THE ROLE OF EQUITY IN INTERNATIONAL LAW

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This paper considers the role of equity in international law. After setting out a working definition of equity and considering whether recourse to equity is permissible, it asks whether there is any need for equity in international law – that is, whether there is anything that can be done by recourse to equity which could not otherwise be done. Concluding that there are limited circumstances in which recourse to equity might appear necessary, it then discusses the features of equity which make its use desirable in certain contexts. Two short final sections deal with the content of equity, and with the question whether its use requires the consent of states.

A Working Definition of Equity

Later in this paper I shall have to return briefly to the question of the content of equity; but it is necessary to adopt a working definition at this stage. A serviceable definition of equity is: general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.[1] I use the term to signify equity as distinct from law. The extent to which equity becomes, through its use, modulated or controlled by legal rules is not important here (although it is discussed below).[2] What is critical is the attachment of equity to the conception of justice and its detachment from the rules of any particular legal system.

I am aware that by forcing a distinction between law and equity in this way I am to some extent creating the problems which I address, and may therefore be accused of putting up straw men. I do so deliberately in the context of this paper. The close relationship between law and equity is undeniable, and the pervasive influence of equity on legal rules and principles is at least as strong in international law as in other legal systems. But there seems little point in trying to tease out the precise nature and extent of that relationship and influence. The two are so thoroughly commingled as to be inseparable, and it is not clear that an attempt to separate them would be either informative or interesting. The purpose here is to examine the particular roles of Law and Equity as distinct bodies of norms and approaches to normativity.

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1 This was the definition of the phrase "law and equity"used by the Tribunal in the United States–Norway Arbitration, 1922 (1923) 17 AJIL 362 at 384. The phrase was adopted by the Tribunal in the *Cayuga Indians* arbitration: see Nielsen F K, *American and British Claims Arbitration* (1926), p 307, at 320–321.

2 See further, Weil P, *The Law of Maritime Delimitations – Reflections* (1989), pp 159–177.

Is The Use of Equity Permissible?

The first question which should be asked is whether it is permissible to use "equity" within the international legal system. The answer is so clear on one level that extended discussion is unnecessary. Recourse to general principles of justice in order to assist the "just" application of law is a feature common to the major legal systems of the world.[3] As such, there is no difficulty in accepting that it is a part of public international law subsumed, in the terms of article 38.1 of the Statute of the International Court of Justice, within the category of "general principles of law recognized by civilized nations". Consequently, international tribunals would be entitled to apply it, to the extent that its application is within the boundaries of that common practice in municipal legal systems, even in the absence of an express authorization. This, of course, is the burden of the often-quoted passage from the Individual Opinion of Judge Hudson in the *Diversion of Water from the River Meuse* case.[4]

Whether equity in this sense should be regarded as a category distinct from "law proper" is a more difficult question. In the next section I argue that the application of abstract norms to concrete cases necessarily involves recourse to principles and techniques often brought under the heading of "equity". To the extent that this is true it would follow that equity may be applied wherever law may be applied, and that no special warrant is necessary for the use of equity. But to the extent that this is not true – that is, to the extent that equitable concepts and techniques are not simply a part of international "law", whether as customary law, treaty law, or general principles of law recognized by civilised nations – the question of the entitlement of a tribunal to have recourse to them would arise. Again, the answer in broad terms is clear. If what is applied is something other than the applicable law as defined in the regulating instrument (such as article 38.1 of the Statute of the International Court), then it may not be applied without the consent of the Parties. I return to this point below, after consideration of the question whether a category of equity distinct from law is necessary or desirable.

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3 See David R and Brierley JEC, *Major Legal Systems in the World Today* (1968), esp pp 115–118 (French and German law), 178–180 (Soviet law), 287–3 292, 328–329 (Common law), 415 (Hindu law). David and Brierley give equity an attenuated role in Islamic law, ibid, pp 392–393; other writers give it, or comparable concepts such as the technique of *usul* and science of *fikh*, a more prominent role: see, for instance, Afchar H, "The Muslim Conception of Law" in *International Encyclopaedia of Comparative Law*, Vol VII, Chapter I, p 84, at 90–96.

4 PCIJ Series A/B, No 70, pp 76–77, where he said: "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".

Is The Use of Equity Necessary?

