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In the Light of Different National Circumstances: Equity under the Paris Agreement

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I. Introduction

The Paris Agreement is the latest addition to the body of treaties governing climate change. Among other things, the Agreement seeks to revolutionise the principle of equity and common but differentiated responsibilities (CBDR) by providing that it shall apply "in the light of different national circumstances." The Paris Agreement prides itself as a progressive development in the distribution of the costs and benefits of climate change.

Although equity and CBDR have earlier been adopted as guiding principles under the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement adds that the CBDR principle shall apply "in the light of different national circumstances." This addition was a result of agitations around the continued relevance of differentiated responsibility given the emergence of some erstwhile developing countries as economic powers and significant emitters of greenhouse gases. The addition was adopted as a way of narrowing the broad dichotomy of countries into developed and developing countries, where the former took up substantive responsibilities, and the latter were beneficiaries of climate funds. It was to ensure that developing countries with enough capacity to take action would not be excluded from such responsibilities based on the application of equity and CBDR.

This paper argues that this addition was unnecessary and merely cosmetic. It shows an inchoate understanding of the principle of equity and CBDR has expressed in the UNFCCC. The notion of taking national circumstances into account in the distribution of climate change responsibilities is implied in equity and CBDR. Instead, I argue that the intention of the Paris Agreement to flesh out respective capabilities in the distribution of commitments is achieved not

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through the addition of this phrase but through other provisions in the Agreement. The caveat 'in the light of different national circumstances' is mere tautology and contributes nothing to both the jurisprudence and the practice of equity in international law.

II. Domestic law origins of equity

Equity is perhaps one of the oldest legal concepts, and its use and manner of application have differed from one legal system to another. The concept has also been utilised by politicians, moralists, political philosophers, among others. Equity has thus gained a wide range of meaning, and its precise meaning would vary depending on the context within which it is used. Moralists and philosophers would differ from politicians and diplomats in the use of the word. Its use in different treaties, by the international court of justice or tribunals, within the General Assembly or the Security Council would also differ from what is meant when it is used in domestic legislation or within the strict common law sense.[1]

The history of equity, which shall be explored below, leads to two different understanding of the concept. One is the idea that equity is the prerogative of judges used as a means of correcting or mitigating the harshness that will result in the direct application of the law to a specific situation. The other school views equity as a rational decision-making process which forms part of natural law and therefore sees equity as a source of law rather than distinct from the law.[2] Equity is thus seen as a part of the judicial adjudication process.[3] This disparity has dictated several legal and political debates on the concept of equity such as the positivist-naturalist debates, the form and role of equity in international and domestic law, the North-South debate, and the extent to which equity should be adopted in law courts and other legislative or judicial process. The following sections would highlight some of these differences and how they have impacted the use of the concept in international law on climate change.

Equity, like many other legal concepts, does not have a linear history or a crystal-clear definition. However, much of what is known as equity today emerged from Aristotle's famous treaties, *Nicomachean Ethics*.[4] According to him, equity and justice were not genetically different. He explains this by pointing out that if equity were different from justice, either of them would be good and the other evil, and it

1 Christopher Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Transnational Publishers 1993) 3.

2 *ibid* 21.

3 Wolfgang Friedmann, 'The Uses of General Principles in the Development of International Law' (1963) 57 Am J Int'l L 279, 287.

4 Aristotle, *Nicomachean Ethics* (Roger Crisp edn, Cambridge University Press 2000) 99–100.

would be odd that equity receives our commendation if it is evil. If they are both good, it means they are not genetically different. Aristotle, however, maintains that although they are both good, what is equitable is superior when compared with 'strict justice', strict justice being the strict adherence to the letter of the common law.[5] The need for equity arises due to the nature of common law rule, which is a general statement of what is right or just. Although legal adjudication will usually be on general terms, there would be situations where the application of 'an otherwise universally valid rule of law' would result in injustice.[6] In such cases, the justice of the situation falls outside the general rule.[7]

Equity will thus create an exception to the general rule by taking a more definite and specific judgement of what is just in that particular situation. In equity, the law is adapted to the facts of individual cases but must conform to the general notions of law and justice in doing so.[8] Equity was thus not contrary to, but supplementary to common law justice.[9] It is an efficient way of ensuring that justice which is the objective of the common law, is achieved. Equity, as espoused by Aristotle, is thus an exception created to rectify the ills of common law in specific cases and remained an integrated part of the legal system.

A. Equity under the roman law

The concept of equity gained primacy in Roman law through the adjudication of the praetors (magistrates). It had developed as a set of small and inconsistently applied, procedural remedies applied by the Roman magistrates known as praetors to matters of property rights and contracts.[10] It gave room for equity to serve as a tool for remedying situations among individuals who were otherwise politically equal. The magistrates modified the *ius civile* by introducing equitable edicts. These edicts gave remedies to litigants such as a widow whose husband had died intestate and would thus have had no cause of action under the civil law. The magistrates thus developed the jus honorarium to make up for cases where it was necessary to achieve justice even though the parties may not have followed the legal formalities that should have given rise to such rights.[11]

5 *ibid*.

6 Anton-Hermann Chroust, "Aristotle's Conception of Equity" (1942) 18(2) Notre Dame Law Review 123.

7 Rossi (n 1) 22.

8 Michael Akehurst, 'Equity and General Principles of Law' (1976) 25(4) Int'l and Comp Law Quarterly 801; Chroust (n 6) 124.

9 Aristotle (n 4).

10 Justice Margaret White, "Equity: A General Principle of Law Recognised by Civilised Nations?" (2004) 4(1) QUTLJJ 105; Rossi (n 1) 28.

11 *ibid* 105.

However, equity under Roman law never developed beyond a set of imprecise remedies borrowed from natural law.[12]

B. Equity in the civil law system

The development of equity within the civil law system followed a significantly different route when compared to its development under the common law. While the common law system had allowed for judges-made law under the courts of law and equity, civil law had no such equivalence. On the other hand, civil law followed a stricter code-based system of adjudication where certain officials codified what was believed to be the law. These legal scholars known as the Glossators and Commentators were responsible for bringing together the law in written form and ensured consistency.[13] Equitable principles were included in these collections of the law in order to make up for the strictness of the code system. This codification helped to give the principles full effect in the adjudication of the law without having the dual nature which it had under the common law system.[14]

Various civil codes have since then developed, which make provision for moral justice as part of the legal adjudication process further fusing the direct application of legal process and equitable principles.[15] Provisions, therefore, abound which provides that where a statute requires a judge to decide according to his estimation of the circumstances, or to proper reasons, he must make such a decision in accordance with 'justice and equity.' Others make use of the phrase 'doctrines of natural law'[16] or 'natural equity'[17] or 'doctrines of equity'.[18]

C. Equity under english common law

In England, equity gained prominence through its application in individual cases. Even though judges never intended to establish a distinct set of rules, equity eventually developed into "an independent source of law… a new system of law."[19]

[12] Rossi (n 1) 31.
[13] *ibid* 38.
[14] Ralph Newman, "Equity in Comparative Law" (1968) 17 (4) Int'l and Comp Law Quarterly 830–1.
[15] Rossi (n 1) 38–9.
[16] The Austrian Civil Code, section 7; The Argentine Civil Code, article 7; The French Civil Code, article 21; The Constituent Assembly Law of Ghana, article 4.
[17] The Civil Code of Colombia, article 32; The Ecuador Civil Code, article 17–18; The Honduras Civil Code, article 20.
[18] The Puerto Rico Civil Code, article 7.
[19] Gustav Radbruch, "Justice and Equity in International Relations" in Norman Bentwich, *et al* (eds), *Justice and Equity in the International Sphere* (Constable & Co 1936) 2.

