

**The Meaning and Interpretation of Principle of Equity in Management of Non-navigational Uses of International Water Resources**

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## Abstract

Water is indispensable for the survival of human life and a healthy environment. However, many factors threaten the availability and access to water resources to many people around the world. In many instances, a watercourse may run across several States, thereby creating a transboundary watercourse. The States across or along which the transboundary watercourse passes have an interest and a right in the access to and utilization of the shared watercourse. The transboundary nature of many watercourses necessitates that access and utilization of such watercourse be done in an equitable manner. How would a transboundary watercourse be accessed and utilized equitably among the relevant States?

To address the problem of inequitable access and utilization of transboundary watercourses, the Principles of Equity were introduced as international guiding principles. The proper meaning and interpretation of these Principles needs to be precisely delineated in order to achieve this goal. This research report explores the meaning and interpretation of the 'Principles of Equity' in the international watercourse management. It suggests that a thorough understanding and interpretation of these Principles is instrumental to the management and negotiation of treaties and resolution of disputes related to international watercourses.

Key Words: Principles of Equity, International watercourses, Water resources management, equitable utilisation

## List of acronyms

CESCR	The UN Committee on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IWRM	Integrated Water Resources Management
OHCHR	The United Nations High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SADC Protocol	The Protocol on Shared Watercourse Systems in the Southern African Development Community (1995)
UN	United Nations
UNWC	United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses 1997
VCLT	Vienna Convention on the Law of Treaties 1969

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## 1 Introduction

The research report focuses on the meaning and interpretation of the Principles of Equity in non-navigational uses of international water resources.<sup>1</sup> Because water is a *conditio sine qua non* of human life,<sup>2</sup> there arises the need for provision of tools for the management of this resources especially when the watercourse runs across, along or through many States. Notwithstanding the inevitable importance of water to life, the reality is that access and utilisation of international water resources are not equitable due to many factors including competition among various users and uses, nonexistence or wrong interpretation of the international watercourse agreements and discrimination among others. It can be argued that without discrimination and with proper interpretation of international watercourse agreements, the achievement of equitable access and utilisation of international water resources is possible.<sup>3</sup>

In search for a solution to the problem of inequitable access to international water resources, international legal instruments, in particular, those concerned with the management of international watercourses such as the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (UNWC) have codified and incorporated various legal principles including the 'Principles of Equity'. These Principles serve as a tool for both management and dispute resolution among international Watercourse States.<sup>4</sup>

Although this 'one size fits all' Principle termed equity is now a generally accepted principle in international law, a thorough understanding and proper interpretation of these Principles are important in order to realize the intentions of international water legal instruments and treaties thereby leading to equitable management and resolution of disputes related to international watercourses and transboundary water resources. The following paragraph discusses the key questions addressed in this research.

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<sup>1</sup> In this research report, international water resource is used interchangeably as international watercourses and transboundary water resources. 'Watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus; 'International watercourse' means a watercourse, parts of which are situated in different States.

<sup>2</sup> M Vučić 'Access to water in the context of the international watercourse: a theory of the community interest' (2019) LXVII *Anali Pravnog fakulteta u Beogradu*, godina 3 75.

<sup>3</sup> Vučić (note 2 above) paraphrased.

<sup>4</sup> Ibid 75.

## 1.1 Problem statement

The meaning and interpretation of Principles of Equity in international water law is not yet fully delineated, it is continuously evolving. This has prompted this research to raise the following questions:

- i. What is the meaning of the Principles of Equity in the management of the international watercourses and resources?
- ii. How have these Principles been interpreted in States treaties and Protocols to give effect to the objectives of these documents?
- iii. How would these Principles be applied in the negotiations of treaties and settlement of disputes related to the equitable management of international water resources?

Exploring the answers to the questions posed is the objective of this research report as they will contribute to providing a solution for the equitable management of international watercourses and resources.

## 2 The meaning of the Principles of Equity

### 2.1 The origins and historical development of the Principles of Equity

In an effort to trace the origins of the term, equity, White notes that according to the ancient Greeks, equity is referred to as clemency. The Romans, referred to this term as *aequitas* or equality.<sup>5</sup> Ancient Chinese law described it as compassion while in Hindu philosophy it is more closely related to the doctrine of righteousness. Some Islamic schools, relate the term *istihsan* to equity which is employed to avoid undue hardship from the application of the law.<sup>6</sup> In his work, 'Equity and Conscience', MacNair explained that the source of 'equity' is the concept of 'επιεκεια' found in Aristotle's *Nichomachean Ethics*, where the idea is explained in terms of the difficulty of making general definite rules over the indefinite range of possible factual situations.<sup>7</sup> Rendleman in his synthesis of the Aristotle's work notes that "in a common translation, *Nichomachaen Ethics* implies that equity "is a rectification of law where it fails through generality."<sup>8</sup>

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<sup>5</sup> M White 'Equity a general principle of law recognised by civilised nations' 2004 4 *Queensland University of Technology Law and Justice Journal* 1 104.

<sup>6</sup> Ibid 104.

<sup>7</sup> M MacNair 'Equity and Conscience' 2007 27 *Oxford Journal of Legal Studies* (GB) 4 65.

<sup>8</sup> D Rendleman 'The triumph of Equity revisited: the stages of equitable discretion' 2015 15 *NEVADA Law Journal* 1399.

White linked the development of Western legal tradition to Aristotle's work and argues that the broad concepts of justice and equity as articulated by Aristotle, profoundly influenced the Western legal tradition.<sup>9</sup> Aristotle's approach to equity recognises the need for systemic correction of shortcomings in the law guided by the generality or universality of the doctrines that form the building blocks of the principles of equity.<sup>10</sup>

On an international level, Grotius influenced the emerging law of nations by his work on international law and community of interest doctrine.<sup>11</sup> He categorised Aristotelian idea of equity as comprising two-fold principles. On the one hand, equity being an understanding of what was right and just; and on the other hand, its corrective capacity to moderate the general law.<sup>12</sup> White remarked that Grotius recognised equity as a principle that must be applied in dealings between nations.<sup>13</sup> According to MaCNair, this is the idea of general fairness and justice as overriding inconsistent positive law.<sup>14</sup> Both Aristotle and Grotius therefore contributed to the development of Western legal tradition and international law of which the Principles of Equity is an integral part of.

Equity as a legal principle has been developing over the years from diverse practices across the spectrum of human societies. According to historical records, equity can be identified in many societies and religions, though in different forms and contexts. The Principles of Equity fundamentally manifest in various maxims. These maxims of equity are short statements or rules of thumb that guide courts of equity in the exercise of their sound judicial discretion. Pomeroy proposes that some of the maxims and doctrines that inform the Principles of Equity are:

1. equity regards that as done which ought to be done;
2. equity looks to the intent, rather than to the form;
3. he who seeks equity must do equity;
4. he who comes into equity must come with clean hands;
5. equality is equity;

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<sup>9</sup> M White (note 5 above) 104.

