by all states. (Principle1(b)).

160 *Ibid*.

developed state parties to reduce green house gas emissions and in the governance of the financial mechanism. Similarly, Articles, 8 (j), 15 (7) of the United Nations Convention on Biological Diversity,[161] stipulate the use of the term 'fair and equitable sharing of benefits' arising from the use of genetic material between the state permitting the research and the state from which the material originates. These benefits include the results of subsequent research and development, 'commercial and other utilisation of genetic resources' and the results and benefits arising from bio-technologies. Even though there was a broader consensus for achieving equity and equitable results, nothing substantive appears to have yet materialised in terms of action on the ground. With regard to the meaning of equity in the Convention, Sands has described the actual situation prevailing over the period:

> "Little consideration was given … to what the concept means or to its consequences when applied to a particular set of facts. Indeed, the way it was sometimes referred to suggest that some of its main proponents had little understanding of its prior use in international law."[162]

In my view, the meanings of equity and equitable utilisation have been tested on numerous occasions in several spheres. Hence, UNCED does not need to have its own definition. On the lack of any precise definition of equity and equitable utilisation, French has argued that[163] there are four interrelated reasons as to why the international community was so eager to use a term that had so far received little usage in international environmental law. Firstly, the text agreed that UNCED was not simply concerned with the issue of environmental protection, but rather, the much broader topic of sustainable

161 *Ibid*.

162 P. Sands, "International Law in the field of Sustainable Development" (1994) 65 *BYIL*, p. 340.

163 *Supra* note 67, pp. 10475-77.

development. Secondly, flexibility was the concern then to ensure that there was no hindrance at the time to reaching an agreement, so that the definition and broader terms would be sorted out later by convention of the parties. Thirdly, there was sufficient reason for states to agree to disagree on the controversial issues laid aside for resolution in the future. Fourthly, the use of the term "equity" at UNCED allowed international environmental law to integrate more fairly the needs and interests of developing states, particularly the obligation that requires equitable representation within UN bodies or other institutions, or the equitable sharing of benefits.

There is no clear-cut definition of equity and it has been considered as a sense of fairness and justice. From this perspective, equity does mean greater support and co-operation between North and South in achieving sustainable development. Such co-operation unequivocally implies technological and financial co-operation. The whole endeavour of UNCED with respect to North and South concentrated on transferring more aid and technology from North to South.[164] Moreover, after the increasing advocacy for the NIEO by the South, the UNGA has adopted several non-binding documents, such as the 1974 Declaration on the Establishment of the NIEO and the Charter on Economic Rights and Duties of States (CERDS), as an endorsement of the earlier principle. Both documents set out pre-conditions to the achievement of greater justice and fairer economic arrangements in the international system. This was also supported by the ILA 1986 Seoul

164 *Supra* note 26, pp. 108-111. At the special session of the UNGA, the Group of 77 nations called for discussion on the problems of raw materials and development, and put their case boldly and forcefully, accusing the developed nations of creating an unjust, and an inconsistent system for them. They passed two resolutions, 3201 and 3202, containing a declaration and programme of action on the establishment of the New International Economic Order, and an action plan to carry out this proposal. It was severely criticised and developed states refused to accept it.

Declaration on the progressive development of principles of public international law relating to a New International Economic Order.[165]

The North had earlier agreed to provide 0.7% of their GNP in ODA to the developing countries during the Rio Conference 1992. In addition to that GEF was restructured (1992) in order to achieve the target of sustainable development in numerous UNCED documents as a commitment to co-operation.[166] After its establishment, the GEF contributed enormously by providing loans to developing countries.[167] As French has observed,

> "the use of equity in environmental agreements and soft law instruments reflects a broader attempt by the international community to incorporate the interests of developing states into environmental law and policy. The introduction of differential standards between developed and developing states, and the provision of financial and technological assistance, are other examples of the same trend".[168]

In a broader sense, the words "equity" and "equitable" assist in ensuring equality in achieving the same levels of development and prosperity to all people in the developing states as are enjoyed by the people of the developed states. The main basis for this is that environmental sustainability required prime consideration to secure the rights of future generations as well as of the present generation. In order to reduce the disparity between North and South in terms of living standards and provision of basic amenities of life, the interpretation of equity

165 *Ibid*. p. 112-130.

166 *Supra* note 159, p. 739.

167 *Ibid*. p 737 - 40% to biodiversity, 40-50% to global warning, and 10-20% to fresh water resources have been allocated.

168 D. French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibility" (2000) 49 *ICLQ*, pp. 35-60.

deserves special attention. Thus, equity can be considered a means to bridge the chasm between the two groups of nations to achieve justice and sustainable development. This is equally important in ensuring peace, prosperity and the sustainable development of the earth, with currently more than six billion people and with many more people to replace them in the years to come.[169] It has become fashionable to quote the word "equity" in most treaties, resolutions, conferences, and declarations, joint communiqués and so on in political spheres as the meeting point for states with diverse interests and agendas.