Equity had developed as part of the development of the common law system.[20] The medieval historian, GB Adams, asserts that there was no clear distinction between equity and common Law until the fourteenth century. Both systems operated together in terms of the institutions that administered these rules and the functions of the rules.[21] Equity developed as an attempt by the Lord Chancellor to ensure security and justice in the kingdom when common law had failed or proved inadequate in the circumstances.[22] The procedure for equity usually began as 'petitions for grace' asking the king to interfere with securing justice where the regular law failed to do so.[23] Lord Woolsey commenting on the need to apply equity in some instances made it clear that 'the king ought to… mitigate the rigour of the law, where conscience hath the most force; therefore, in his royal place of equal justice, he hath constitute a chancellor, an officer to execute justice with clemency, where the rigour of law opposes conscience.'[24]

The development of equity was further aided by the principle of *stare decisis*, which ensures that judicial decisions are consistent and predictable.[25] The application of stare decisis helped not only to concretise equity as part of the legal system but to cure one of the significant criticism of equity which was its susceptibility to the whims of whoever was chancellor. The separation in the administration of equity has led to criticisms that equity is outside the administration of law and reliance on it was a reliance on concepts that are external to the law. This confusion persists to this day and has had an impact on the application of equity in international law.[26]

Equity under the common law thus became a means of reconciling legal certainty (which is necessary for social order) with justice which is essential in specific situations: the attempt to ensure that justice is achieved amidst the quest for legal certainty.[27] Equity corrects what would have otherwise been failures of justice due to the incapacity of strict law to adjust to specific situations.[28] Unlike common law which concerns itself strictly with rights and wrongs according to the law, equity takes a more comprehensive view of right and wrong in its approach to justice. It

[20] George Adams, "The Origin of English Equity" (1916) XVI (2) Columbia Law Review 88.
[21] *ibid* 89.
[22] Richard Hedlund, "The Theological Foundations of Equity's Conscience" (2015) 4 Oxford Journal of Law and Religion 123.
[23] Adams (n 20) 91.
[24] Shyamal K Chattopadhyay, "Equity in International Law: Its Growth and Development" 5 Ga J Int'l & Comp L 381.
[25] Rossi (n 1) 36.
[26] *ibid* 32–3.
[27] Ralph Newman, "An Analysis of the Moral Content of the Principles of Equity" (1967) 19(1) Hastings LJ 150.
[28] *ibid* 151.

considers the unique situation of the parties involved and what relationships may exist between them to make the case worthy of special consideration.

It is thus clear that whether within the old Greek tradition, Roman, common or civil law system, equity was recognised as a concept for the mitigation of general legal principles in order to achieve justice in specific cases. Judges and litigants relied on these concepts frequently to plead their case where it appeared that the application of strict legal principles would not avail them. The aim was not to derogate or undermine established legal principles and the rights which they may have created but to ensure that these principles do not serve as obstructions to justice in some instances. It was a mechanism for marrying the quest for legal certainty with the need for justice.

III. Equity in international law

Although the origins of the equity principle can be traced back to various domestic legal systems, equity has also become an enshrined concept within the international legal system.[29] Hugo Grotius was one of the thinkers who first emphasised the application of equity in international law. He stated that "… upon this principle [equity] all wills and treaties ought to be interpreted. For as all cases could neither be foreseen nor expressed by the lawgiver." He concludes that it is, therefore, necessary to vest in the judiciary the power to make exceptions in the interpretation of the law in some instances.[30]

Equity was first introduced into the international legal system through the practice of international arbitral tribunals.[31] From early treaties such as the Jay Treaty of 1794 to the popular *Alabama Claims Arbitration* of 1871–1872, several treaties followed between the late 19th century and the first half of the 20th century which provided for arbitration as a means of solving disputes between states.[32] Principles of natural law[33] were introduced into the international legal system through these arbitral decisions. The arbitrators employed natural law principles in stemming down the strictness of the treaties and legal agreements which they had to apply in their arbitration. The 1794 Jay Treaty provided that the Commissioners "decide the claims in question according to the merits of the several cases, and to justice, equity and the law of nations." The 1892 *Hero, Nutrias*

[29] Friedmann (n 3) 287; Ruth Lapidoth, "Equity in International Law" (1987) 81 Proceedings of the Annual Meeting *(American Society of International Law)* 139.

[30] Hugo Grotius, *The Rights of War and Peace* (Campbell translation 1901) 26.

[31] Clarence Jenks, *The Prospects of International Adjudication* (Stevens 1964) 319; Rossi (n 1) 87.

[32] Rossi (n 1) 42.

[33] Natural law is that claim which states that there is a set of moral standards to which the law must conform if it is to be regarded as just.

and San Fernando steamships cases between the United States and Venezuela were also to be decided "in accordance with justice and equity and the principles of international law".

This practice continued into the 20th century with the *Orinoco Steamship Arbitration 1910*, where the tribunal was to adjudicate "in accordance with justice and equity". It was also provided by a treaty that "the principles of law and equity" be applied in deciding the *Norwegian Shipowners' Claims (Norway v United States)*.[34] The tribunal held that this implies that the tribunal would be within its jurisdiction to apply equity where positive law is lacking in an area of the dispute between the parties.[35] In this case, equity was understood by the tribunal as a general principle of justice.[36]

The tribunal in the *Cayuga Indians case* noted that where the application of positive law would lead to an abnormal result, recourse must be made to "generally recognised principles of justice and fair dealings."[37] The tribunal explained that the purpose was to avoid reaching inequitable results.[38] The Gran Chaco conflict concerning the border between Bolivia and Paraguay (1932–38) was also settled by an arbitral award based on equity and good conscience. This award presents a compelling case as the decision to rely on equity had been based on the undesirability of relying on written law because it would have led to an undesirable result.[39]

In the *Norwegian Ship Owners Claim Case*, the United States government had requisitioned some ships during World War 1, including some being built for Norwegian citizens. The Norwegian government, therefore, requested for payment on behalf of its citizens. The American government however, refused, and a dispute therefore arose. In applying 'law and equity' to the case, the arbitrators explained that "… these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state."[40] Also, the arbitral tribunal in the *Indo-Pakistan Western Boundary (Rann of Kutch)* case had no express consent of the parties to apply equity. The arbitrators, however, concluded in the preliminary discussions that "as both Parties

[34] *Norwegian Shipowners Claims* (*United States of America v Norway*) Reports of International Arbitral Awards 13 Oct 1922 vol 1 307, 310.

[35] *ibid* 331.

[36] *ibid*.

[37] *Cayuga Indians (Great Britain v United States)* Reports of International Arbitral Awards 22 January 1926 vol VI 174, 180.

[38] *ibid*.

[39] *Dispute between Bolivia and Paraguay* (1934) Report of the Chaco Commission 45.

[40] *Norwegian Shipowners Claims* (n 34).

have pointed out, equity forms part of international law; therefore, the parties are free to present and develop their cases with reliance on principles of equity."[41]

In the *Meuse Case* before the PCIJ, Judge Manley Hudson maintained this position and stated that: "… principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals… Article 38 of the Statute expressly directs the application of 'general principles of law recognised by civilised nations', and in more than one nation, principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the extraordinary power conferred upon it 'to decide a case *ex aequo et bono*, if the parties agree thereto'... It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."[42]

Judge Anzilotti reinforced this position stating that the principle of equity is "so universally recognised, that it must be applied in international relations also."[43] The ICJ noted in *Military and Paramilitary Activities in and against Nicaragua ([Nicaragua v United States of America]* that anyone is yet to object to this position.[44] In the *Frontier Dispute Case*, a dispute had arisen as to the exact delimitation of the boundaries of the Burkina Faso and Mali. Mali had urged the court not to apply Article 38(2). Instead, the court should apply a "form of equity which is inseparable from the application of international law".[45] It is worthy to note that Burkina Faso never objected to this conception of equity as inseparable from the application of international law. In its decision, the ICJ acknowledged that equity was inextricably tied to the idea of justice and held that it would apply that form of equity which ensures a proper interpretation of the law.[46] The court here was taking a typical Aristotelian position, employing equity to ensure that the interpretation of the law does not lead to absurdity. Thus, showcasing that equity had become a part of the

[41] *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan* Vol. XVII Report of Arbitral Tribunals 19 February 1968 1, 11.

[42] *Diversion of Water from the Meuse (Netherlands v Belgium)* Judgment No. 25 28 June 1937 PCIJ Ser A/B, No 70, [322].

[43] *ibid* 211.

[44] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (1986) ICJ Rep para 269.

[45] *Case Concerning the Frontier Dispute (Burkina Faso v Mali)* ICJ Reports 1986, 22 December 1986, [27].

[46] *ibid* 149.

international legal system even without express consent as contemplated in Article 38 (2) of the ICJ Statute.