The question asked in this section is whether the use of equity is necessary in international law. By this is meant, whether there are circumstances in which the law prescribes in a particular case a result which is, in the eyes of the judge (I leave aside for the moment the question of non-judicial uses), unjust, according to general principles of justice as the judge sees them, and where justice can only be done by applying equity as distinct from law.

(I) *Types of Equity*

It is customary to distinguish between different kinds of equity, or different modes in which equity can be applied. The traditional categories are equity *infra legem,* equity *praeter legem*, and equity *contra legem,* to which some jurists add a fourth category of decisions *ex aequo et bono.* Each category is said to have distinguishing characteristics. Equity *infra legem* is "that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes"[5], or equity "used to adapt the law to the facts of individual cases".[6] Equity *praeter legem,* in contrast, is equity used to fill gaps in the law, or more precisely used "not...with a view to filling a *social* gap in law, but...in order to remedy the insufficiencies of international law and fill its *logical* lacunae".[7] Equity *contra legem* is equity used in derogation from the law, to remedy the social inadequacies of the law.[8] Decisions *ex aequo et bono* are decisions which "do not have to be at all related to judicial considerations".[9] In fact, this attractive division cannot easily be sustained in the context of public international law.

(a) *Equity infra legem*

Take first the case of equity *infra legem.* There is no obvious reason for distinguishing between this and law proper. Substantive legal norms purport to apply to abstract categories of persons or circumstances, and cannot be applied to a concrete case without some mediating act of characterisation which determines that the "facts" of the case fall within the ambit of the rule. That involves an exercise of judgment. This is plainly so in the case of norms establishing the existence of rights and duties.

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5 *Frontier Dispute* case, ICJ Rep 1986, 554. This definition is adopted by Professor Lapidoth in her paper "Equity in International Law" (1987), 22 Is L R, 161 at 172.

6 Akehurst, "Equity and General Principles of Law" (1976), 25 ICLQ 801.

7 Separate judgment of Judge Ammoun in the *Barcelona Traction case (Second Phase)* case, ICJ Rep 1970, p 3.

8 See the separate judgment of Judge Ammoun in the *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3 at 139.

9 Lapidoth, n 9 at 172. I do not discuss decisions *ex aequo et bono* specifically in this paper, although much of the discussion of equity *contra legem* is relevant to this category of decisions.

For instance, the task of applying rules relating to treaties can only be approached after there has been an initial determination that a treaty has been made; and for that determination it is necessary to decide whether the verbal and other dealings between the parties to the alleged treaties are such as to have "made", as a matter of law, a treaty. Legal categories are not the categories of ordinary perception; they are superimposed upon the categories of ordinary perception. In order to decide whether an oral exchange (such as provided the context of the Ihlen declaration) or a text which exists only as a program within a computer constitutes a treaty, it is necessary to interpret rules developed to apply to written agreements. This initial question of characterisation involves the use of judgment and discretion. The need for such an initial characterisation is not peculiar to hard cases. It exists even in relation to written texts reprinted in the UN Treaty Series, although the question is generally easier to answer in that context. That this is so is apparent if the possibility of the putative treaty being a forgery, or procured by coercion, is considered.

The cases which are commonly cited as examples of the use of equity *infra legem* in international law look, at first sight, rather different from my treaty example. For instance, writers sometimes cite as an example of this use of equity, cases concerned with the fixing of quantum of compensation by the making of an "equitable" estimate once the right to recover under a specific head of damages is established.[10] On one view, these cases are concerned with the exercise of a power of the court, and the power is one which the court asserts on the basis of a right to apply equity. Thus it might be said that the court has the power to award compensation; that no rules stipulate the precise amount which it must award in any particular case; and that consequently the court must fall back on principles of equity. But are such cases really different from cases involving the determination of the existence of a treaty? Are not both kinds of case instances of the application of a general rule to a concrete case, involving the exercise of a degree of judgment which is not merely an inevitable, but arguably the characteristic, feature of juridical reasoning? If the cases are viewed as determinations of the limits of the claimant's *right* to compensation rather than of the court's *power* to award it, do they not give rise to essentially the same issues as a determination of the limits of a legal right in any other circumstance?[11] If the answer to that question is that the two kinds of case are the

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10 See eg, Akehurst, n 6 at 802–803; Lapidoth n 5 at 173. Cf *Starrett Housinq Corp v Iran* (1987) 16 Iran–US Claims 112 at 221: "the practice of the Tribunal supports the principle that when the circumstances militate against calculation of a precise figure, the Tribunal is obliged to exercise its discretion to 'determine equitably' the amount involved." Note that the Tribunal was directed to decide all cases "on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the arbitral tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." Claims Settlement Declaration, Article V and Tribunal Rules, Article 33, text in 1 Iran–US Claims T R 9 at Il and 60, and 87.