The idea and prominence of equity thus implies an appreciation by the world community that prosperity and development in one part of the globe is not sufficient to maintain the world order. Unbalanced development in several regions could pose a threat to the peace and security of the world. The other realisation is that the level of development achieved in the past has been at the expense of the environment, bringing many problems such as, climate change, ozone layer depletion, and pollution on land, oceans and within fresh water resources.[170]

In order to carry out the remaining development works in the South, pursuant to experience gained in the North, many lessons should be learned to avoid repeating the North's mistakes. The North too must reverse its profligate consumption of resources. In the meantime, the development of the South must not be discouraged or hindered, but carried out by integrating environmental concerns within the framework of sustainable development. In doing so, the North must co-operate by all means possible with the South in dealing with the

169 P. Brown & J. Vidal, "End seas of poverty" , *The Guardian*, 27 August 2002, John Pronk, Envoy of UN Secretary General to the WSSD is quoted as saying that the poverty of developing countries should be addressed by the help of developed states, p. 3.

170 *Supra* note 159, p. 340.

broader interest of a world order characterised by the balanced development of all nations. To achieve this, the developed states should increase their ODA contributions.[171]

3.9 Drainage Basins and Diversion of Waters

The evolution of the concept of the drainage basin is significant in this field, in order to fulfil the increasing water requirement for states.[172] It should be recalled that the first book published (1931) relating to this area is by Smith, who held the view that the drainage basin concept must be followed when developing and apportioning the benefits from shared water resources.[173]

The drainage basin concept considers the entire river basin as a single unit irrespective of political boundaries. US President Theodore Roosevelt advocated this principle.

> "each river system, from its headwaters in the forest to its mouth on the coast, is a single unit and should be treated as such".[174]

Later, the 1911 Madrid Declaration[175] of the Institute of International Law, in its preamble, recognised the 'permanent physical dependence' of co-basin states as a principle of international law. Several institutions, such as the Convention Relating to the Development of Hydraulic Power as adopted by the Conference of Communications and Transit at Geneva in

171 *Supra* note 90, p. 63: following the Second World War, the US gave aid of almost 2% (100 billion a year) of its GNP to Europe for three years. But the USA at present is giving less then 0.7% in aid, most of this goes only to Israel, Egypt, Indonesia, and China. Jacobs has suggested increasing the North's aid.

172 C. B. Bourne, "The Development of International Water Resources: The Drainage Basin Approach" (1969) in 47 *CBR*, p. 64.

173 *Supra* note 3, p. 31.

174 *Supra* note 172 p. 64.

175 D. A Caponera (ed), *The Law of International Water Resources*, Rome: FAO Legislative study no 23, 1980, p. 274.

1923,[176] the Seventh Montevideo Conference of Pan-American states in 1933,[177] and the resolution of the Inter-American Bar Association at Buenos-Aires in 1957 all supported this notion.[178] The idea of the drainage basin as a single unit, together with the idea that the interventions of basin states should not be contrary to the basin-wide spirit, have invoked the interest of the international community. They have now been recognised as part of international law. These concepts have been codified in the1966 Helsinki rules and the UNCIW, at its Dubrovnik Meeting in 1956, adopted a statement of principle:

> "so far as possible, riparian states should join each other to make full utilization of waters of a river both from the view point of the river basin as an integrated whole, and from the viewpoint of the widest variety of uses of the waters, so as to assure the greatest benefit to all".[179]

This resolution, along with the 1958 New York Convention of the ILA formed the basis of the Helsinki Conference of 1966, which adopted the Helsinki Rules on the Uses of Waters of International Rivers.[180] The development of the drainage basin and the equitable utilisation rules, emerged from a fertile concept, that of 'community of interest'. According to the judgement of PCIJ in the *Oder River case*, the community of interest in a river is the basis of common legal rights of co-basin states and the foundation of IWL.[181]

176 *Ibid*. p. 45.
177 *Ibid*. p. 204.
178 *Ibid*. p .317.
179 *Ibid*. p. 287, Report of the Forty Seven Conference of the ILA held at Dubrovnik, (1958), pp. 241-243.
180 Report of the Fifty Second Conference of the ILA held at Helsinki, (1966), pp. 484-532.
181 *River Oder* judgement, PCIJ series (1937), pp. 221-222.

There are several arguments and facts that do not always support the norm of drainage basins as indivisible geographical units. Exceptions occur in two ways: one by natural phenomenon like earthquakes, volcanic eruptions, landslides, soil erosion or where the river itself changes course.[182] The other includes human-induced processes like intra-basin diversion of water that has been allowed in several circumstances. In the US, there are several examples of huge water transfers between basins, which have been permitted by the Supreme Court in several circumstances.[183] In Israel, Turkey, Russia, India and China, huge diversion structures are still are being constructed.