The principle of equity was also central to the ICJ decision in the *North Sea Continental Shelf* cases. The case centred on the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other hand. The court was saddled with the responsibility to determine the legal principles upon which the delimitation was to be carried out. Rejecting the application of the equidistance principle as provided for by the Geneva Convention, the court held that the shelf was to be delimited by agreement between the parties and in accordance with equitable principles.[47] The court, however, cautioned that the surrounding circumstances be taken into account in the application of these principles. Equity was not to be applied as a matter of abstract justice.[48]

In reaching this decision, the court was careful to distinguish its application of equitable principles (*intra legem*) from *ex aequo et bono*.[49] The court made it clear that the introduction of equity, in this case, was not tantamount to acting outside the purview of the law. The objective justification for the application of equity was within the law. Express consent of the parties as provided for in Article 38(2) of the Statute of the ICJ was therefore unnecessary in the present case. The court emphasised that its duty to dispense justice means that its decision must "find its objective justification in considerations lying not outside but within the rules." The application of equity must be founded within the rule of law, thus ensuring that judges do not exercise an unrestrained discretion in determining cases. The court held that equity was a general principle of law applicable to international legal decision making.[50]

This decision has, however, been criticised. Friedmann, for example, noted that "by rejecting the criteria laid down in the convention and other documents, the court, in effect, was giving a decision *ex aequo et bono*, under the guise of interpretation".[51] Another scholar, Janis criticised the ICJ's opinion (per Judge Hudson) as too Anglo-American and warns against adopting an exclusively Anglo-American interpretation of equity in international law. He points to current

47 *North Sea Continental Shelf Cases, (Germany v. Denmark; Germany v. Netherlands)* 1969 ICJ 53.

48 *ibid* 85.

49 While the application of equity *intra legem* refers to the application of equity founded upon the law, *ex aequo et bono* refers to that application of equity not prescribed by the law and hence only applicable by consent of parties to the case.

50 *ibid* 88.

51 Wolfgang Friedmann, 'The North Sea Continental Shelf Cases: A Critique' (1970) 64 Am. J. Int'l L. 236. It is difficult to find a case where parties have consented to the ICJ's exercise of ex aequo et bono under Article 38(2) of the Statute of the ICJ.

international practices and especially the views of third world scholars which see equity as distributive, rather than merely discretionary, justice.[52] It must, however, be noted that while these scholars may have disagreed on the specific interpretation of equity, they do not dispute that there is a sense in which the application of equity is required in international legal decision making. Equity is generally accepted as an established principle of international law.[53]

IV. Contesting claims of equity

It is clear from the analysis above that the principle of equity has become established as a part of the international law jurisprudence. It is, however, dangerous to assume that language in international law has a single or permanent meaning.[54] The sense in which a concept or principle is used in international law differs across various scholars, international lawyers and practitioners. These concepts also evolve continuously from time to time and may have several meanings across various contexts. This challenge is particularly apparent with the use of equity. Its application (or non-application) within international law is made more difficult by economic and social differences between countries and across regions of the world.[55]

Concepts and principles within international law have been fraught with varying interpretations due to the different legal, political, doctrinal and even economic traditions that converge in the international legal system. Thus, even seemingly simple terminologies have proved difficult to give precise meanings and interpretations, and this has been even more complex with the principle of equity.[56] Having established that equity had become a common principle adopted within the international legal system, it is necessary to examine the sense in which the concept has been used within the system.

It is necessary to state from the outset that although international case law is replete with the application of equity, judges on these international tribunals generally do not state that they are applying equity or provide a direct equity analysis.[57] Lapidoth explains that the practice has been to refer to a particular principle without referring to its equity origins.[58] Thus, it is commonplace to see such principles as proportionality applied in rulings on the use of force, estoppel,

[52] Mark W Janis, 'The Ambiguity of Equity in International Law' (1983) 9 Brook. J. Int'l L. 26-29.
[53] Friedmann (n 3); Lapidoth (n 29) 139.
[54] Janis (n 52) 7.
[55] Peter Thacher, "Equity under Change" *Proceedings of the Annual Meeting* (American Society of International Law 1987) 134.
[56] Janis (n 52) 7.
[57] Lapidoth (n 29) 140.
[58] *ibid* 144.

etc. without a direct reference to equity. This has, therefore made it difficult to ascertain the specific meanings or implications of the application of equity in international law.

A. Equity as distributive justice

By the turn of the twentieth century and with much of the global south gaining independence and joining the global system and international law, agitations began about the need to restructure the existing international social, political and economic structures. Newly independent African, Asian and Latin American countries began to argue for a new economic order where the distribution of global wealth will be more evenly shared among developed and developing countries of the world.[59] The use of equity in the call for a new international economic order found its root in the economics and politics of decolonisation.[60] Scholars and practitioners alike began to clamour for a more just distribution of global wealth, and they found equity as a useful normative tool for pushing for this position within the international legal system.

Equity, even from its common law origins, had the characteristics of emphasising the need to do justice by taking cognisance of the peculiar facts of each case. The distinguishing characteristic if equity in the judicial decision-making process is the freedom which it gives the decision-maker to make decisions without the restrictions of established legal rules and principles. This characteristic makes equity suitable for contexts where there are competing interests, such as access to shared resources, but very little law designed to address such interests or inequality.[61] It was, therefore, a flexible tool for advocating for justice in the global distribution of wealth and for ensuring that members of the global South have access to the basic necessities. Third world scholars and practitioners thus began to transform the uses of equity from the discretionary sense in which it had been widely known into a more substantive concept for ensuring fair distribution of the world's resources.

This agitation led to the adoption of the UN General Assembly resolution on the Establishment of the New International Economic Order. This resolution provides that states work together for an order "based on equity, sovereign equality, independence, common interest and co-operation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices."[62] The objective of this order was to eliminate the gap between

[59] Janis (n 52) 17.
[60] Janis (n 52) 1.
[61] Vaughan Lowe, "The Role of Equity in International Law" (1988–1989) 12 Aust YBIL 73.
[62] GA Res. 3201 (S-VI) UN GAOR Supp (No. 1) 5 UN Doc A/9556 in 13 ILM (1974) 715.

developed and developing countries and ensure economic development in the latter. It sought to reduce global inequality and ensure prosperity for all.[63] The UN Conference on Restrictive Business seems to have adopted the same position. The conference declared that "in order to ensure the equitable application of the Set of Principles and Rules on Restrictive Business, states should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries…" The resolution obliged developed countries to promote local industries and economic development within these developing countries.[64] Equity in this essence was a form of distributive justice, ensuring that global wealth was distributed to regions of the world that previously had little or nothing of this wealth.

Equity was thus taking a new definition under the new international economic order. Unlike previous use of equity under the arbitral tribunals and the ICJ, equity here was not discretionary. It was an obligation, founded upon the principle of justice and fairness, to reduce the developmental gap between the nations of the world. It implied the sharing of the benefits of technological progress, a just model for the determination of prices of raw materials and primary commodities exported by developing countries and those imported by them, and generally ensuring a just and equitable international division of labour.[65] A similar reference was made to equity in the Programme of Action on the Establishment of a New International Economic Order and in the Charter of Economic Rights and Duties of States.

However, these references to equity do not impose any legal character on the concept. They were more or less political statements of aspiration for a just distribution of global wealth between developed and developing countries without any legal implication. This is especially so when one juxtaposes these notions of equity with the traditional Aristotelian sense in which equity is used in the Common law systems: a form of discretional powers to be used by a judge or arbitrator in specific cases. Janis responds to this kind of query by noting two things. First, subsequent practice as shown that reference to equity does indeed imply some measure of a legal rule. Secondly, such claims fail to take into cognisance the

[63] Janis (n 52) 17.

[64] UN Doc TD/RBP/CONF./10 (May 2, 1980) in 19 ILM 813 at 814.

[65] GA Res 3201 (S-VI) UN GAOR Supp UN Doc A/9556 in 13 ILM (1974) 715, 716; GA Res 3202 (S-VI) UN GAOR Supp (No 1) 5 UN Doc A/9631 (197) 14 ILM 251, 252.

existence of other legal principles whose application give legal quality to these references to equity.[66]

Bedjaoui's explanation of equity in his treatise *Towards a New International Order*, follows the distributive justice theory.[67] Bedjaoui, a former judge of the ICJ, starts his analysis by arguing that Europe and the United States are largely responsible for the inequality in the global distribution of wealth. He contends that this group of countries have exploited resources at the expense of the Third World, and they are only able to live in wealth at the expense of the developing world. He further argues that the present international legal system, under the guise of neutrality, has helped to consolidate the gains of this unequal economic relations if not to create it.