<sup>10</sup> Ibid 105.

<sup>11</sup> Vučić (note 2 above) 83.

<sup>12</sup> White (note 5 above) 106.

<sup>13</sup> Ibid 106.

<sup>14</sup> MaCNair (note 7 above) 65.

6. where there are equal equities, the first in time shall prevail;
7. where there is equal equity, the law must prevail;
8. equity aids the vigilant, not those who slumber on their rights, or *Vigilantibus non dormientibus, cvquitas subvenit*;
9. equity imputes an intention to fulfil an obligation;
10. equity will not suffer a wrong without a remedy;
11. equity follows the law.<sup>15</sup>

The common thread that runs through all the maxims of equity is the general principle of justice as distinguished from any particular system of jurisprudence or the law of any State. In her analysis, White argues the maxims of equity form part of general principles of equity in international law.<sup>16</sup> White notes further that as the western legal system developed, equitable principles gradually emerged as an adjunct to both Roman law and to the English common law based on the need to ameliorate or correct the body of civil law.<sup>17</sup> In the Roman legal system, the Praetor had ultimate responsibility for the running of the legal system, and could use it to create new remedies referred to as *ius honorarium*.<sup>18</sup> MaCNair concurs with White in the above argument and adds that a new remedy could be created when law was defective in point of justice.<sup>19</sup> MaCNair suggests that the modern technical meaning of 'equity' is merely 'the rules which were applied in the Court of Chancery in 1875, as developed by the modern court system.'<sup>20</sup>

## 2.2 What are Principles of Equity?

Rieu-Clarke suggests that equity has different meanings and that the precise nature of the concept is somewhat obscure.<sup>21</sup> White, in her contribution, suggested that equity tends to suggest justice attained

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<sup>15</sup> JN Pomeroy *A treatise on equity jurisprudence: As administered in the United States of America; Adapted for all the States, and to the union of legal and equitable remedies under the reformed procedure* (1907) para 363 at 601.

<sup>16</sup> White (note 5 above) 116.

<sup>17</sup> White (note 5 above) 105. See also MaCNair (note 7 above) 67.

<sup>18</sup> White (note 5 above) 105.

<sup>19</sup> MaCNair (note 7 above) 67.

<sup>20</sup> *Ibid* 64.

<sup>21</sup> A Rieu-Clarke, R Moynihan and B Magsig *UN Watercourses Convention user's guide* (2012) 106.

through what is fair. White described equity as the spirit of the law and suggested that it entails discretionary characteristics both as to its application and its extent.<sup>22</sup>

MaCNair opines that equity is generally attributed to fairness or justice as opposed to the rigid letter of the law.<sup>23</sup> McIntyre defined equity as “considerations of fairness, reasonableness and policy often necessary for the sensible application of the more settled rules of law”.<sup>24</sup> Rieu-Clarke et al are of the view that equity can be described as a supplement to rather strict rules, giving the judge some leeway in their application, where it would seem too rigid or harsh otherwise.<sup>25</sup> Kennedy notes that in a broad jurisprudential sense, equity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules.<sup>26</sup> He suggests that equity means the power to adapt the relief to the circumstances of the particular case, "individualized justice," in effect.<sup>27</sup>

Smith, while discussing equity, albeit in a different field but contextually applicable to this topic defined ‘equity’ as a part of the law serving a particular function,<sup>28</sup> which he called equitable function and remarked that equity serves as a second-order safety valve on the regular law.<sup>29</sup> He notes further that equity on this account is a function that consists of second-order intervention into the rest of the law. That is, equity is law about law; equity refers to law but not vice versa.<sup>30</sup> Put in another way, equity operates as a legal mechanism used to regulate and control the law.

Smith is of the view that equity as a legal mechanism occupies higher hierarchical legal status which is used to regulate the operation of general legal principles which he implicitly remarked are of lower hierarchical status to the Principles of Equity. The implication of the statement is again, that equity can be used to regulate legal rules, but legal rules cannot be used to regulate equity.

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<sup>22</sup> White (note 5 above) 103 & 110.

<sup>23</sup> MaCNair (note 7 above) 64.

<sup>24</sup> O McIntyre 'Utilization of shared international freshwater resources – the meaning and role of “equity” in international water law'(2013) 38 *Water International* 12 113.

<sup>25</sup> Rieu-Clarke et al (note 21 above) 106.

<sup>26</sup> KC Kennedy 'Equitable remedies and principled discretion: The Michigan experience' 1997 74 *University of Detroit Mercy Law Review* 4 609.

<sup>27</sup> Ibid 609.

<sup>28</sup> H E Smith 'Equitable defences as meta-law' in PS Davies, S Douglas & J Goudkamp (eds) *Defences in equity* 2018 19.

<sup>29</sup> Smith (note 28 above) 18–19.

<sup>30</sup> Ibid 19.

In an attempt to define equity, the report draws from White and Rieu-Clarke et al and defines equity, as a set of long-standing legal principles or long tradition in legal systems which are deployed to ameliorate or correct the positive laws where prescriptive and rigid rules applied to complex situations would lead to unfair results.<sup>31</sup>

The inference drawn from the foregoing discussion is that equity is a legal principle which may not necessarily be in black and white. There is no defined meaning of the term equity or defined scope of its operation. As such the ICJ remarked in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)* [1984] (Canada/USA) that there has been no systematic definition of the equitable criteria that may be taken into consideration for settlement of dispute or in the international maritime delimitation.<sup>32</sup> The above statement seems to suggest that the definition of equity and its principles are broad and flexible. The ICJ notes further that it would be difficult if equity is ascribed a defined meaning because of its highly variable adaptability to different concrete situations.<sup>33</sup>

### 2.3 Equity and international watercourse management

In the field of international watercourse management and international law in general, Rieu-Clarke et al notes that 'equity is often used as a synonym for fairness or justice in both procedural and substantive dimensions. While the procedural part is concerned with reaching decisions through 'right processes', the substantive part tries to achieve distributive justice'.<sup>34</sup>

In respect of the management of international water resources, Goldie opines that these Principles comprise the 'compendium of concepts supporting, promoting, and implementing those entitlements, benefits, and satisfactions which are validated by society's contemporary sense of justice and fairness'.<sup>35</sup> For instance, the Principles of Equity will be required where the rigid and inflexible nature of positive laws create a condition of inequality in the simultaneous exploitation of the international watercourse by the Watercourse States. In such instance, equity operates to temper the rigors of positive international law's application to those specific

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<sup>31</sup> Rieu-Clarke et al (note 21 above) 106. See also White (note 5 above) 105.

<sup>32</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)* (Judgment) [1984] ICJ Rep 246 157.

<sup>33</sup> Ibid 157.

<sup>34</sup> Rieu-Clarke et al (note 21 above) 106.