An example of inter-basin diversion in international rivers has been provided for by agreement, as in Article 3 of the 1945 agreement between Austria and Yugoslavia dealing with the Drava River.[184] Article 1 of the 1957 Treaty between Switzerland and Italy concerning the Spol River[185] also provides for such diversion management. Article VI of the Boundary Water Treaty of 1909 between USA and Canada concerning the St. Mary and Milk rivers has also allowed for diversion.[186] Diversion into the Maine River had been carried out in 1860. Other examples of international diversions are the Israeli undertaking to take water from Lake Tibris through a canal and pipeline to the Negev Desert, and Chile's diverting of some of the waters of the Luca River, which flows from Chile into Bolivia, into a national drainage basin.[187] There were also

182 *Supra* note 172: The Great Lakes drainage followed southward first via the Mississippi river during the Pleistocene period and later via the Rome outlet into the Hudson river and then again changed to the St. Lawrence river. The Kosi river in Nepal has moved 112 km eastward during the past 130 years.
183 283 U. S. 336 (1931), p. 336.
184 227 UNTS, 1954, p. 128.
185 36 LNTS, 1925, p. 77.
186 *Supra* note 172, p. 72-73.
187 *Ibid*. p. 71-72.

disputes between the USA and Canada about the Canadian proposal for diverting the Columbia River water through the Fraser Diversion Scheme, and this was not implemented.[188] The Lake Lanoux case provides a good illustration of a diversion in which the Arbitral Tribunal rejected Spain's argument and held that a diversion followed by restitution was not contrary to the treaty provision and international law.[189]

3.10 The Right of a State to Utilise Water in its own Territory

Every state does have the right to utilise the waters within its territory; however, this right is not unlimited and unconditional. Each state can use the waters in such a way that it does not injure the other watercourse states on account of its utilisation. Court judgments such as the *Lake Lanoux* Arbitration, and the verdict on the diversion of waters from the *Meuse case* supported this view explicitly. In U.S. inter-state water cases, such as *Connecticut v. Massachusetts*, *New Jersey v. New York*, and *Kansas v. Colorado*, the right of states to utilise waters in their territory has been safeguarded and advocated (which has been evaluated already). However, the first precondition to such utilisation is that it must not be injurious or harmful to the other basin states, and that the share one is entitled to must not be exceeded.[190] The idea of not causing injury as enunciated in the *Trial Smelter case* sic utre tuo ut non atianum laedas (analysed above) is one of the foundations of this idea.

As discussed earlier, Article 4 of the Salzburg Resolution of the ILI in 1961 completely prohibits any utilisation that might cause injury, as did the Declaration of Montevideo, the 1957

188 R. W. Johnson, "The Columbia Basin" in Q. Garreston, R. Hayton & C. Olmstead (eds), *The Law of International Drainage Basins*, New York: Ocena Pub, 1967, pp. 202-220.

189 24 ILR (1961) p. 101.

190 *Supra* note 6, pp. 190-191.

Buenos Aires Resolution, and the Madrid Declaration, 1911.[191] Articles IV and V[192] of the Helsinki Rules and Articles 5, 6, 7, 20, 22, and 24 of the UNCIW reaffirm these ideas.

The report of the Nile Commission, which was embodied in the 1929 Nile Waters Agreement between Egypt and Sudan, protects only the efficient utilisation of waters from serious injury by the acts of co-riparian state.[193] The approach that only efficient utilisation is to be protected under international law was somewhat diluted by the Rau Commission in 1939, regarding the disputes between Punjab and Sind. A commission headed by Sir Bengal Rau, recommended that the Sind should transform its wasteful inundation canal system into a weir-controlled one, and that Punjab should allow Sind three years to do so before starting its own project, and Punjab should contribute to the cost of the barrage necessary to make the conversion of the canals in Sind.[194] The American experience illustrated by the Supreme Court decision in *Wyoming v. Colorado* supports this notion of useful and beneficial utilisation.[195]

Article 2 of the 1933 Declaration of Montevideo, provides that

> "… no state may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious …"[196]

191 *Ibid*. pp.195-202.

192 Article 4 of the Helsinki Rules 1966, and the UNCIW, Article 6 prescribes the conditions prerequisite for Article 5.

193 *Supra* note 6, p. 214.

194 *Ibid*. p. 215: the Commission found that the upstream project would in fact cause material injury to Sind's inundation canals which were operable only at times of flood, and it was the method of irrigation and not the volume of water used that was the source of the problem.

195 *Ibid*. pp. 217-218.

196 *Ibid*. p. 223; also see the Seventh International conference of OAS at *supra* note 174, p. 204.