Despite his incrimination of the international legal system, he argues that the system can also be a tool for correcting this global inequality. This, however, would imply that international law is freed from its "paralysing formalism to steer it towards a nobler, more humane and more essential goal- the promise of development."[68] Relying on the general idea of equity as that process through which a judge reaches a decision which ensures justice given the peculiar circumstances, Bedjaoui sees equity as that avenue through which the inequalities in the distribution of global wealth may be corrected. He, therefore, concludes that international law "must give great prominence to the principle of equity. In doing so, it must keep the objective in view which consists of reducing and, if possible, eradicating the gap that exists between a minority of rich nations and a majority of poor nations."[69] He thus sees equity as a norm to be deployed for purposes of redistributing global wealth and correcting existing inequalities in the level of development between various countries.

Although Janis agrees with Bedjaoui on the necessity for equity, he questions the need to transform the international legal system radically. Janis argues that the existing international legal system had inherent flexibility which could be adopted to achieve the equitable ends for which Bedjaoui argued. There is, therefore, no need to jettison or cause a radical change in the traditional legal system as Bedjaoui seem to be suggesting.[70] Janis also disputed Bedjaoui's claim that international law was too divorced from principles of natural law. In support of this contention, Janis gives an index of scholarly writings dealing with the relationship between

[66] Janis (n 52) 19.

[67] Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979).

[68] *ibid* 63.

[69] *ibid* 119.

[70] Mark Janis, "Towards a New International Order by Mohammed Bedjaoui" (1983) 6 B C Int'l & Comp L Rev. 357.

international law and equity.[71] While Janis was right in pointing out that there were indeed certain elements of natural law in international law and Bedjaoui was not entirely accurate with his claim, the texts he provides in support of his argument miss the main points of Bedjaoui's conception of equity.

These texts merely discuss equity as a form of discretionary power to be exercised by the international arbiter or judge in reaching decisions in a dispute. Bedjaoui was, however, referring to equity in a different form, not merely as a procedural or discretionary power of a judge, but as a tool for distributive justice. Haq takes a similar position on equity when he argues for an obligatory transfer of resources from developed to developing countries in order to achieve "economic equity in the global context."[72] Janis adequately summarises these notions of equity as "a form of distributive justice, aimed to meet the needs of developing countries."[73]

B. Equity as discretionary justice

Ian Brownlie and Lauterpacht, two prominent international law scholars, however, disagree with the distributive justice schools of thought on the role and interpretation of the concept of equity within the international legal system. Contrary to the notion of equity as a corrective measure to address the global economic inequality between countries, these scholars view the role of equity in the international legal system as a tool to ensure a more flexible international system, especially where specific cases cannot be fully adjudicated by strict rules.[74] They both insist on equity as the ability of the judge to exercise some form of discretionary power in the pursuit of justice.

Brownlie rejects the idea of equity as a tool for solving global problems such as global economic inequality. According to him, equity offers "little but disappointment as a tool for solving these sophisticated problems."[75] Equitable principles in this context are according to him "no more than a bundle of impressionistic ideas…"[76] Similarly, Lauterpacht restricts the invocation of equity in international law to that discretionary powers to be exercised by judges, and when a judge applies this subjective or discretionary principle, parties must be

[71] *ibid* 359.

[72] Inamul Haq, "From Charity to Obligation: A Third World perspective on Concessional Resource Transfers" (1979) 14 Tex. Int'l LJ 406.

[73] Janis (n 52) 22.

[74] *ibid*.

[75] Ian Brownlie, "Legal Status of Natural Resources in International Law (Some Aspects)" (1979) 162 Recueil des Cours 287.

[76] *ibid*.

given the opportunity to make submissions on such principles.[77] Equity within international law was thus for him a means of ensuring a more flexible and responsive international law.[78]

Another scholar of the Western tradition, Lowe, argued that the application of equity is not necessary for international law since there will always be other techniques which could be applied to fill whatever gaps may exist in international law.[79] He argues that it will always be possible to do justice in international law without recourse to "a distinct normative source in the form of equity."[80] He contends that the equitable application of the law can achieve the end sought by advocates of equity.[81] A tribunal merely needs to interpret existing law in a manner that does justice, rather than introduce extra-legal factors into the decision making process. Koskenniemi holds similar views and sees the invocation of equity as unrealistic attempts to revive natural law.[82]

Lapidoth, however, cautions that the subjectivity of equity is dangerous for international law. She contends, and rightly so that the conception of equity is dependent on an individual's "ethical environment". She continues that the fact that this will be different for each actor in the international legal system implies that the qualities of the law such as 'generality, clarity, certainty and predictability' will be lost.[83] The subjectivity of equity would make a decision which is just to one party unjust to another. Lapidoth, however, concedes that equity is part of the law and must be applied appropriately.[84]

Although an overwhelming majority of Third World Scholars and the Resolution on the New International Economic Order supports the notion of equity as distributive justice, there is no consensus on such interpretation of equity within the international legal system. For example, Janis cautions that equity has been used within other contexts where its precise meaning is not readily deducible.[85] He cites Article 11(7) of the UN 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies which states that the purpose of the regime was to establish "an equitable sharing by all State Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries,

77 Elihu Lauterpacht, "Equity, Evasion, Equivocation and Evolution in International Law" in Proceedings and Committee Reports of the Am Branch of the Int'l L Ass'n (1977–78) 45–6.

78 *ibid* 46.

79 Lowe (n 61) 63.

80 *ibid*.

81 *ibid* 65.

82 Matti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 1989).

83 Lapidoth (n 29) 146.

84 *ibid* 147.

85 Janis (n 52) 26.

as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration."[86] Thus, although the agreement uses the word 'equity', the implication in this context is not specific.

Janis suggests that equity within this context can be interpreted both in the discretionary and the distributive justice dimension. If one takes the distributive interpretation, it implies that the benefits from moon exploration would be shared with developing countries based on their needs rather than their direct contribution to the exploration process. On the other hand, a discretionary justice interpretation would imply that parties would negotiate the distribution of benefits at a later time, and while they should take the needs of developing countries into consideration during such negotiations, the guiding rule will be the contribution of each state to the exploration of the moon.[87]

In explaining the uncertainty in the meaning and implication of equity within international law jurisprudence, Janis also examines the UN Convention on the Law of Sea which makes use of the term 'equity' and 'equitable principles' in several contexts with unclear meanings. While the use of equity in the preamble seems clear and refers to the distributive sense of the word (as used in the new international economic order), equity in the delimitation provisions seems to refer to negotiated settlements and flexible decision making (the discretionary sense as argued by Lauterpacht and Brownlie). The other uses of equity within the UNCLOS are mostly uncertain.[88]

Given these uncertainties and the inability of both the discretionary and the distributive justice theory to adequately explain the use of equity within international law, Janis postulates a third theory: equity as measured justice. Equity as measured justice seeks to combine both the discretionary and distributive sense of equity. According to Janis, equity is achieved by taking two steps. The first is to ask whether it is such a case that requires that decision be made on a discretionary basis and secondly, how that power of discretion is to be exercised. In other words, can extra-legal principles be invoked in the decision-making process or the distribution of rights and obligations? If the answer is in the affirmative, what extra-legal principles can be adopted in this process? To this second question, he answers that developmental need or distributive justice becomes one, among other

[86] UN Doc A/34/664 (12 November 1979) cited in MW Janis, "The Ambiguity of Equity in International Law" (1983) 9 Brooklyn J Int'l Law 7, 27.

[87] Janis (n 52) 27.

[88] *ibid* 28–9.

factors which may be adopted. The litmus test is that the decision reached must be proportional to the non-legal standard adopted.[89]

V. Equity and CBDR in International Climate Change Law

Prior to the 1992 Conference on the Environment and Development and the adoption of the UNFCCC, equity had begun to emerge in a wide variety of environmental law treaties. Examples include the 1982 UN Convention on the Law of the Sea which provided for the: realisation of a just and equitable international economic order", for an "equitable solution" in the achievement of the objectives of the Convention and several other references to the principle of equity in one form or the other.[90] Others include the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, the Biodiversity Convention with an apparent reference to fair and equitable sharing,[91] the Oil Pollution Convention which provides for the equitable geographic distribution of membership on Executive Committee.[92] These treaties showed an increase in the inclusion of the principle of equity within treaties, especially treaties which concerned environmental issues.

The United Nations Conference on the Environment and Development (Rio Conference) held in 1992 was, however, the first major conference where countries had the opportunity to negotiate and adopt a treaty on climate change. Countries had gathered at this conference backed by the discovery by scientists that human action was leading to a change in the state of the climate and that there was a need to reduce anthropogenic emissions of greenhouse gases. Prior to the conference, the United Nations General Assembly had established the World Commission on Environment and Development (the Brundtland Commission). The Commission had the responsibility to recommend how countries at different stages of development could cooperate to achieve the common objectives of economic development and environmental protection.[93]

In its report, *Our Common Future*, the Commission noted that an ecological crisis would persist as long as poverty and inequity remain endemic.[94] The Commission noted the widening resources gap between developed and developing countries and the dominance of industrialised countries in international rulemaking. According to the Commission, this "inequality is the planet's main environmental problem"[95]

89 *ibid* 30–3.