<sup>35</sup> LL Goldie (foot note 14 above) 3 673.

situations where generalizations would produce anomalies, inequities, injustices, or imbalances in respect of simultaneous enjoyment of rights to the shared common resource.<sup>36</sup> In other words, peaceful and beneficial utilisation of an international watercourse requires an equitable balancing of the rights and interests of the Watercourse States concerned.<sup>37</sup>

In line with the above postulation, the Permanent Court of International Justice (PCIJ) has recognized and applied the Principles of Equity in the settlement of international water dispute. In the *Diversion of Water from Meuse (Netherlands v Belgium)* PCIJ [1937],<sup>38</sup> the PCIJ remarked that ‘what are widely known as Principles of Equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals’.<sup>39</sup> The PCIJ invoked Article 38 of the Statute of International Court of Justice and remarked that the Principles of Equity is already an established legal principle in more than one State, as such, the court is not restricted to apply these Principles as general principles of law recognized by civilized nations.<sup>40</sup> The implication of equity being part of general principles of law is that only those principles generally accepted across different legal systems could be taken into consideration as a source of law.<sup>41</sup> According to the ICJ, in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982], “equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is, by definition, to administer justice is bound to apply it”.<sup>42</sup>

In *GabCikovo-Nagymaros Project (Hungary/Slovakia)* [1997], the ICJ recognised that these Principles have their basis in the community of interest of all riparian States in the use of a shared watercourse.<sup>43</sup> Rieu-Clarke et al opine that the community of interest entails that States manage a river as a single unit, and territorial boundaries become less relevant.<sup>44</sup> They refer to community of interest as ‘the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the

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<sup>36</sup> Ibid 673.

<sup>37</sup> O McIntyre (note 24 above) 112.

<sup>38</sup> *Diversion of Water from Meuse (Netherlands v Belgium)* [1937] PCIJ No. 70 para 322.

<sup>39</sup> *Netherlands v Belgium* [1937] (note 38 above) para 321.

<sup>40</sup> Ibid 322.

<sup>41</sup> White (note 5 above) 108.

<sup>42</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18 para 71. See also O McIntyre (note 24 above) 113.

<sup>43</sup> *GabCikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 para 85.

<sup>44</sup> Rieu-Clarke et al (note 21 above) 102.

others.<sup>45</sup> The implication of the statement is that a shared water resource creates common legal rights of access to the international watercourse and such right must be exercised equitably.<sup>46</sup> The common legal right of access to the international watercourse requires the removal of any preferential privilege of any riparian State in relation to the others. It also entails that no one nation will unilaterally assume control of a shared resource nor deprive a Watercourse State of its right to an equitable access to an international watercourse.<sup>47</sup> Note should be taken that the community of interest doctrine is applicable to navigable international watercourses.<sup>48</sup>

It is important to note that equity does not imply equality or suggest that international watercourse must be accessed on equal basis by the riparian States. On this point, White remarked that equitable utilisation of an international water resource could be achieved irrespective of unequal access to the international watercourse by different watercourse States.<sup>49</sup> For instance, in *North Sea Continental Shelf* [1969], where the case involved the delimitation of the continental shelf areas in the North Sea between Germany v Denmark and the Netherlands, the ICJ indicated that equal utilisation and management of international watercourse by Watercourse States may in some circumstances create inequity.<sup>50</sup> In other words, an equitable result may be realised even though Watercourse States enjoy rights considerably different from those of its neighbours/other Watercourse States in respect of a particular international watercourse.

## 2.4 Codification of Principles of Equity

As mentioned earlier, Equity Principles are a long tradition in legal systems, which have evolved over the years. In the present international legal development, codification of these Principles sets standards, provides clarity and uniformity in the interpretation and application of laws in international level. In the field of transboundary water resource management, the Principles of Equity has been codified in the Art 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses 1997(UNWC). The UNWC is an effort to codify the customary as well as statutory international environmental law on

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<sup>45</sup> Ibid 104.

<sup>46</sup> *Hungary/Slovakia* (Judgment) [1997] (note 43 above) para 85.

<sup>47</sup> Ibid 85.

<sup>48</sup> Rieu-Clarke et al (note 21 above) 104.

<sup>49</sup> Ibid 91.

<sup>50</sup> *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3 para 91.

international watercourses. It also provides the basic legal framework for managing international watercourses.

In terms of the draft articles on the law of the non-navigational uses of international watercourses and commentaries of the International Law Commission (ILC), international watercourses should be managed equitably under specific watercourse agreements.<sup>51</sup> ILC report notes that the application of Equity Principles contained in Art 5 of the UNWC establishes the fundamental basis for the draft articles as a whole. The ILC report emphasised the importance of planning the development of a watercourse in a sustainable manner for the benefit of present and future generations.

Before the codification of the Principles of Equity into the UNWC under the principle of equitable and reasonable utilization of international watercourses, the PCIJ recognized these Principles as a general principle of law recognized by civilized nations under Art 38 of the Statute of the ICJ.<sup>52</sup> It was claimed that the principle of equitable and reasonable utilisation is the cornerstone of the UNWC and the fundamental doctrine guiding water-sharing for international watercourses.<sup>53</sup> The following paragraphs discuss the Equity Principles as codified in some of the international legal instruments starting with the United Nations Conference on the Human Environment, Stockholm 1972. It is noteworthy to mention that despite the codification of these Principles, there still remains no definitive meaning of the term Equity. The ICJ noted in *Canada/USA* 1984 that codification efforts have left this field untouched.<sup>54</sup>

#### 2.4.1 United Nations Conference on the Human Environment, Stockholm 1972

The United Nations Conference on the Human Environment, Stockholm 1972 contains broad provisions of the codification of the intra and intergenerational equity. The introductory proclamations and in principles 1, 2 and 21 notes the imperative goal for mankind to defend and improve the human environment for present and future generations. The concept of management of water resources for the benefit of present and future

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<sup>51</sup> International Law Commission at its forty-sixth session 1994 commentary on Art 5.

<sup>52</sup> *Netherlands v Belgium* [1937] (note 38 above) para 321.

<sup>53</sup> UNWC user's guide fact sheet series: number 4.

<sup>54</sup> *Canada/USA* (Judgment) [1984] (note 32 above) para 157.

generations is termed inter and intragenerational equity.<sup>55</sup> These terms will be discussed in detail in the paragraph 2.4.3.1 below.

#### 2.4.2 UN Rio Declaration on Environment and Development 1992 (“the Rio Declaration”)

The Rio Declaration in its preamble reaffirmed the Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16 June 1972. Principle 3 of the Rio Declaration provides that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.<sup>56</sup>

#### 2.4.3 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses 1997(UNWC)

The UNWC was signed in New York on 21 May 1997 and entered into force on 17 August 2014.<sup>57</sup> The preamble of UNWC proclaimed and expressed the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations.