Article 3 states in the case of damage referred to in the foregoing Article, an agreement of the parties shall always be necessary. In the case of any injury, the states concerned must involve themselves in negotiation and seek out a satisfactory resolution of the dispute by paying reparation for the injury. For instance, India paid compensation to Pakistan when Pakistan's irrigation network was disrupted by partition and the construction of an irrigation network was required in Pakistan.[197]

In the 1872 *Helmond* case, such rights and obligations were provided to both states.[198] Nonetheless, Iran challenged the decision and it has not been applied yet. In the inter-state dispute between *Aargau and Zurich*, the Federal Court of Switzerland in its decision of 1878, upheld the principle of equality of right for both states over their common watercourse.[199]

The German Federal Court, in the case of *Wittenberg and Prussia v. Baden* in 1927, decided that a state is under "the duty not to injure the interest of other states".[200] The disputes were resolved later by mutual agreement. In 1913, the Austrian Court, the Imperial Royal Administrative Court, in *the Leitha*

197 *Ibid.* p. 231.; also see *supra* note 63, p 208-The Indian contribution was fixed at US$ 174 million, and around US$ 800 million was allocated by western governments for the Indus Development Fund.

198 *Ibid*. p. 235-36; also see II YBILC (1974), pp. 233-234.

199 Schindler, "The Administration of Justice in the Swiss Federal Court in International Disputes" (1921) in *AJIL*, pp. 169-172: A license to build a hydro-electric plant on the Jonalach River was given under Zurich law, on the consideration that a certain sum of money deposited in a bank be used to indemnify persons whose existing uses downstream might be injured by the new works. The work diminished the flow to downstream Aargau which led to Aargau complaining to the Federal Court to declare the former concession invalid. The court called upon the parties to utilise waters as such way that did not create any harm or cut the entitlement of other cantons.

200 *Annual Digest of Public International Law Cases*, (1927) p. 128.

River Case, however, rejected the Hungarian citizens' claim that diversion of the Leitha waters inside Austria was a violation of customary international law.[201] The concept of not causing injury or any harm to the other basin states was also affirmed in the *Franco-Italian dispute* over the use of the Roja River water.[202]

In a recent case concerning the construction and implementation of the *Gavcikovo-Nagymaros* dam, the ICJ held the view that the operation of Variant C by Slovakia, to mitigate the harm caused by non-implementation of the Treaty by Hungary, where 80% of the waters were diverted, ignoring Hungary's legitimate interest in it, was illegal.[203] Thus, for its illegal work Slovakia was required to pay compensation to Hungary for having adversely affected Hungary's reasonable and equitable entitlement over the beneficial use of those waters. In the *Corfu Channel* case, the ICJ adjudged that respect for territorial sovereignty is an essential cornerstone of international relations. Albania was held responsible for the damages incurred by the British vessels and crew, and it was required to give notification of the mines lying beneath the surface of the sea, where the accident had happened.[204]

In the context of state practice, a co-riparian state has a right to utilise the waters within its territory on the condition that such

201 *Annual Digest of Public International Law Cases*, (1940) pp. 594-595.

202 *Annual Digest of Public International Law Cases*, (1938-1940) p. 120.

203 37 ILM (1998), pp. 168-239.

204 ICJ Decision on Corfu Channel case, (1949), ICJ Reports, p. 4, "the court draws the conclusion that the laying mines of the minefield could not have been accomplished without the knowledge of Albania. As regard the obligations resulting for her from this knowledge, they are not disputed. It was her duty to notify shipping and especially to warn the ship proceeding through the strait on October 22, of the danger to which they were exposed. In fact, nothing was attempted by Albania to prevent the disaster, and these grave omissions involve her international responsibility".

utilisation must not cause any harm to other co-riparian states. With few exceptions state practice, treaty regimes and judicial pronouncements all suggest that the right to use waters in one's own territory is restricted and conditional in the sense that states must first fulfil their obligation.[205] This constitutes state practice and *opnio juris* sufficient to make it customary international law.

3.11 Water as a Political Weapon

Water has been used as a political weapon in order to advance interests of individual states on numerous occasions. As has been seen, Egypt has shown its interest in allowing Israel access to waters of the Nile so as to resolve the Palestine problem and liberate Jerusalem from Israeli rule for political, religious and cultural reasons. Israel objected to this offer by stating that it was not ready to trade Jerusalem for Egyptian water.[206] Jordan recognised the Israeli rights to the Jordan River waters in return for the latter acquiescing in Jordan's procurement of American weapons.[207] Syria withdrew its support to the Kurds fighting inside Turkey in lieu of uninterrupted flow of the waters of common rivers.[208] Bangladesh allowed India use of shared waters in return for India denying support for guerrillas who were carrying out

205 M. Picasso Botto, "The Amazon Cooperation Treaty: A Mechanism for Cooperation and Sustainable Development" in A. K. Biswas, N. Cordero Benedito, P.F. Brague & C. Tortagdu (eds) in *Management of Latin American River Basin: Amazon, Plata, and Sao Francisco*, Oxford: Oxford University, 1996, pp. 86-93 & 120-121. The Tennessee, Loire, Ganges, Mekong, Zambezi, Plata, and Amazon river basins works were carried out in the similar way.

206 *Supra* note 13, p. 57.

207 *Ibid*. p. 49.