90 Preamble, articles 74, 83 and 161 of the UN Convention on the Law of the Sea.

91 Articles 1 and 15(7) of the Biodiversity Convention.

92 Article 22(2).

93 UN General Assembly resolution A/38/161 19 December 1983 para 8(b).

94 *Report of the World Commission on Environment and Development: Our Common Future* (1987) ch 2, [4].

95 *ibid.* 17.

The Brundtland Commission, therefore, concluded that any attempt to address environmental concerns without tackling underdevelopment in some regions of the world would be futile.[96] In other words, global environmental governance would only stand a chance if it is coupled with provisions which ensure economic growth for the developing world.

It was thus clear from its inception that the development of a treaty on climate change would have to deal with issues of equity which had earlier been raised at the 1972 UN Conference on the Human Environment and echoed by the Brundtland Report. The position of equity in climate change law and policy, however, proved contentious due to the nature of climate change. This is due, among other reasons, to the fact that historically, climate change is a consequence of industrialisation and consumption patterns which are most prevalent in developed countries.[97]

Although all countries contribute to the build-up of greenhouse gases, it is generally agreed that developed countries are responsible for the majority of the accumulated greenhouse gas (GHG) emissions.[98] Developed countries are responsible for over seventy per cent of global emissions while developing countries contribute about a quarter even though they have eighty per cent of the world's population.[99] As at the early 2000s, the United States alone was responsible for almost twenty-five per cent of the world's greenhouse gas emissions as compared to 136 developing countries who contribute a total of twenty-four per cent of these emissions.[100] Peter Hayes even went as far as making calculations to deduce how much cost different countries were responsible for as a result of their historic contributions to climate change.[101] Earlier in the 1960s, the Swedish scientist Borgström had explained that many European countries were using the resources of emerging countries to enrich their own countries while leaving these countries

[96] Lorraine Elliott, *The Global Politics of the Environment* (2nd edn, Macmillan 2004) 171.

[97] Karin Mickelson, "Leading Toward a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories About International Environmental Cooperation" (2005) 43 Osgood Hall LJ 150–4.

[98] Marina Cazorla and Michael Toman, "International Equity and Climate Change Policy" (2000) 27 Climate Issue 2.

[99] Jos Olivier, Greet Janssens-Maenhout, Marilena Muntean and Jeroen Peters, *Trends in Global CO2 Emissions: 2016 Report* (NEAA 2006) 34; John Ashton and Xueman Wang, "Equity and Climate in Principle and Practice" in Joseph Aldy, *et al* (eds), *Beyond Kyoto: Advancing the International Effort against Climate Change* (Pew Center on Global Climate Change 2003) 5.

[100] Timmons Roberts and Bradley Parks, "Ecologically Unequal Exchange, Ecological Debt and Climate Justice: The History and Implications of Three Related Ideas for a New Social Movement" (2009) 50(3–4) Int'l J of Comp Soc 393.

[101] Peter Hayes, *The Global Greenhouse Regime: Who Pays?* (Earthscan 1993).

worse off. It is thus apparent that the effects of climate change are disproportionate to the historical responsibility and present capabilities for this phenomenon.[102]

Developing countries argued during the Rio conference that the primary duty to act with respect to environmental protection lies with developed countries.[103] Developed countries owe an ecological debt to developing states, and since they are the major beneficiaries of climate change, they are liable for its consequences.[104] They were concerned that responsibility should be placed on them for a problem which they had played little or no part in creating.[105] Developing countries have consistently emphasised that since the root cause of climate change lies in the environmental effects of industrialisation, much of which has been to the advantage of developed countries.

Industrialised states should, therefore, take the lead in addressing environmental problems.[106] Under the auspices of the G77, developing countries maintained that developed countries had both a "historic and current responsibility" for environmental problems due to their unrestrained exploitation of natural resources in the past.[107] Unlike what was later adopted, the G77 had stated expressly that developed countries bear the "main responsibility for global environmental degradation." The provision of financial and technological resources was, therefore, to be regarded as a form of compensation for this past exploitation of resources which has resulted in global harm.[108]

Developing states argued that the transfer of resources by developed countries was not a charitable duty but a necessary obligation arising from its disproportionate use of the atmosphere.[109] They, therefore, emphasised that

[102] Ambuj Sagar and Tariq Banuri, "In Fairness to Current Generations: Lost Voices in the Climate Change" (1999) 27 *Energy Policy* 509–14; Jekwu Ikeme, "Equity, Environmental Justice and Sustainability: Incomplete Approaches in Climate Change Politics" (2003) 13 Global Env'l Change 200.

[103] Kevin Gray and Joyeeta Gupta, "The United Nations Climate Change Regime and Africa" in Beatrice Chaytor and Kevin Gray (eds), *International Environmental Law and Policy in Africa* (Springer 2003) 65.

[104] Daniel Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18 YJIL 479; Mickelson (n 97); Erik Paredis, Gert Geominne, Wouter Vanhove, *et al*, *The Concept of Ecological Debt: Its Meaning and Applicability in International Policy* (Academia Press 2007) 7.

[105] Michael Grubb, "Seeking Fair Weather: Ethics and the International Debate on Climate Change" *International Affairs* (1995) 71(3) 464.

[106] Andrew Hurrell and B Kingsbury, "An Introduction" in Andrew Hurrell and B Kingsbury (eds), *The International Politics of the Environment: Actors, Interests and Institutions* (Clarendon Press 1992) 39.

[107] Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities" (2000) 49 Int'l & Comp L Quarterly 37.

[108] *ibid.*

[109] *ibid.*

the provision of resources to developing countries does not confer developed countries with additional rights or privileges in climate change governance. They thus sort for equal representation in the financial and institutional structures of the UN framework on climate change. At the point of adopting the UNFCCC, the Secretary-General of the UN made it clear that "the recognition that the industrialised countries should take the lead in tackling climate change is one of the political cornerstones of the Convention."[110]

It is clear from the above that for developing countries, equity in the climate change regime is based on two principal grounds: the historical responsibility of developed countries for the emission of greenhouse gasses and their higher capability to bear the cost of climate change. Historic equity relies on the fact that developed countries are responsible for the bulk of past and continuing GHG emissions which have led to climate change. The argument, therefore, goes that it will be inequitable to require developing states, who are mostly 'innocent' of this vice and worse still, lacking the capacity to bear equal responsibilities with developed states in the attempt to reduce greenhouse gas emissions.

It brings the application of equity in climate change law within the historical context of the activities that have led to climate change. Springer illustrates this drawing from Locke's Second Treatise on Civil Government. He explains that all humanity owns the earth and all that is in it in common. Thus, let us imagine that there was a giant sink into which we could all put our waste, everyone would be entitled to put their waste in there for as long as is necessary. Even if some put in more than others, this would create no problem where the sink has a limitless capacity to receive those wastes. However, where this sink has a limited capacity and is filling up already, those who use it disproportionately more than others, deny the others the opportunity to use it.[111] The wrongful arrogation of this sink in the past by some group of people, therefore, calls for compensation of those who now have to use the sink restrictedly despite their non-contribution to the disproportionate use in the past.[112] The position is therefore that for any distribution in the present to be equitable, it must take this history into account in its distribution of costs and benefits.

Developing states, therefore, emphasises the role that developed states have played in emitting greenhouse gases and on that basis, developed countries should bear the necessary costs of climate change mitigation. Past greenhouse gas emissions should be considered in deciding who bears the cost of climate change mitigation

[110] Kofi Annan, "We need decisive action in Kyoto to limit Greenhouse Gas Emissions" (1997) 15(4) *Climate Change Bulletin* 4.

[111] Peter Singer, *One World: The Ethics of Globalization* (3rd Ed, Yale University Press 2016) 32.