11 International law has commonly been regarded as a compact between nations, consisting of rights and duties and of which the municipal law of contract and tort is

same, there is no need to have recourse to the notion of equity *infra legem.* The use of discretion is simply a part of the process of applying the norm. If the answer is that they are different, it must be asked how they differ. Any difference must surely lie in the extent of the discretion. In determining that a treaty exists, it may be said, the question is simply whether or not the facts reach the threshold standard for the establishment of the existence of a treaty – a question turning in large measure on the application of rules concerning evidence, proof, and presumptions, which rules must themselves be counted as a part of the "law" on the making of agreements. All the criteria which may be utilized are contained within the rules. In determining the amount of compensation payable for, say, pain and suffering[12] on the other hand, it might be said that there is much less guidance, and that the list of criteria to which reference may be made (or, to put it another way, the list of factors which may be taken into account) is not exhaustively contained within the rule. But if that be so, the case is surely one which calls for the use of equity *praeter legem.* Recourse is had to equity in order to fill the hole left by the absence of precise rules on the determination of the quantum of compensation.

The same would be true of recourse to equity as a justification for not extending the application of a rule of law to the particular circumstances of a case. Either this is a straightforward determination of the scope of the rule, or it may be regarded as a recourse to equity to repair the hole left by the absence of a rule determining the scope of the rule of law. Of course, if there is a rule which says that the substantive rule of law must be applied to the particular circumstances of the case, then reference to equity as an excuse for not so applying it would be a use of equity *contra legem.*

(b) *Equity praeter legem*

I would want to press the case further and argue that many, perhaps most, alleged uses of equity *praeter legem* in international law are no more than routine examples of the handling of rules in the international legal system, and that the concept of equity *praeter legem* in international law differs somewhat from the concept as it applies in municipal legal systems.

The idea that there can be a "gap" in the law depends upon an ability to define the limits of the law with certainty and clarity. It is closely linked to the idea of a *ratio decidendi* in case law, and to the existence of clear rules of

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the paradigm. An alternative view would see international law as a system of limitations upon the powers of actors in the international legal system, by analogy with constitutional and administrative law in municipal legal systems. The implications of these alternative conceptions of international law merit further attention. For instance, adoption of the private law approach based on analogies from contract and tort law might tend to set equity up against the law and put it in a corrective role, tempering the harshness of legal duties, whereas the public law approach might be more disposed to incorporate equity within the law.

12 Akehurst's example, n 6 at 802–803.

interpretation in statute law. Kratochwil makes the point clearly in relation to municipal law:[13]

> "Consider in this context the famous case of *Donoghue v. Stevenson,* where the purchaser of a bottle of ginger beer found a dead snail in the opaque bottle and sued for damages after consumption of the drink. Does the decision of the Court for the plaintiff provide a precedent for 'dead snails,' or any snails, or any noxious or disgusting foreign body in objects made for human use, or only for those of consumption, or only for such objects which come in bottles? Or does it establish only liability for cases in which the noxious element is not discoverable by the consumer without destroying the saleability of the commodity, thereby restricting the scope of the general *caveat emptor* rule?"

In a municipal system such questions can be answered authoritatively (if retrospectively) and the answers constituted as a part of the rule by virtue of the doctrine of precedent and the concept of the *ratio decidendi.* In international law, the position is rather different.

Take, for example, the passage in the *Corfu Channel* case in which the International Court referred to obligations on Albania to warn British ships of mines in the Channel, arising from "elementary considerations of humanity", which passage is cited as an example of recourse to equity *praeter legem.*[14] Setting aside the fact that the Court had other grounds for its decision and that the Parties were in any event agreed on the obligations which arose for Albania if it was proved that Albania had knowledge of the laying of the minefield,[15] and setting aside also the question whether "considerations of humanity" can be equated to equity,[16] it remains doubtful whether this is a proper example of equity *praeter legem.*

The Court could have pointed to rules of customary law stipulating that "[a] Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea",[17] and that "[a] state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to

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13 Kratochwil FV, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic affairs* (1989), p 221.