208 M. Murakami, *Managing Water for Peace in the Middle East: Alternative Strategies*, Tokyo: United Nations University, 1995, p. 23.

attacks on Bangladesh from India.[209] Turkey has proposed an ambitious, complex and mammoth water transfer project from the Sehan and Ceyhan rivers to several Arab countries, in order to solve their acute water shortage problems by transporting water through a pipeline across thousands of kilometres. If this proposal succeeds, Turkey will have a dominant position in the Middle East (ME).[210] The proposed Fraser River Diversion in the Columbia Basin by Canada compelled the USA to agree on the downstream issues raised earlier, which led to the conclusion of the Columbia Treaty 1961.[211]

Peter Glecik, an expert on water and conflict, has suggested that water has played a role in international conflict in history, and will in the future too. He talks about 'war against nature' rather than calling it "war caused by water related disputes."[212] It is also increasingly argued that the availability of fresh water has become a part of human rights, because water, like oxygen, is a primary need of human beings for their existence.[213] The right to water and its linkage with human rights has been widely discussed and recognised as a basic human right, and is

209 *Supra* note 49 (Crow), pp. 122-123.

210 *Supra* note 14, p. 78-79: Turkish President Ozal in 1987 suggested that a pipeline could be constructed in the Seyhan and Ceyhan rivers in the southern Turkey to deliver water to Sharjah in UAE and to Jeddaha on the Red sea. Such a pipeline would carry 3.5 thousand metres per day. The estimated cost of this has been put at US$ 20 billion. A second suggestion, made public in 1991 was that a mini-pipeline be built as far as Jordan; using the waters of the Goksu or Manaugat rivers west of the Sayhan and Ceyhan rivers.

211 R. W. Johnson, "the Columbia Basin" in A.H. Garretson, et.al (eds), *The Law of International Drainage Basins*, New York: Ocena Pub., 1967, pp. 205-210.

212 http://www.worldwaterforum.org/index2.html.

213 *Ibid*. It was discussed by the World Water forum 2002 that a water right is human right and international law should treat it in this sense. See S. McCaffrey, "A Human Right to Water: Domestic and International Implications" (1992) in 5 *GIELR*, pp. 1-23.

associated with the right to development of states in the 21st century.[214] McCaffrey has argued that the right to life stipulated in the International Covenant of Political Rights, Universal Declaration of Human Rights and also economic rights are inextricably interwoven with human rights issues. Moreover, he also suggested that the right of a state to receive an unhindered flow of water from shared watercourses is also linked with these human rights.[215] With respect to the relation between peace and water in the case of the ME, it is a widely recognized fact that without the settlement of water sharing and allocation issues in the ME peace will not possible.[216]

3.12 Recent Developments on Equitable Utilisation

The *Gacikovo-Nagymaros* case, decided by the ICJ in 1997,[217] and the 1997 UNCIW have confirmed equitable utilisation within the rules of IWL. Most bilateral treaty agreements have focussed on equitable sharing of benefits, particularly those treaties which were made after the 1990's.[218]

214 Ministerial Declaration of the Hague on Water Security in the 21st century 22 March (2000), Second World Water Forum held in the Hague, Para 1; also see supra note 212 (McCaffrey).

215 H. Smets, "The Right to Water as a Human Right" (2001) in 5 *EP&L*, pp. 248-250.

216 *Supra* note 208, King Abdullah of Jordan and Soviet President Mikhail Gorvachov stressed the point during the Hague water conference that the Middle East problems and its relation to water: "no national solution will solve our water problems, there has to be international involvement; the water shortage in the Middle East has the potential to result in war if not resolved in next 10 to 15 years".

217 37 ILM (1998), pp. 179-191, "Hungary, in the treaty of 1977 had consented to share benefits from the utilisation of Danube water, but not to be forfeited its basic rights to an equitable and reasonable sharing of the resources of an international watercourse".

218 Mekong, Ganges treaty between Bangladesh and India, and the Mahakali treaty between Nepal and India.

Besides this, the Water Resources Committee (WRC) of the ILA, which has continued its work on the non-navigational uses of international watercourses, has adopted an article on 'Adequate Stream Flow' at its 1998 Rotterdam meeting and a consolidation of the ILA Rules on International Water Resources 1966-1999 at its meeting in Italy in June 1999. In its pursuit of the Helsinki Rules 1966 and the Settlement of International Water Disputes, the WRC has continued its study, and the recently held Vienna meeting worked on strengthening the Rules.[219] The general principles of Article 3 of the Campione Consolidation on the Rules on International Water Resources accommodate this rule.[220] In the article on Adequate Stream Flows, it stipulates:

> "consistent with the principle of equitable utilisation, basin states shall, individually and, where appropriate, in co-operation with other basin states, take all reasonable measures to ensure stream flows are adequate to protect the biological, chemical and physical integrity of international watercourses, including their estuarine zones".[221]

There are increasing environmental considerations in the use of IWC. For example to implement large water projects, construction of a dam is unavoidable; but many dams and reservoirs are failing to realise the objectives for which they were built. The reasons may be technical, environmental or social. Some appear to be inflicting more harm than realising the bounties they were initially supposed to generate, as is indicated in the report of the World Commission on Dams

219 www.ila-hq.org.