[112] *ibid* 37.

and adaptation and in the distribution of emission cuts and targets.[113] Bygones are not bygones, rather historical emissions are to be taken into consideration in sharing the cost of climate change, and since "developed countries are responsible for the present damage, then it is their responsibility to clean the mess."[114] It thus invokes historical principles of justice which demands that a person should bear responsibility for the outcome of their activities.[115]

This not only applies to the question of who should bear the cost of climate change but also to the allocation of emission targets to different countries. The earth and its ability to absorb emissions are seen as a shared resource, a question of justice, therefore, arises as to how this should be distributed among various countries. In the story of the sink, it is like deciding who should get how much of sink space given the disproportionate use in the past. In order to be equitable, recourse must necessarily be made to how much of this resource each country has explored in the past before giving allocations. Reducing emissions would mean a reduction in the general level of emissions and certain industrial activities would either need to be stopped or restructured since increased greenhouse gas emissions have traditionally been a by-product of industrialisation. Developing countries, therefore, argued that it would be inequitable to undermine their development through emission targets and argued that they should be allowed emissions reaching the same per capita level with the emissions of developed countries.[116]

Developing countries have also argued that developed countries should take the lead on climate change based on their higher levels of wealth and capability. This position relying on the first holds that since developed countries enjoy higher levels of wealth and technological development, they are in a better position to bear the cost of climate change. Equity here thus focuses on capability rather than culpability. This is based upon the ideas of fairness that the condition of those who are worse off should be improved by those who have the means to do so.[117] It gives the responsibility to the one who can bear it the most. These arguments focus on the need for redistributive justice. The redistribution of wealth by developed

[113] Mathias Friman, *Historical Responsibility in the UNFCC* (Centre for Climate Science & Policy Research 2007) 2.

[114] Ikeme (n 102) 201.

[115] Stephen M Gardiner, "Ethics and Global Climate Change" (2004) 114(3) *Ethics* 570. It is worthy of note that developing countries successfully got the rest of the world to acknowledge the need to restructure the Global Environmental Facility and make its operation more democratic, transparent and financed as appropriate. Articles 11 and 21(3) of the UNFCCC.

[116] Jonathan Wiener, "On the Political Economy of Global Environmental Regulation" (1999) 87 Georgetown L.J 765; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Ed, OUP 2009) 374; David Pearce and Kerry Turner, *Economics of Natural Resources and the Environment* (Johns Hopkins University Press 1990) 61–9.

[117] Singer (n 111) 46.

states to the least advantaged members of the society has been described as a desirable end if it would lead to the most significant benefit.[118] Rawls has noted that this seeming inequality that places higher responsibility on certain states is not necessarily unjust.[119] He notes that if the "basic structure of the Society of Peoples" contains certain unjustified inequalities, then it would be necessary to correct such inequalities.

Although closely related, compatible and reinforcing of each other, these two grounds are distinct. Whereas historic equity sees the earth as a common resource of humanity and seeks to hold developed states accountable for climate change damage, the second ground focuses more on the ability of respective countries and the principle of distributive justice rather than the cause of climate change. The collection of countries illustrates this difference in Annex 1 under the Convention. There were no criteria for deciding which country belonged to the group. For example, a country such as Switzerland who is generally not guilty of historical emissions is also included in Annex 1.

Developed countries are therefore historically responsible for over seventy per cent of historical global emissions of GHG while developing countries contribute about a quarter even though they have eighty per cent of the world's population.[120] As at the early 2000s, the United States alone was responsible for almost twenty-five per cent of the world's greenhouse gas emissions as compared to 136 developing countries who contribute a total of twenty-four per cent of these emissions.[121]

The question at the time of concluding the UNFCCC was therefore whether developing countries who, at that time, had played little or no role in the historic emissions leading to climate change should be saddled with the same responsibility as developed countries, whose actions had been the major cause of climate change. The contentions at the Rio conference, therefore, centred around who should take responsibility, what that responsibility should be and under what circumstances should these responsibilities be discharged. The principle of equity and common but differentiated responsibilities was therefore introduced into the UNFCCC as a rallying point for the contention that climate change was a universal responsibility of all mankind on the one hand and the contention that certain countries should bear the cost of addressing climate change having been largely responsible for historical emissions of GHG.[122] The underlying principle for equity (and CBDR)

[118] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 266.
[119] *ibid* 113–4.
[120] Olivier (n 99) 34; Ashton (n 99) 5.
[121] Roberts (n 100) 393.
[122] This twin principle has since occupied a central position in climate change law and policy.

under the climate change regime was the same with earlier introduction of the term in both domestic and international law: the need to do fairness and justice. In this case, the need to be fair and just in the distribution of the cost of climate change given the disparity in the contributions to climate change and the different levels of emissions.

A. Equity and CBDR in the UNFCCC

The principle of equity stands at the core of the UNFCCC. Article 3 provides that parties shall be guided by the principle of "equity and in accordance with their common but differentiated responsibilities and respective capabilities." This means that even though all states have a shared responsibility for addressing the state of the climate, countries would take up different levels of obligations in tackling the problem of climate change and each country's capacity would determine this. The principle recognises the peculiar needs of the least developed states and emphasises that even though all states have a joint responsibility to protect the environment, the contribution to the cost of climate change action would differ.

It represents an acknowledgement of the fact that states differ in their ability to respond to environmental challenges.[123] While developed countries have the technological and financial capacities, developing countries have fewer of these necessary tools for responding to climate change.[124] The principle of CBDR, therefore, takes cognisance of these different levels of capabilities and states that this shall determine the extent of each state party's rights and obligations under the climate change regime. The obligations to be undertaken by each country was to be different and based on each country's national circumstance.

In outlining specific commitments to be undertaken by country parties, Article 4 of the UNFCCC places the cost of climate change action on developed countries by obliging them to provide necessary finance and technology for mitigation and adaption to climate change.[125] It is also important to note that the UNFCC places no obligation on developing countries to undertake emission cuts, while developed countries are required to commit to emission cuts. Although the Convention creates reporting obligations which bind both developed and developing states, the discharge of this responsibility by developing countries is dependent on the effective implementation by developed country Parties of their commitments to provide financial and technological resources and assistance

[123] Estherine Lisinge-Fotabong, *et al*, "Climate Diplomacy in Africa" (Climate Diplomacy Policy Brief 2017).

[124] *ibid.*

[125] Article 4(3) of the UNFCCC.

to developing countries. The Convention further provides that the discharge of responsibilities under the Convention will take fully into account that economic development and poverty eradication are the first and overriding priorities of the developing country Parties.[126]

The UNFCCC establishes a provision which conditions the implementation of obligations by developing states upon the "effective implementation by developed country Parties of their commitments… related to financial resources and transfer of technology…" This means that a developing state is not under any obligation to comply with any provision of the convention unless and to the extent to which it receives technological and financial assistance under the convention. Secondly, no commitment to climate change action must limit the ability of a developing country party to pursue or attain economic development.

The UNFCCC thus adopts a view of equity which ensures absolute differentiation between developed (Annex I) and developing countries (otherwise known as non-Annex 1 countries). Developed countries are obliged under the Convention to bear the cost for climate change action. The application of the law in this manner was necessitated by the economic and developmental needs of developing countries. It has been noted that this level of differentiation increased or motivated the participation of developing states in the emerging climate change regime.[127] It creates incentives for them to be a part of the regime by providing for differentiated standards and the transfer of finance and technology for taking climate action.[128] Scholars have noted that further consensus on higher standards in international climate change law would have been impossible to achieve without this application of equity.[129] Thus, the UNFCCC provides for an equitable principle which broadly groups countries into developed and developing countries, expressly placing obligations on the former.

The principle of equity within the climate change regime must, therefore, be understood in the light of this. The distribution of duties and responsibilities is to be dependent on each country's national circumstance. The pre-eminence of the national situation is inherent in the application of equity in the UNFCCC. Equity was not to apply blindly or permanently. A country takes up responsibilities under the regime based on its economic groupings (the UNFCCC defines state parties into Annex I, II and non-Annex I parties). Although not expressly mentioned in the UNFCCC, it logically follows that the specific roles of a state would change as

[126] Article 3(4) of the UNFCCC.

[127] Anita Halvorssen, *Equality among Unequals in International Environmental Law Differential Treatment for Developing Countries* (Westview Press 1999) 3–4.

[128] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd Ed, CUP 2012) 43.

[129] Birnie (n 116) 135.

its economic situations and groupings also change. This implies that countries with no level of responsibility when the UNFCCC was adopted in 1992 would take on increasing levels of responsibilities as their economic situation changes.

Although (former) developing state parties may be opposed to this interpretation, it must be noted that although the UNFCCC recognises the historic emissions of developed countries, the principle of equity was not to apply based on historic emissions but based on present "respective capabilities".[130] It would, therefore, be contrary to the provisions of the UNFCCC for a newly industrialised state party to claim that it would not vary its level of responsibility to reflect its new developmental status because its historic emissions were minimal. The legal provision of the UNFCCC distributes responsibilities based on capabilities and not historical emissions.