According to Rieu-Clarke et al, the underlying principles upon which the UNWC was founded is the concept of ‘limited territorial sovereignty’ which is widely accepted as the foundation upon which the law of international watercourses, in general, and the UNWC in particular, have evolved.<sup>58</sup> Rieu-Clarke et al notes that the concept stipulates that all Watercourse States enjoy an equal right to the utilisation of a shared water resource, and each Watercourse State has to respect the sovereignty and correlative rights of other Watercourse States. This implies that no riparian State will exceed its own right to equitable utilisation.<sup>59</sup>

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<sup>55</sup> <<https://www.mdpi.com/2071-1050/10/11/3836/htm>>.

<sup>56</sup> Principle 3 of the UN Rio Declaration on Environment and Development 1992.

<sup>57</sup> United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses 1997.

<sup>58</sup> Rieu-Clarke et al (note 21 above) 102.

<sup>59</sup> Ibid 102.

The document is a framework convention<sup>60</sup> designed to regulate the different aspects of water use, management, protection, development and conservation of transboundary/international watercourses. Under the framework, Watercourse States may enter into one or more agreements, which apply and adjust the provisions of the UNWC to the characteristics and uses of a particular international watercourse or part of it.<sup>61</sup> In other words, the UNWC lays down the fundamental substantive and procedural rules for the regulation of international watercourses and leaves the riparian States with the responsibility to draw their specific and tailor-made water agreements while taking into account the respective river basins' characteristics.<sup>62</sup>

According to McCaffrey, the Equity Principles codified in the Art 5 of the UNWC are regarded by many as the cornerstone of the law of international watercourses.<sup>63</sup> This report is of the view that these Principles are the pillars upon which almost all the principles codified in the UNWC finds support. Further, the management of international watercourse involves the integration and balancing of relevant factors, which must be done in an equitable manner.<sup>64</sup>

#### 2.4.3.1 Intergeneration and intragenerational equity

The report observes that the anthropogenic exploitation of natural resources including water resources are often done without consideration of the effects or impacts of such activities on the environment, including water resources. The concept of inter and intragenerational equity is focused on caution in the exploitation of natural resources. The caution is the promotion of sustainability by taking into account and giving effect to the Equity Principles in the exploitation of natural resources so as to 'preserve, conserve and improve the human environment for present and future generations.'<sup>65</sup> The concept of sustainability embodies a desire to sustain the ability to exploit international water resources from generation to generation. Spijkers notes that inter and intragenerational equity entails the duty "to ensure that exploitation of international

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<sup>60</sup> Preamble of the SADC Protocol.

<sup>61</sup> Art 3(3) SADC Protocol.

<sup>62</sup> Art 3 of the UNWC. See also A Chelkaba 'The influence of the UN Watercourses Convention on the development of the Nile River basin cooperative framework agreement (CFA)' 2018 12 *Mizan Law Review* 1 166.

<sup>63</sup> S McCaffrey 'The contribution of the UNWC on the law of the non-navigational uses of international watercourses 2001 1 *IJGEI* 3/4 252.

<sup>64</sup> Arts 5 & 6 of UNWC.

<sup>65</sup> O Spijkers 'Intergenerational equity and the sustainable development goals' 2018 10 *sustainability* 3836 5.

watercourses meets the needs of the present generation without compromising the ability of future generations to meet their own needs”.<sup>66</sup>

There rests an obligation upon the Watercourse States in the management of transboundary water resources to ensure that both the present and the future generations meet their water needs. While intragenerational equity implies equity within the present generation, intergenerational equity implies equity between different generations. The principles of intra and intergenerational equity seek to reconcile economic development with protection of the environment broadly expressed in the concept of sustainable development.

McIntyre is of the view that the principle of intergenerational equity involves the balancing of interests between present and future generations.<sup>67</sup> In the *Legality of the Threat or Use of Nuclear Weapons* [1996], where the ICJ was called to give an advisory opinion, it applied the principles of intra and intergenerational equity in respect of environment. In the matter, the ICJ remarked that the use of nuclear weapons would have a pernicious impact and pose a serious danger to future generations [which implies intragenerational equity] and stressed its concern regarding inter and intragenerational equity.<sup>68</sup> Further, the Court also recognised that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.<sup>69</sup> The ICJ's remarks regarding a healthy environment for both present and future generations point to the concept of inter and intragenerational equity. The ICJ again referred to inter and intragenerational equity in the *Hungary/Slovakia* [1997] where Hungary submitted a matter to the ICJ to adjudicate whether a unilateral operation undertaken by the Slovak Republic will continue to have significant detrimental effects on Hungary's environment and access to the water of the Danube River.

#### 2.4.3.2 Equity Principles and equitable and reasonable utilization under UNWC

There is a distinction between the term “Equity Principles” and “equitable and reasonable utilization” used in the management of international water resource. On the one hand, equitable and reasonable utilisation is often and specifically considered as synonymous with fair and sustainable use.<sup>70</sup> On the other hand, Equity

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<sup>66</sup> O Spijkers (note 65 above) 6.

<sup>67</sup> O McIntyre ‘The role of customary rules and principles of international environmental law in the protection of shared international freshwater resources’ 2006 46 *NAT. RESOURCES J* 157 174.

<sup>68</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 35.

<sup>69</sup> *Ibid* 29. See also *Hungary/Slovakia* (Judgment) [1997] (note 43 above) para 53.

<sup>70</sup> Rieu-Clarke et al (note 21 above) 272.

Principles refers to long-standing legal principles applied across the board in the correction or rigid positive laws. ICJ confirmed in the *Tunisia/Libyan Arab Jamahiriya* [1982] that the legal concept of equity is a general principle directly applicable as law.<sup>71</sup> Equity in the utilization of international watercourse entails that riparian States have an equal right to use the common water resources in accordance with their needs.<sup>72</sup> Equitable utilization in this context implies that Watercourse States have equal right to use the water for beneficial purposes, rather than division into equal portions.

Further, Rieu-Clarke et al are of the view that 'reasonable utilisation' serves the function of metrics for the assessment of quality of the use; while 'equitable utilisation' is used for balancing the interests of the various water users and uses between Watercourse States in circumstance of a 'conflict of use'.<sup>73</sup> Rieu-Clarke et al argued that the principle of equitable and reasonable use, recognises equity as a broader umbrella within which the concept of reasonableness becomes relative.<sup>74</sup> This implies that 'reasonable' uses are still subject to an 'equitable' allocation.<sup>75</sup> During the conduct of this research, Marguerite Davis of University of Witwatersrand, Faculty of Commerce, Law and Management remarked that 'equitable and reasonable' utilization in the management of international resources under Art 5 of the UNWC would go 'hand in glove' as such, concurring with Rieu-Clarke et al.