220 Article 3 states: "each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin". ILA booklet on the London conference 2000, Water Resources Committee, p. 4.

221 *Ibid*. p. 2.

(WCD).[222] For example, the Aswan dam in Nile and Farakka in India have inflicted damage to the environment. Jackson has rightly observed that the notion of Third World leaders in relation to environmental protection and its relation with development is that environmental problems can only be tackled when poor countries have achieved a certain level of prosperity. Moreover he gave an example that the first Indian Prime Minister, Mr Nehru, described dams as the temples of modern India and saw them as a symbol of national pride.[223] More than 57% of all dams are in India and China.[224]

3.13 The Role of Joint Commissions in IWC

The idea of treating an IWC as a single unit, ignoring the political boundaries, requires mechanisms that bridge the gap between sovereign nations. To pursue this notion, the creation of an agency which is independent of governments and able to resolve issues of common concern is essential. The early writings of jurists that contributed to the development of this concept have been immensely beneficial. For example, Smith enunciated the idea in the 1930s, and was supported by

222 WCD, *Dams and Development: A Framework for Decision Making*, Earthscan, London, (2000), pp. 8-10. 40 to 80 million people were displaced by these dams, people's health and livelihood have often been put at risk and adequate compensation has not been granted. This has also caused severe damage to the environment. In two years, the commission undertook studies of 11 large dams in five continents, surveyed 150 dams in 56 countries, conducted 17 thematic reviews along five dimensions of the debate, as well as four regional consultations and attracted 947 submissions form 97 countries. Also see W. Barnaby, "Re-routing World Waterways", in *The Times*, December 1 (2000), p. 26.

223 B. Jackson, *Poverty and the Planet: A Question of Survival*, London: Penguin, 1994, p. 10.

224 *Supra* note 222, pp. 40-42; also see A. Roy, "The People vs the God of Big Dams", *The Times of India*, 25 October (2000), p. 15.

Andrassy, Laurterpacht and others.[225] The ILI in its 1911 Resolution recommended the establishment of a Joint Commission as an advisory body to carry out projects on such basins.[226] This idea was also advocated at the Seventh International Conference of American States held at Montevideo in 1933. An early Joint Commission to undertake such a special responsibility (to determine the best sites for building locks on the Meuse) was constituted in 1785 between Germany and the Netherlands.[227] Since then, water conflicts and disputes have been mitigated and resolved through the creation of bi-national bodies that have greatly contributed to the equitable resolution of water disputes. The roles of such commissions, committees or groups have always remained catalytic and commendable.[228]

The reasons for the success of joint bodies are multi-dimensional. They include neutrality, expert knowledge on the subject and a strong will to seek out a sound and acceptable resolution under special circumstances. The tremendous success of such commissions can be seen in practice in the major river basins.[229] More than 300 IWCs have come into being after the rupture of the former Soviet Union and Yugoslavia; the numbers are increasing. For most of the watercourses concerned such commissions are already in place. It is therefore argued that the establishment of a commission could contribute to the resolution of any impasse, however long and complicated a dispute may be. The constitution of such a

225 L. A. Teclaff, *The River Basin in History and Law*, the Hague: Martinus Nijhoff, 1967, p. 152.

226 *Supra* note 198, p. 275: Article 7 suggests appointing a Joint Commission.

227 *Supra* note 225.

228 Even complex issues have been resolved by such entities, for example, by the commissions between Canada and the USA, Mexico and USA and even between arch rivals India and Pakistan.

229 T. Upreti, "The Role of Joint Commission in International Watercourses Issues" *The Kathmandu Post*, 22 July (2001).

commission could be varied, involving bureaucrats, politicians and even heads of state.[230] The Mahakali River Treaty 1996 between Nepal and India, envisages such a joint commission. Despite this, the commission has yet to materialize, and neither the finalisation of DPR nor the disputes over inundation between the two countries have been resolved.

The International Waterways Commission of 1905 (later replaced by the Joint Commission established under the Treaty of 1909 between Canada and the USA)[231] is a better example. This Treaty is a landmark event in the development and resolution of serious disputes over the use of waters between a powerful state and a weaker neighbour. This Treaty provides that in the event of an injury, the party that inflicts such injury should negotiate to abate and mitigate such injury or pay reparation for it. The commission has quasi-judicial authority to administer and, conduct research and investigations as well as public hearings. This is possible through political will, even though the physical conditions of both states differ, and their interests vary. Article VII of this Treaty establishes the IJC with six commissioners, three appointed by each of the Canadian Prime Minister and US President. Without the consent of the IJC, no water projects are possible in the IWC.[232] Moreover, every complex issue has been resolved through it. It is the best example of the sharing and allocation of mutual benefits from a shared watercourse using the mechanism of an IJC.