B. Equity and CBDR in the Kyoto Protocol

The Kyoto Protocol to the Climate Change Convention was adopted in December 1997.[131] This Protocol had come into force amidst contentions between state parties that there was a need to strengthen the commitments of developed state parties under the framework convention.[132] The aim of the Kyoto Protocol was, therefore, to set specific objectives for emission reductions with specified timeframes. It was an instrument to flesh out in specific terms the general principles that had been provided for in the UNFCCC and was targeted primarily at creating specific obligations for developed countries, developing state parties were not to take up any new obligations.[133]

The process that culminated into the Kyoto Protocol has however been described as one of "the most difficult and complex ever conducted for a multilateral environmental agreement."[134] The contentions had revolved around issues such as emission reduction targets, emissions trading, joint implementation, financing, transfer of technology, the role and treatment of developing countries:[135] all issues with implications of equity within the Protocol. The divisions became heavily contested that the United States, despite being one of the major negotiators of the

[130] Article 3 of the UNFCCC.
[131] Kyoto, 10 December 1997, 16 February 2005; reprinted at 37 ILM 22 (1998).
[132] Decision 1/CP.3, Report of the Conference of the Parties on Its Third Session, Kyoto, 1–11 December 1997, FCCC/CP/1997/7/Add.1.
[133] Decision 1/CP.1, Report of the Conference of the Parties on Its First Session, Berlin, 28 March–7 April 1995, FCCC/; Preamble to Article 10 of the Kyoto Protocol. CP/1995/7/Add.1, para. 2(b)
[134] Sands (n 128) 284.
[135] *ibid.*

Protocol and the world's largest emitter, refused to ratify the Protocol. Nevertheless, the Protocol entered into force in February 2005.

The outcome of the Kyoto Protocol has been described as "narrow, thin and ultimately symbolic."[136] The failure of the Kyoto Protocol has been alluded to issues such as the refusal of emerging developing states to undertake commitments, the bindingness of emission targets, the withdrawal of significant emitters from the Protocol, among others. As the end of the first commitment period of the Kyoto Protocol began to approach, state parties entered into negotiations towards a second commitment period. Unfortunately, it became difficult to reach an agreement. Countries like Japan, Russia and Canada had stated that they were not prepared to be a part of the second commitment period.[137] Canada ultimately withdrew from the Kyoto Protocol in 2011.

Given the issues surrounding the 'fall' of the Kyoto Protocol, important questions in the climate change regime became how should a post-Kyoto Climate agreement deal with the emissions of and commitments of developing states, would a legally binding agreement be more desirable or should the agreement be in form of a soft law? Parties ultimately agreed at the Durban Conference of the Parties 2011 to "develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties."

C. Equity at COP21

In 2011, about two decades after the UNFCCC was adopted, the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was formed. This group was responsible for the formulation of a new legally binding agreement for the regulation of climate change action.[138] The Paris Agreement was adopted four years later at the Conference of the Parties (COP) held in Paris, France in December 2015. Like the climate change agreements before it, the ADP and negotiating parties had to battle with the distribution of the costs of climate change action. It is therefore not surprising that twenty-five years after the UNFCCC, equity still stood at the centre of the Paris Agreement.

The inclusion of equity under the Paris Agreement reflects the need to continue the 'burden-sharing formula' established under the UNFCCC whether as a necessity for justice under the climate regime or as a practical means for enhancing

[136] Robert Keohane and David Victor, "The Regime Complex for Climate Change" (2011) 9(1) Perspectives on Politics 5.

[137] D Ryan, *et al*, "Climate Change after Cancun: A Post-COP-16 Analysis" (2010) 18(6) Environmental Liability 208.

[138] Concern for a legally binding agreement had arisen due to the lack of compliance with the emissions reduction targets of the Kyoto Protocol. Parties, therefore, sought for an agreement which state parties will be obliged to comply with.

ambition. However, while parties generally expressed support for the continued inclusion of equity and CBDR within the climate regime, there were opposing views on the practical implications of this on the obligation of parties.[139] This was primarily because unlike the case in 1992, several 'developing' countries had now become major economies and had also become significant emitters. Countries like Brazil, South Africa, Mexico, China and India had become responsible for a considerable percentage of global emissions.

The concerns, therefore, centred around firstly, the fact that the capacities of certain countries had changed and their level of responsibility under the climate change regime should change to reflect this new capability. Secondly, developing countries had joined the industrial revolution, and there were concerns about the levels of their emissions and the need to place restrictions on these emissions. The negotiators were thus faced with the best way to reflect the principle of equity while taking these issues into consideration. The success of COP21 was to be determined, among other things, by the ability to reach a common understanding of the concept of equity and differentiation and the practical implications of this in the new Agreement.[140]

D. Equity and differentiation under the paris agreement

In the Paris Agreement, equity and CBDR took on a new form from what had been known in previous climate change agreements. Article 2 of the Agreement provides that: "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, *in the light of different national circumstances*" (emphasis added).[141]

The Agreement thus includes the phrase "in the light of different national circumstances", which has been described as a "dynamic approach" introduced by the Paris Agreement in the application of equity and differentiation.[142] This phrase was introduced in an attempt to ensure an adaptation of equity and differentiation, which suited the various groups and parties involved in the negotiation process. Scholars like Rajamani has therefore described equity as espoused in the Paris Agreement as distinct from equity as used in the UNFCCC. She attributes this to

[139] International Institute for Sustainable Development (IISD), "Summary of the Paris Climate Change Conference: November–13 December 2015" Earth Negotiations Bulletin 12.

[140] Christina Voigt, "Equity in the 2015 Climate Agreement: Lessons from Differential Treatment in Multilateral Environmental Agreements" (2014) 4 Climate Law 51.

[141] Article 2 of the Paris Agreement; Lavanya Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics" (2016) 65 Int'l & Comp L Quarterly 506.

[142] Sandrine Maljean-Dubois, "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?" (2016) 25(2) Reciel 153.

the addition of the qualifier "in the light of national circumstances." This addition reflects an operationalisation of equity.[143] In other words, it tailors the applicability of equity to specific issues, thus ensuring different forms of differentiation for different parties and in different areas.[144] Ultimately, the responsibilities of states will evolve as their national circumstances also evolve.[145]

Maljean-Dubois explains this caveat as a specification within the Agreement that equity and differentiation were evolutionary. She points out further that this clause gives room for a "flexible and evolutionary interpretation of the CBDRRC" as the national political, social and economic circumstances of state parties change.[146] According to her, this flexibility is the hallmark of equity and differentiation under the Paris Agreement, compared to earlier climate change agreements.[147] It serves as an insurance for developed state parties who had been concerned from the days of the Kyoto Protocol about the role of emerging economies in climate change. Developing countries will thus be obliged to move progressively towards economy-wide emissions reduction targets and to contribute to the global climate finance funds.

Bodansky also joined in the appraisal of the caveat.[148] He sees it as introducing an element into the climate change regime, which ensures that equity and differentiation do not exist in a vacuum but in accordance with the different state of each country.[149] Another author describes it as broadening the range of factors on 'the basis of which Parties can be differentiated beyond responsibility and capacity' and thus shifting from the bilateral approach which had been dominant in the preceding instruments.[150] According to Doelle, it is a more nuanced approach to differentiation.[151] All of these scholars hinge this appraisal on the same reasoning: that the phrase 'in the light of different national circumstances'

[143] Rajamani (n 141) 509.
[144] *ibid* 508–9.
[145] *ibid* 508.
[146] Maljean-Dubois (n 142) 153–4.
[147] *ibid* 154.
[148] Daniel Bodansky, "The Paris Climate Change Agreement: A New Hope?" (2016) 110 Am J Int'l L 288–319.
[149] *ibid* 299–300.
[150] Meinhard Doelle, "The Paris Agreement: Historic Breakthrough or High Stakes Experiment?" (2016) 6 Climate Law 15.
[151] *ibid*.

the principle of equity and differentiation is applied in line with the prevailing or current conditions and circumstances of a state party.