In terms of the UNWC user's guide, equitable utilization does not necessarily mean an equal portion of the resource or equal share of uses and benefits nor does it imply that the water itself must be divided into equal shares.<sup>76</sup> According to McIntyre, the principle of equitable and reasonable utilization is the predominant normative rule of international law relating to the utilization of international water resources.<sup>77</sup> Vučić notes that the principle of equitable and reasonable utilization is the first of the substantive principle which is based on the right of every riparian State to an equitable share of the benefits of a transboundary watercourse.<sup>78</sup> The correlative obligation of this right is to use the water body equitably and reasonably. Equity and

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<sup>71</sup> *Tunisia/Libyan Arab Jamahiriya* (Judgment) [1982] (note 42 above) para 71.

<sup>72</sup> T Bulto 'Between ambivalence and necessity in the Nile basin: Occlusions on the path towards basin-wide treaty' (2008) 2 *Mizan Law Review* 2 216.

<sup>73</sup> Ibid 106.

<sup>74</sup> Ibid 108.

<sup>75</sup> Ibid 108.

<sup>76</sup> UNWC user's guide fact sheet series: number 4.

<sup>77</sup> O McIntyre (note 24 above) 112.

<sup>78</sup> M Vučić 'Silala basin dispute - implications for the interpretation of the of the concept of international watercourse' (2017) LXV *Annals FLB – Belgrade Law Review* 4 95.

reasonableness are gauged against a variety of factors, which include local hydrological and natural characteristics, social and economic criteria, negative impacts, and the availability of alternatives.<sup>79</sup>

Aguilar & Iza notes that equitable use does not imply a division of water basins, but the establishment of equal rights and shared sovereignty of States over these resources. They opined that ‘in practice, this means achieving a balance of interests to consider the needs and uses of the waters for each of the States which are part of the water basin.’<sup>80</sup> All States shall then share the benefits according to what is considered reasonable to satisfy their needs.<sup>81</sup>

#### 2.4.3.3 Equitable use and unilateral action

In general terms, Equity Principles enjoin the cooperation of riparian States in the management of transboundary water resources. Nakamichi suggests that these Principles are the fundamental tools that address the responsibility of riparian States to conduct their activities in a fair, proportionate, equitable and cooperative manner.<sup>82</sup> In light of the above view, riparian States should acknowledge and comply with their obligations under international law to treat an international watercourse as a public good which should be shared equitably among the riparian States.

In *Hungary/Slovakia* [1997], the ICJ held that the unilateral diversion of a shared resource would deprive the other riparian state of “its right to an equitable and reasonable share of the natural resource” and violate respect for proportionality as implied by equality, “which is required by international law”.<sup>83</sup> Further, the court considered that the continuing effects of the diversion of these waters on the ecology of the affected riparian area was a failure to respect the proportionality required by international law.<sup>84</sup> This implies that unilateral action by a riparian State, in the utilization of an international watercourse, could not be considered to be

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<sup>79</sup> Arts 5–6 of the UNWC. See also M Vučić 'Silala basin dispute - implications for the interpretation of the of the concept of international watercourse' (2017) *LXV Annals FLB – Belgrade Law Review* 4 95.

<sup>80</sup> G Aguilar & A Iza 'Governance of shared waters: legal and institutional issues (2011) *IUCN Environmental Policy and Law Paper* 58 30.

<sup>81</sup> *Ibid* 30.

<sup>82</sup> M Nakamichi 'The International Court of Justice Decision Regarding the Gabčíkovo-Nagymaros Project' 9 (2017) *Fordham Environmental Law Review* 2 357.

<sup>83</sup> *Hungary/Slovakia* (Judgment) [1997] (note 43 above) para 85.

<sup>84</sup> *Ibid* para 85.

equitable and reasonable if the interests of the other riparian State in the shared resource, including the environmental protection of the latter, were not taken into account.

Consequently, the ICJ pointed out that reprisal reaction by a riparian State in response to unilateral action by another State must be proportionate to the harm or the unilateral action in order to pass the equity test. To this effect, the ICJ remarked that the deprivation of Hungary's right to an equitable share of the natural resources of the Danube River constitutes a failure to respect the proportionality required of Slovakia under international law. In this light, Nakamichi suggests that under international law, a State's response to a breach by another State must in some sense be proportionate to the breach in both magnitude and kind.<sup>85</sup>

Equity in terms of Art 5 of the UNWC implies that Watercourse States must not act unilaterally in ways that would fail to consider the equitable interests of co-riparian States in the use, management and protection of an international watercourse. States must also act in conformity with the adequate protection of international watercourses against detrimental conditions such as erosion and pollution.<sup>86</sup>

#### 2.4.4 The Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region (1995) (SADC Protocol)

The SADC Protocol recognises equitable utilisation of shared watercourses in the SADC region and is mindful of the existence of other Agreements in the region regarding the common utilisation of certain watercourses.<sup>87</sup> The overall objectives of this Protocol are *inter alia* to promote and facilitate the establishment of shared watercourse agreements and shared watercourse institutions for the management of shared watercourses and as well as to advance the equitable and reasonable utilisation of the shared watercourses.<sup>88</sup>

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<sup>85</sup> M Nakamichi (note 82 above) 357.

<sup>86</sup> UNWC user's guide fact sheet series: number 4.

<sup>87</sup> Preamble of the Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region (1995).

<sup>88</sup> Art 2 of the SADC Protocol.

Under the general Principles of the SADC Protocol, State Parties undertake to respect the existing rules of customary or general international law relating to the utilisation and management of the resources of shared watercourses.<sup>89</sup>

This report is of the view that Art 3 is a codification of the Principles of Equity, in particular, equitable participation by the Watercourse States in the utilisation and management of international watercourse in the region. This codification is clearly reflected in the Art 3(7) of the SADC Protocol which provides that Watercourse States shall, in their respective territories, utilise a shared watercourse in an equitable and reasonable manner. In particular, a shared watercourse shall be used and developed by Watercourse States with a view to attain optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the Watercourse States concerned, consistent with adequate protection of the watercourse for the benefit of current and future generations. This is the codification of the intergenerational and intragenerational equity in the SADC protocol. The SADC protocol also stipulates that equitable participation includes both the right to utilise the watercourse and the duty to co-operate in the protection and development of the watercourse.<sup>90</sup>

#### 2.4.5 Human rights to water: Vital human needs

This paragraph briefly discusses the concept of human rights to water and its link with the Principles of Equity. It further discusses the human right to water and sanitation in light of the attainment of equality and equity in general.<sup>91</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR) advocates that access to clean water is a human right because it is 'indispensable for leading a life in human dignity' and a 'prerequisite to the realization of all other human rights.'<sup>92</sup> On November 2002, the CESCR adopted General Comment No. 15 on the right to water with Art 1 stipulating that "human right to water is indispensable for leading a life in human dignity."<sup>93</sup> The right to water is defined as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses.<sup>94</sup> The United

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<sup>89</sup> Art 3(3) of the SADC Protocol.