The International Boundary and Water Commission (IBWC) is a mechanism created by the USA and Mexico under a 1944

230 *Supra* note 225, p. 140-141: The Upper Volta River Authority, is headed by the President of the Ghana, although it is a national authority.

231 D. LeMarquand, "The International Joint Commission and Changing Canada-United States Boundary Relations" (1993) in 33 *NRJ*, p. 62, also see D. J. Allee, "Subnational Governance and the International Joint Commission: Local Management of United States and Canadian Boundary Waters" (1993) 33 *NRJ*, pp. 133-151.

232 *Ibid*. pp. 65-67.

Treaty. Its jurisdiction is more limited in many respects than the USA-Canada IJC. Nevertheless, it has made an immense contribution to the resolution of conflict and reconciled the interests of both nations. The implementation of the treaty's provisions is its basic duty. The commission consists of two national sections. A single commissioner, who must be an engineer, heads each section. Experience suggests that public demand in both countries is for the jurisdiction of the commission to be expanded to enable it to cover a wider range of issues.[233]

The creation of a Joint Commission in Europe took place in the early Nineteenth century. Several commissions exist with jurisdiction over the Rhine, Danube and Meuse Rivers. For the Nile basin, the Nile Commission is in place; for the Indus, there is a Joint Commission, which has successfully worked even during times of war between the arch-rival states.[234] There are separate multilateral projects for the Mekong, SADC, Amazon and so on, which are also administered and implemented of commissions. The results show that the creation of a Joint Commission or a committee in order to successfully implement treaty provisions and enhance co-operation in using the waters of an IWC for mutual benefits is essential.

The tremendous success of such commissions and their smooth working is well exhibited in the Scandinavian states. Russia and Finland set up the Joint Frontier Commission in 1964. The Finland-Sweden Frontier Rivers Commission was set up in 1971 by the Boundary Rivers Agreement, as was the Finish-Norwegian Frontier Rivers Commission. As argued by

233 S. Mumme, "Innovation and Reform in Transboundary Resource Management: a Critical Look at the International Boundary and Water Commission, United States and Mexico" (1993) in 33 *NRJ*, p. 103, also see H. InGram & D. R. White, "International Boundary and Water Commission: An Institutional Mismatch for Resolving Transboundary Water Problems" 33 *NRJ*, et al., pp. 153-154.

234 *Supra* note 17 (Soffer), p. 250.

Fitzumaurice,[235] the Finnish-Swedish Commission is working as a national entity in both nations without any problem. It is functioning as a court and administrative organ in both states, to the exclusion of national courts and administrative organs. This may only be possible where the judicial systems, procedures and existing law are as close they are in both these countries. Fitzumaurice further argued that this legal proximity allows a solution that may be called 'merged sovereignty'. In several respects, it represents the best example of international co-operation, one that has positively honoured the rights of indigenous people. The Sami people's inherited rights over reindeer and fishing have been protected and enhanced. However, the Joint River Commission between India and Bangladesh established under a 1977 agreement, which was later upgraded to Ministerial level, failed to obtain its objectives due to the differences of opinion on how to augment flow in the dry season. This prevented the Commission from obtaining the objectives set out on its establishment.[236]

3.14 Conclusions

The importance of equity in the modern world is paramount. The application of it in political, socio-economic, trade and environmental issues has become a common dimension. Its link with politics creates a truly democratic system. Similarly, in the environmental dimension, it secures healthy environmental rights for both present and future generations. In the area of trade, commerce and economics, equity has become an explicit link for vouchsafing the judicious economic rights of developing nations to participate in a healthy and equitable economic and international trade system. Thus, equity bridges

235 *Supra* note 1, p. 461.

236 S. M.A. Salman & K. Uprety, *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective*, the Hague: Kluwer Law, 2003, pp. 151-159.

the gap between wealthy and poor nations reconciling the divergent interests of the developing and developed nations.

In the legal sphere, equity can be used to administer fair and rational justice to all people of the world. Moreover, its application here is to ensure fairness and justice, and to address the interests of the contestant parties. Its application is most appropriate wherever there are legal lacunae, rigidity or inability to resolve issues related to particular exigencies. It can be argued that without recourse to equity, a proper and just adjudication of IWL disputes is not possible. As a principle relied upon on numerous occasions, it has been recognised by the majority of treaty regimes and both supported and advanced by courts and tribunals, municipal and international. Most writings of the publicists support the notion that equity has been assimilated into IWL. However, the obligation not to cause any harm or deprive other watercourse states of their rights always binds states in each circumstance. Each watercourse state must always comply with this duty, which implies that a use is inequitable if it inflicts any injury or harm.[237]

However, the said rules are by no means complete and universally accepted. There are many matters which are still contentious[238] and particularly criticised by some upstream and downstream states alleging that the reasonable and equitable rule favours the other. Perhaps, Jennings may be right to argue