VI. In the light of different national circumstances: more words, less meaning[152]

Despite the position of these scholars, a clear reading of the principle of equity and differentiation as contained in the UNFCCC reveals that the phrase, "in the light of different national circumstances," adds nothing new to the principle. It is necessary to understand the nature of the principle of equity and differentiation and to understand the kind of treatment it offers developing state parties. This principle was introduced in the UNFCC based on two overarching issues: the responsibility of developed countries for historical emissions and the low capacity of developing states to respond to climate change.[153] Thus, the responsibility of states is made to correlate with their level of capacity.

In other words, state parties enjoy a contextual treatment. Magraw defines contextual treatment as a norm which requires that different factors be taken into consideration with respect to different countries. [154] In other words, certain circumstances (context) determine the kinds of and the level of obligations to be borne by each country. For equity and differentiation, this circumstance is the '*respective capabilities*' of a country to respond to climate change. In other words, the level of obligation of a state party under the UNFCCC will be determined by its capacity to undertake climate action. Since a country's economic condition will usually not be static, it implies that its obligations under the UNFCC climate change regime will also not be static. Levels of obligation will change as the economic realities and abilities of the state changes.

This is also illustrated in the specific phrasing of the principle; it reads "common but differentiated responsibilities and *respective capabilities*." The term 'respective capabilities' means that states have different capacities and the specific obligations to be undertaken would reflect this difference in capacity. In other words, capacity determines obligation. The principle acknowledges that the circumstances and hence capacities of each country would differ, and this difference would determine their responsibilities. Where a country that hitherto lacked capacity improves in its economic fortunes, it follows that its 'respective capability' now

[152] The phrase 'in the light of different national circumstances' had previously appeared in the US-China Joint Announcement on Climate Change (11 November 2014).

[153] Preamble to the UNFCCC

[154] Daniel Magraw, "Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms" (1990) 1 Col J Env'l L & Policy 1.

allows it to be able to take on more commitments and its obligations would change to reflect the change in its current capabilities.

Thus, the addition of the phrase "in the light of different national circumstances" in the Paris Agreement merely states the obvious. It repeats a statement which is inherent in the principle of equity and differentiation as couched in the UNFCCC. It adds nothing new to the application of equity and differentiation in global climate change governance. The underlying principle of equity and differentiation is that states are treated based on their different capabilities and the phrase merely restates this. The only other usefulness of the addition may be found in whether it helps clarify the principle of equity and differentiation and how it should apply. Unfortunately, it does not. It gives no clarity on how a change in circumstance should be determined, to what extent must the economic capabilities of a state party change before its obligations under the treaty change, to what extent should a change in capabilities correlate with the level of change in the level of commitments, *etc*.

Having said that, it is necessary to point out that the Paris Agreement indeed introduces a new dimension to the application of equity and differentiation under the global climate change regime. However, these are to be found in other parts of the Agreement and not in the addition of the phrase "in the light of different national circumstances." A major shift in the Agreement is the absence of a list of 'annexed' countries as seen in the UNFCCC and the Kyoto Protocol and the provision on climate funds. These changes help to reflect the changing *capabilities* of country parties. As national circumstances have changed the grouping of parties into Annexes was no longer relevant, and the notion that developed countries be the sole donors of climate finance gave room for a provision which encouraged others to contribute to such funds. The Paris Agreement also contains other concepts such as sustainable development,[155] equitable access to development,[156] poverty eradication[157] and climate justice[158] which are closely related to and reflect the principle of equity. We shall take a closer look at the application of equity and differentiation to climate finance under the Agreement.

VII. Climate finance and equity under the paris agreement

The issue of climate finance is one of the significant areas of the climate change regime, where the application of equity and common but differentiated responsibilities and respective capabilities (CBDRRC) has enormous implications.

[155] Preamble to the Paris Agreement, articles 2, 4, 6, 7, 8 and 10(5).
[156] Preamble to the Paris Agreement.
[157] Preamble to the Paris Agreement, articles 3, 4 and 6(8).
[158] Preamble to the Paris Agreement.

Under the UNFCCC, financial obligation was bifurcated, developed countries being the donors while developing countries were the beneficiaries. This was in line with equity and differentiation since, at the time, developing countries generally lacked the capacity to fund climate action. Although the Paris Agreement adopts the traditional position that "developed country Parties shall provide financial resources to assist developing country parties with respect to" climate action and obliges them to take the lead in the mobilisation of climate finance in favour of developing countries,[159] it introduces certain shifts from the traditional UNFCCC position on climate finance. Also, these shifts are very significant in understanding the application of equity and differentiation within the Paris Agreement, and international climate change law in general.

Article 9(2) of the Agreement provides that "other Parties are encouraged to provide or continue to provide such (financial) support voluntarily."[160] In other words, while not making it obligatory, the Agreement seeks to widen the class of donor states by including donors other than developed country parties, albeit voluntarily. The inclusion of this phrase had followed the desire by countries such as the US, Canada and Australia to broaden the category of donor states by introducing a new group with a higher level of commitment and to be known as 'graduated parties', 'major emitters' or 'advanced developing countries'.[161] According to them, this would be a proper reflection of the present economic realities and financial capacities of different states.[162] This was, however, rejected by the majority of the developing countries to be affected by this new categorisation.[163] Ultimately the term 'other parties' was adopted, and these other parties were merely 'encouraged' to contribute, and no obligation was created.

Thus, the Paris Agreement while maintaining the traditional UNFCCC arrangement wherein developed state parties have the primary obligation to provide climate finance, creates a new category of 'other parties' who are encouraged to contribute towards climate finance. This reflects the change in the economic and developmental level of some developing countries such as Brazil, China, India, Mexico, Singapore and South Africa. The position was thus held that since there had been a change in their level of development since the UNFCCC

[159] Article 9(3) of the Paris Agreement. Parties also set a target of $100 billion per annum in climate finance till 2025. Unfortunately, this target has been largely unmet.

[160] Article 9(2) of the Paris Agreement.

[161] Sikina Jinnah, *et al*, "Tripping points: barriers and bargaining chips on the road to Copenhagen" (2009) 4 Env'l Res Letters 3.

[162] Ralph Bodle, Lena Donat and Matthias Duwe, "The Paris Agreement: Analysis, Assessment and Outlook" (2016) CCLR 11.

[163] Rajamani (n 144) 508.

was first adopted, equity must be adopted in a manner that reflects this change in circumstance.

In conclusion, equity and differentiation remain at the centre of global climate change law and policy. The implication of this principle on the specific commitment of each country is, however, not static. It would evolve as the economic situation and general capabilities of a country changes. This is reflected in the very wording of the UNFCCC which provides for 'respective capabilities.' The Paris Agreement has helped flesh this out in various areas of commitments, the most obvious of which is the provision of climate finance. This changing level of obligation is the very core of differentiation according to respective capabilities. The addition of the phrase, "in the light of different national circumstances," adds nothing to this principle or its application within the climate change regime. The Paris Agreement's contribution to the jurisprudence and application of equity and differentiation is to be found in its various provisions on mitigation, adaptation, the absence of a list of annex countries and importantly, its provision on climate finance.

VIII. Conclusion

The history of equity and CBDR in the global climate change regime is a long one. It is a history embedded in notions of justice and the need to ensure that the costs and benefits of climate change are equitably distributed. This means that those who have contributed the least to climate change will not be made to bear the cost of climate change in a manner that is disproportional to their contribution to global emissions and their capacities. This was not a problematic categorisation to make at the inception of the climate change regime, and the UNFCCC clearly delineates country parties into different groups known as Annexes.

However, twenty-five years after the UNFCCC, developing countries have emerged into bigger economies and industrial nations. Some of them now contribute immensely to climate change and have developed financial capabilities such that obliging them to take climate action will not impede their development. This has necessitated the need to ensure that the new Agreement reflects the changed capacity of certain developing country parties. Although the Agreement adds a caveat "in the light of different national circumstances" to the phrasing of the principle of equity and CBDR under the Paris Agreement, this addition does nothing in fleshing out the practical implication of differentiation on specific commitments of country parties. The changing capacities of state parties are reflected in other parts of the Agreement and more especially Article 9 on climate finance, with its subtle provision for a new class of climate fund donors. The

Agreement also does away with the old method of annexing countries as seen in the UNFCCC and Kyoto Protocol.

The Agreement thus ensures that a generalisation of countries into developed and developing countries irrespective of their *respective capabilities* is avoided. This is achieved not with the additional phrase to the provision of equity and CBDRRC but through the nuance which the Agreement introduces into its various substantive provisions on commitments and obligations. The novelty of the Agreement is thus to be found within its other provisions. These include the abolition of the annex of state parties, sustainable development, and equitable access to development, poverty eradication and climate justice.