<sup>90</sup> Art 3(7) of the SADC Protocol.

<sup>91</sup> The World health Organisation Equitable Access Score-card 2013 6.

<sup>92</sup> D Takacs 'South Africa and the human right to water: Equity, ecology, and the public trust doctrine' (2016) 34 *Berkeley J. Int'l Law* 2 64.

<sup>93</sup> Art 1 of General Comment No. 15.

<sup>94</sup> Art 2 of General Comment No. 15.

Nations General Assembly, on 28 July 2010 with Resolution 64/292 explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.<sup>95</sup>

A consultation process which was carried out by the UN Office of the High Commissioner for Human Rights (OHCHR) outlined several interpretations of the term 'equitable' used in Human Rights Council's decision 2/104 on human rights and access to water when referring to access to safe drinking water and sanitation. CESCR General Comment No. 15 highlights that the Principles of Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.<sup>96</sup> However, considerations of equity are often broader than the question of how to distribute water expenses. It is noteworthy to point out that equitable access considered within a human rights framework refers to equal and non-discriminatory access and it is on this basis that the Principles of Equity are understood and used.<sup>97</sup>

The relationship between different kinds of uses relative to human rights to water is addressed in the UNWC.<sup>98</sup> In terms Art 10 of the UNWC, no single use enjoys preference over the other unless an agreement or custom indicate otherwise. However, in the event of a conflict between uses of an international watercourse, it shall be resolved with special regard being given to the requirements of vital human needs water required for production of food in order to prevent starvation.<sup>99</sup> Rieu-Clarke et al suggest that in international water management, vital human needs means the minimum individual water requirements for human survival which must always be protected under the principle of "equitable and reasonable utilisation".<sup>100</sup> The implication of the Art 10 is that in the case of conflicting uses across international borders, Watercourse States must give special regard to vital human needs in solving such conflict. In this light, priority must be given to providing sufficient water to sustain human life, including both drinking water and the water required for the production of food in order to prevent starvation. The report argues [paraphrasing Vucic] that

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<sup>95</sup> < UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, No.35, available at: <https://www.refworld.org/docid/4ca45fed2.html>>

<sup>96</sup> Art 27 of General Comment No. 15.

<sup>97</sup> UNGA Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments 22.

<sup>98</sup> Art 10 of the UNWC.

<sup>99</sup> Ibid.

<sup>100</sup> Rieu-Clarke et al (note 21 above) 129.

freshwater allocation must be treated as public good such that every person enjoys equality of access to adequate quantity and quality of water in an equitable manner.<sup>101</sup>

### **3 Interpretation of the Principles of Equity in international water resources management.**

#### **3.1 Introduction**

This paragraph discusses the interpretation of the Principles of Equity in the management of international water resources. Interpretation of these Principles requires understanding of the doctrines encapsulated in maxims of equity as listed in the paragraph 2.1 above.<sup>102</sup> These maxims serve as one of the guiding principles to the interpretation of the Principles of Equity.

#### **3.2 Judicial interpretation of the Principles of Equity**

Courts and tribunals adjudicating international watercourse disputes have interpreted equity provisions in the watercourse agreements. White notes that 'if a law can be interpreted in more than one way, then equity may be applied in order to ascertain the interpretation that would best serve the purposes of the law'.<sup>103</sup> This report is of the view that proper interpretation of these Principles have resulted in successful negotiations of treaties and amicable settlement of disputes related to transboundary water resources. The following paragraphs discuss the interpretation if these Principles by various courts and tribunals.

In the *Netherlands v Belgium* [1937],<sup>104</sup> where the Netherlands instituted a court proceeding against Belgium regarding the construction of certain canals by Belgium, for the diversion of water from the river Meuse, which the Netherlands believed could alter the water level of the river Meuse. The Netherlands asserted that such construction by Belgium had violated a treaty signed in 1863, establishing the regime for taking water from the Meuse. In the matter, the PCIJ considered many legal principles including the Principles of Equity.<sup>105</sup>

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<sup>101</sup> Vučić (note 2 above).

<sup>102</sup> Pomeroy (note 15 above) 363 at 601- 602.

<sup>103</sup> White (note 5 above) 110.

<sup>104</sup> *Netherlands v Belgium* [1937] (note 38 above) para 326.

<sup>105</sup> <<https://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-4/diversion-of-water-from-the-meuse-netherlands-v-belgium/>>.

Judge Hudson invoked one of the fundamental doctrines and maxims of the Principles of Equity that states ‘that he who seeks equity must do equity’. On this ground he denied the relief sought by the Netherlands on the basis that it was itself guilty of the same breaches which were alleged against Belgium. The PCIJ also made reference to other maxims that inform the Principles of Equity such as the doctrine of clean hands which states that ‘he who comes into equity must come with clean hands’.<sup>106</sup>

In the *North Sea Continental Shelf* [1969], the ICJ remarked that the proper interpretation of equity does not necessarily imply equality.<sup>107</sup> This indicates that equal treatment does not provide an equitable solution.<sup>108</sup> The report suggests that the implication of the above argument is that when interpreting the equity provisions in a treaty, the court is required to interpret the provisions of the treaty flexibly, taking into account the relevant factors in order to achieve an equitable result.

In the *Tunisia/Libyan Arab Jamahiriya* [1982], one of the central focus in the matter was what the equitable Principles entails.<sup>109</sup> The ICJ remarked that the Principles entail the achievement of just and fair result.<sup>110</sup> The ICJ further remarked that the result of the application of equitable principles must be equitable in both the result to be achieved and the means to be applied to reach the result.<sup>111</sup> This implies that an equitable result must reflect both substantive and procedural fairness. Stepping further into *Tunisia/Libyan Arab Jamahiriya* [1982], the ICJ suggested that when applying positive international law, a court may choose among several possible interpretations, the one which appears in the light of the circumstances of the case, to be closest to the requirements of justice and ultimately equity.<sup>112</sup>

As mentioned in the above paragraph, equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.<sup>113</sup> To achieve an equitable result entails focusing on and arriving at a decision which is just and fair to all the parties to a dispute. In support of this argument,

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<sup>106</sup> *Netherlands v Belgium* [1937] (note 38 above) para 323.

<sup>107</sup> *North Sea Continental Shelf* [1969] (note 50 above) para 91.

<sup>108</sup> *Ibid* 92.

<sup>109</sup> *Tunisia/Libyan Arab Jamahiriya* [1982] (note 42 above) para 70.

<sup>110</sup> *Ibid* 71.

<sup>111</sup> *Ibid* 70.

<sup>112</sup> *Ibid* 71.