237 Commentary, YBILC, (1984), pp. 340-341.

238 *Supra* note 1: Fitzmaurice has argued that paragraph 1 and 2 of Article 7 are conflicting; also see, UN Doc.A/C.6/51NVW/CRP.94, A/C.6/51/SR.62, April 4, 1997: During the UNGA discussion on the instrument, France criticized the draft, stating the haste in negotiations had created serious procedural discrepancies, and imbalance between up and downstream states with many ambiguities. Ethiopia abstained, stating that the draft favours downstream states at the price of upstream states.

that "water resources law is surely not ripe for codification."[239] Special Rapporteur McCaffrey has rightly observed that despite some of the reservations made by member states, the UNCIW is the first legally binding framework instrument with universal jurisdiction, which would contribute to the attainment of the goals of the Charter of the United Nations (for the peaceful resolution of disputes) by its successful codification and progressive development of the rule in international law.[240] In the meantime, it must be acknowledged that there is no universally accepted definition of equity and equitable utilisation. Therefore, there is a lack of unanimity on when and how to apply its provisions in circumstances of unique geographical, hydrological, or political conditions, and there is a large loophole for manoeuvring, which poses a formidable challenge to codification. Equity has provided court's with much needed flexibility, a flexibility that has already enabled it to reach decisions in matters involving the disparate claims of developed and developing countries over such resources.[241] Regarding to significance of equity, however, Higgins cautions,

> "the general principle of equity and proportionality are meant to oil the wheels of decision-making but we should be sceptical. The concept of equity, designed to be an aid to decision-making, carries with it serious problems."[242]

It has been argued that equitable utilisation is the best tool for achieving justice in shared resources, and is the best possible means of resolving conflicts. In practice, however, it has far

239 R. Jennings, "Keynote Address" in *Resolution of International Water Disputes*, the International Bureau of the Permanent Court of Arbitration (ed), the Hague: Kluwer Law, 2003, p. 26: he has argued that technical experts also should have been included in the codification process.

240 J. R. Crook & S. C .McCaffrey, "The United Nations Start Work on a Watercourses Convention" (1997) in 91 *AJIL*, pp. 374 – 377.

241 *Ibid.*

242 *Supra* note 76, p. 237.

reaching implications with several inherent difficulties. Weak and vulnerable countries are in a precarious position in utilising these resources due to the numerous obstacles, such as a lack of cooperation by other watercourse states, lack of capital or technology, and international reluctance towards any meaningful cooperation in utilising shared resources. Yet obtaining an integrated and holistic approach, good faith, cooperation and joint management (including the use of the equitable utilisation rule) appears the best way to maximise the benefits.[243] Multilateral investment agencies such as the World Bank, other development banks, UNDP, IMF, GEF, and the developed nations must play a more creative role, following that played by the World Bank in resolving the disputes over the Indus Water Treaty.[244] In order to accommodate and address the issues of weak and vulnerable nations, some concessions have already been given by instruments or institutions such as LOSC, GATT & WTO,[245] the EU,[246] and

243 A. M. Duda & Mohamed T. El-Ashry, "Addressing the Global Water and Environment Crisis Through an Integrated Approach to the Management of Land, Water and Ecological Resources" March 2000, in 25 *WI*, p. 116.

244 A. K. Biswas was of the view that the leadership shown by Mr Black, the then President of the World Bank in resolving the Indus treaty should be followed by other executives of the numerous agencies which would be able to achieve broader development and equitable society.

245 Some quota free and tariff free entrance for the least developed country's products and other concessions have been offered in the Fourth Ministerial meeting that took place in Doha in 2001. Also see S. P. Subedi, "The Road from Doha: The Issues for the Development Round of the WTO and The Future of International Trade" (2003), in 52 *ICLQ*, p. 426-46.

246 Staff, "European Union provides sugar quota": *The Kathmandu Post* 16 April 2003, Under the EBA Scheme the EU has given quotas totalling 4400 ton of raw sugar to Nepal and some other land-locked states have also received such a quota, which will be tremendously beneficial to them. For example, Nepal is making a profit of Rs 30 million from this transaction and looking to increase such arrangements in the future.

Article 6 of the Rio Declaration asserts that special priority will be given to developing nations.[247] Such concessionary arrangements for this group of nations from the donor agencies and the western nations are most essential.[248] These notions should be implemented in a milieu where every player must come forward voluntarily rather than with compulsion.

The forthcoming chapter will focus on issues related to Nepal. The problems, prospects and way ahead will be analysed in the light of IWL in general, and in the context of bilateral and regional aspects in particular. The pertinent issues will be evaluated in order to explore avenues for the resolution of existing problems.

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247 Principle 6 (Rio Conference) provides special concessions to developing countries. Similarly, principle 7 provided common but differentiated responsibility between poor and rich nations.

248 *Supra* note 115, pp .83-157; also see third UN Conference on the Least Developed Countries in Brussels at www.undp.org/mdg/goals8.pdf. For the eradication of poverty by the year 2015 in the above rank country's targets have been set out.