<sup>113</sup> *Ibid* 70.

the ICJ has remarked that the equitableness depends on whether a just result in the circumstances of the particular case is achieved.<sup>114</sup>

## **4 Applications of Equity Principles in transboundary watercourse management**

### 4.1 Overview

The Principles of Equity serve as a tool for the negotiation of watercourse treaties. These Principles have been deployed by the courts in adjudication of cases related to the management and settlement of international watercourse disputes. Some of the cases where the Principles of Equity was interpreted and applied in the settlement of an international watercourse disputes are those referred to in the previous section.<sup>115</sup>

### 4.2 Equity Principles: Tool to settle international watercourse disputes

Equity as the concept of fairness in the distribution and allocation of resources has developed to become one of the most important international water resource management tools. These Principles are recognised and accepted legal mechanisms for the management of international water resources. It is deployed in situation where a watercourse is shared by several States resulting in the creation of international watercourses. International watercourse creates a condition of common interest in the shared watercourse by the Watercourse States.

Due to the interest of the Watercourse States in respect of the common resource, Watercourse States are required to establish managerial and distributional regimes that are equitable and agreeable to them.<sup>116</sup> Equity entitles a watercourse State to an equitable and reasonable share of the uses and benefits of the

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<sup>114</sup> Ibid 70.

<sup>115</sup> Some of the cases comprise the *Netherlands v Belgium* [1937], *Tunisia-Libya Continental Shelf* [1982], *Hungary/Slovakia* [1997], *North Sea Continental Shelf* [1969] among others.

<sup>116</sup> LL Goldie 'Equity and the international management of transboundary Resources' (1985) 25 *Natural Resources Journal* 3 665.

particular watercourse, and also creates the reciprocal obligation not to deprive other States of their respective rights in this regard.<sup>117</sup>

Drawing from Pomeroy's work titled '*A treatise on equity jurisprudence*' this report argues that the application of Equity Principles in the management of international water resources revolves around determining relevant rights and obligations in accordance with conscience and good faith.<sup>118</sup> It was also noted that courts and tribunals faced with the adjudication of international watercourse dispute are bound to apply Equity Principles as part of international law, in conjunction with the consideration and balancing of various factors which are relevant in order to achieve an equitable result. Some of the factors to be considered are listed in the Art 6 of the UNWC.<sup>119</sup> In general terms, Art 6 provides an indicative list of the key factors and circumstances to be taken into account when determining what constitutes an equitable and reasonable use. In *Netherlands v Belgium* [1937], the PCIJ remarked that 'the level of the water in Meuse river was the determining factor in deciding whether the larger or the smaller quantity of water was to be withdrawn from the Meuse river as stated in the treaty.'<sup>120</sup>

#### 4.3 Equity Principles and conflict of uses of transboundary water resources

In many instances, the quality and quantity of watercourse may be sufficient to satisfy the needs of all Watercourse States if the Watercourse is utilized equitably. However, this is not always the case, more often, different Watercourse States utilise the watercourse for various and diverse reasons such as irrigated farming, domestic uses, navigation and fishing, hydropower generation among others. In such a situation, "conflict of uses" arises due to competing interests in the utilization of a watercourse by the riparian States. Such situation presently exists on the Nile river where the interests of upstream States (in this case Ethiopia's intended dam construction) conflicts with Egypt's interests (the fear of lowering the quantity of water that flows downstream.) In such instance, the ILC draft report commentary on Art 5 suggests that the international practice recognizes that some adjustments or apportionments are required in line with Equity Principles in order to preserve each watercourse State's equality of rights.<sup>121</sup> These adjustments or apportionments are

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<sup>117</sup> UNWC user's guide fact sheet series: number 4.

<sup>118</sup> Pomeroy (note 15 above) 385 at 636.

<sup>119</sup> Art 6 of the UNWC.

<sup>120</sup> *Netherlands v Belgium* [1937] (note 38 above) para 139.

<sup>121</sup> ILC draft report commentary on Art 5.

to be arrived at on the basis of equity and can best be achieved on the basis of specific watercourse agreements.<sup>122</sup>

Rieu-Clarke et al suggests that in such a situation, the various riparian States must enter into consultations in a spirit of cooperation and good-faith.<sup>123</sup> Such consultation must also take into account the well established practice of recognising the 'existing-use' to continue provided that the co-riparian States are in agreement.<sup>124</sup> Arguably, the practice of recognising the 'existing-use' is consistent with the maxim of equity that provides that 'where there is equal equity, the first in time shall prevail'. The reason for the good-faith cooperation and consultation is to weigh the interest of all the riparian States and thereafter strike a balance that is equitable and reasonable in the circumstance of the specific transboundary water resource.<sup>125</sup>

Rieu-Clarke et al are of the view that if, the 'existing-use' of the watercourse by a State is both inequitable and in conflict with existing uses of co-riparians, the former is under a legal obligation to reduce its utilisation of the international watercourse.<sup>126</sup> If conflict of uses arises, it is suggested that the riparian States may enter into negotiations in order to come to an acceptable and amicable arrangement. Such arrangement could take the form of payment of compensation for the use of water in excess of equitable share. The refusal or unwillingness either to amend (i.e. reduce) the existing use or to enter into negotiations with a genuine view to achieve an equitable result may be interpreted as a breach of a Watercourse State's international legal obligations.<sup>127</sup> This argument is in line with the maxim of equity that stipulates that 'equity will not suffer a wrong without a remedy'. The report is of the view that the above discussion is a case-in-point of the Nile River Basin situation. The following paragraphs briefly discusses the Nile river basin in the context of the Principles of Equity.

#### 4.4 Nile River under the spotlight

This report briefly discusses the unending and ever mutating tensions and disputes among riparian States of the Nile river basin in the light of the Principles of Equity. The report acknowledges that detailed exposition

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<sup>122</sup> ILC draft report commentary on Art 5.

<sup>123</sup> Rieu-Clarke et al (note 21 above) 114. See also Article 6(2) of UNWC.

<sup>124</sup> Rieu-Clarke et al (note 21 above) 115.

<sup>125</sup> Ibid 115.

<sup>126</sup> Ibid 114.

<sup>127</sup> Ibid 115.

of Nile river is beyond its scope. However, the dispute regarding the utilisation of Nile river by the riparian States is discussed as a contemporary discourse in the International water resource management.

The Nile river basin spans approximately 6825km bypassing a total of ten riparian States.<sup>128</sup> Utilisation of Nile river has a very high economic significance to the riparian States because they depend on it as source of water for irrigation and hydropower generation, domestic and other uses. Even though the Nile basin is made of ten riparian States, Egypt and Sudan which are the downstream States, utilise the lions-share of the economic benefits that flows from the Nile river. There seems to be disproportionate utilisation of the water resources of the Nile basin by Egypt and Sudan on one hand relative to other riparian States on the other hand. Chenoweth notes that Ethiopia contributes 86 per cent of the Nile river's flow and yet makes negligible utilisation of the water.<sup>129</sup> Egypt utilises approximately 59.2 billion cubic metres of water from the Nile each year, while Sudan utilises about 14 billion cubic metres.<sup>130</sup> The above Nile water allocation originated in colonial-era treaties such as the 1929 Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes, and the 1959 Agreement between the Republic of Sudan and the United Arab Republic (of Egypt) for the Full Utilization of the Nile Waters.<sup>131</sup> In terms of the 1929 Exchange of Notes, Egypt has natural and historical rights on the waters of the Nile. The binding effect of these colonial-era treaties is disputed by other Watercourse States.<sup>132</sup>

This disproportionate access and utilisation of the Nile water may be attributed to the non-existence of a binding international water management treaty for the Nile river basin. The realisation of equitable utilisation of the resources of the Nile river basin may only be attainable through negotiation and introduction of a legally binding basin-wide management agreement over the equitable allocation of the Nile's water resources.

To successfully negotiate and introduce such basin-wide management agreement requires the deployment of the Principles of Equity. Even though the Nile Basin Cooperative Framework Agreement (CFA) with

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<sup>128</sup> Y Walilegne 'The Nile basin: From confrontation to cooperation' (2004) 27 *Dalhousie Law Journal* 2 506. The ten Nile basin States are Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

<sup>129</sup> J Chenoweth 'International River basin anagementm: Data and information exchange under international law and the case of the Mekong river basin' (2000) 18 *Journal of Energy & Natural Resources Law* 2 147.

<sup>130</sup> Ibid 146.

<sup>131</sup> <<http://www.internationalwatersgovernance.com/nile-river-basin-initiative.html>>

<sup>132</sup> < [https://www.internationalwaterlaw.org/documents/regionaldocs/Egypt\\_UK\\_Nile\\_Agreement-1929.html](https://www.internationalwaterlaw.org/documents/regionaldocs/Egypt_UK_Nile_Agreement-1929.html) >.

enshrined Principles of Equity has been introduced, it is not yet in force or binding because it needs a total of six instruments of ratification/accession to enter into force. Presently, only three States have ratified the document, requiring three States to submit their instruments of ratification before the agreement will come into force.<sup>133</sup>

Such framework must incorporate the basic principles and maxims that inform the Principles of Equity. For the basin-wide management agreement/framework to be equitable, it must be 'understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the law of any of the riparian states.'<sup>134</sup>

#### 4.5 Principles of Equity in action: Senegal river basin

A case in point of the deployment of the Principles of Equity in the management of international resources is Senegal river basin where more than 4 countries share the Senegal river watercourses. According to The Food and Agricultural organisation (FAO) report, the basis for equitable management is joint planning and equitable sharing of benefits flowing from the natural resource endowments of the basin.<sup>135</sup>

The Senegal river basin is in West Africa with a surface area of about 300,000 square kilometers bordering over four countries comprising Guinea, Mali, Mauritania and Senegal.<sup>136</sup> The riparian States adopted and applied the principle of limited territorial sovereignty, which is a component of the principle of equitable and reasonable utilization as provided in the Art 5 of the UNWC.<sup>137</sup> This principle functions as a management tool resulting in the joint control and management of the river basin by *Organisation pour la Mise en Valeur de Fleuve Senegal* (OMVS) which is made up of representative of the four riparian States with the headquarters in Dakar, Senegal.<sup>138</sup>

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<sup>133</sup> < <https://www.internationalwaterlaw.org/blog/2017/06/19/the-nile-basin-cooperative-framework-agreement-the-impasse-is-breakable/>>. See also <<https://nilebasin.org/nbi/cooperative-framework-agreement>>.

<sup>134</sup> White (note 5 above) 110.

<sup>135</sup> <<http://www.fao.org/3/y5716b/y5716b01.htm>>.

<sup>136</sup> MM Mbengue 'A model for African shared water resources: The Senegal river legal system' (2014) 23 *Review of European, Comparative & International Environmental Law* 1 59.

<sup>137</sup> Art 5 of the UNWC. See also, Rieu-Clarke et al (note 22 above) 104. Rieu-Clarke et al postulates that the principle of equitable and reasonable utilization is now considered as a principle of customary international law.

<sup>138</sup> FJG Padt & JC Sanchez 'Creating new spaces for sustainable water management in the Senegal river basin' (2013) 53 *Nat Resources Journal* 279.

The report is of the view that arguably the Principles of Equity formed the basis of the management of the Senegal river basin because maxims that underpin the Principles of Equity are reflected in the framework that informs the implementation of the river basin management. Mbengue argues that 'the Senegal river basin has been characterized and governed by an articulated legal regime' that incorporates both procedural and substantive dimensions of equity.<sup>139</sup> He notes further that the legal regime of the river has ensured effective and efficient cooperation among the riparian States, even in times of conflict between some of them.<sup>140</sup>

Padt & Sanchez note that the Senegal river basin agreement concluded in 1978 provides that "the rights and obligations of the States as joint owners are founded on the principles of equality and equity."<sup>141</sup> They note further that by first seeking mutual cooperation they were able to conclude a watercourse agreement. The four basin States have freedom of navigation and no individual State is permitted to utilize the waters solely for its own purposes.<sup>142</sup> On this premise, the report suggests that the founding documents that guide the management of the Senegal basin are consistent with the Principles of Equity. In particular, the maxims of equity which states that 'equity regards that as done which ought to be done', 'he who seeks equity must do equity', equality is equity' as well as 'equity follows the law'. This example of mutual cooperation between Watercourse States on the Senegal River, founded on the Principles of Equity, should be adopted in the management of the Nile river basin.

## 5 Conclusion

The research demonstrates that equity does not imply equality but adjustments, accommodations and proportionality of the international watercourse to satisfy the water needs of the watercourse States. It is important to note that equity does not imply the introduction of new laws but an attempt to make rigid positive laws flexible to give an equitable result and thereby provide and just and fair utilisation of international watercourses. Conclusively, the report demonstrates that the Principles of Equity is a double edge sword that functions both as a tool to access benefits and rights to an international watercourse and as a tool

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<sup>139</sup> MM Mbengue (note 136 above) 59.

<sup>140</sup> Ibid 59.

<sup>141</sup> FJG Padt & JC Sanchez (note 138 above) 279.

<sup>142</sup> Ibid 270.

creating a corresponding obligation on the watercourse States to participate equitably in the protection and management of international watercourse.

The report concludes by suggesting that the Principles of Equity are recognised as international legal principles, in particular as a general principle of law recognized by civilized nations in terms of art 38(c) of the Statute of the ICJ. The principle is codified in various international water management instruments such as the UNWC and other regional treaties.

These Principle have been interpreted and applied by the courts in the settlement of various international watercourse disputes. It has also been successfully deployed in the international watercourse agreement negotiations and dispute resolutions. It is argued that future international watercourse disputes can be avoided if these Principle are appropriately understood, interpreted and applied by the watercourse States during treaties/watercourse agreements negotiations.

Finally, the report shows that the operation of the Principles of Equity is applicable to almost all the principles codified in the UNWC for the management of the international watercourses.

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