14 ICJ Rep 1949, 4 at 22. The passage is cited by Lapidoth n 5 at 173 and Akehurst n 6 at 806.

15 ICJ Rep 1949 at 22.

16 It might be objected that this is an example not of a principle of equity but rather of a principle of morality. However, what the Court was saying, in essence, was that in the absence of any specific rule of law attributing international responsibility to Albania for a failure to issue the warning, general principles of justice required that Albania be held responsible. It might, indeed, be argued that *all* principles of equity are in essence principles directing the disposition of legal cases in conformity with moral principles, and in that sense are themselves modulations of moral principles.

17 Draft Convention on the Territorial Sea prepared by the League of Nations Codification Conference, 1930, League of Nations Document C. 351. M. 145. 1930. V. 14, p 165 (Article 4).

another State, ...if it has failed to use due diligence to prevent such injury".[18] Those rules (assuming, *arguendo*, that they stated customary law as it existed at the time) could have formed a sufficient basis for the decision on Albanian responsibility. The important point here is that they could have done so because the ambit of individual norms in customary international law is fundamentally indeterminate. Particularly given the absence of a system of precedent and *rationes decidendi*, it is, at least in general, not possible to say that a particular rule *must* be construed so as to exclude its application to a particular set of circumstances. It may be that neither of the rules quoted above had previously been construed so as to impose an obligation on a coastal State to warn of hazards in its territorial sea resulting from the actions of third states; but it could not be said that the rules would not bear such a construction.

A similar point arises at an earlier stage in the process of determining the content of customary law – or, more strictly, at a similar stage viewed from a different perspective. The two rules offered above as alternative bases for the decision in the *Corfu Channel* case were (presumably) inferred from State practice. But how is the process of inference controlled? How do we decide whether it is right to infer a broader or a narrower formulation of a norm from State practice?

To take a clearer example, if state practice contains many instances of uncontested assertions of jurisdiction over aliens in cases of cross-frontier shooting and blackmail cases, is it proper to infer a rule allowing "objective" territorial jurisdiction only in relation to such crimes? or in relation to those and similar crimes such as fraud? or in relation to all generally recognized crimes where physical acts take place in the two jurisdictions? or to any such crime under the law of the State claiming jurisdiction, no matter how idiosyncratic that law might be? or to all crimes which produce an effect within the state, even if no physical acts occur there? or to all crimes injuring the interests of the state, or of its nationals?

The inability of international law to answer this question clearly and objectively is, of course, the root of many international disputes. Frequently, disputes arise not because States choose simply to disobey the law; rather, they disagree on what the law is. There is no rational basis on which any formulation of a rule inferred from State practice can be said to constitute an "improper" inference of a rule from that practice, although there may be considerations of principle or policy external to the process of inference which render one interpretation preferable to another. A tribunal prepared to go back to the practice underlying customary international law, therefore, has a very wide choice of rules of markedly different scope which may plausibly be inferred from that practice.

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18 Draft Convention on the Responsibility of States (Article 4 prepared by the Research in Int'l Law of the Harvard Law School, (1929) 23 AJIL Supp, p 134.

This process lies at the heart of the development of international law. As Sir Gerald Fitzmaurice observed:[19]

> "It is axiomatic that courts of law must not legislate: nor do they overtly purport to do so. Yet it is equally a truism that a constant process of development of the law goes on through the courts, a process which involves a considerable element of innovation...In practice, courts hardly ever admit a *non liquet*. As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precept."

It is at least arguable that there will *always* be a rule or principle of law (as opposed to equity) which is capable of extension and application to the case in hand, particularly given the possibility of recourse to "general principles of law recognized by civilized nations" as part of the corpus of international law.[20] If that is so, then there need be no "gaps" which would need to be filled by equity *praeter legem*. It is difficult to construct a proof that there will always be a rule or principle of law susceptible of application. Perhaps the most that can be said is that, in the absence of *a priori* limits on the legitimacy of analogical reasoning in international law, and in the absence of limitations of the kind which arise in legal orders operating rules of precedent within a system of compulsory adjudication, there is no reason to suppose that a gap need ever arise.

The *North Sea Continental Shelf* cases[21] might at first sight seem to contradict this view. There, it might be said, the International Court rested the criteria applicable to continental shelf delimitations directly upon equity rather than upon the extension of existing rules and principles of law. That would not be an accurate characterisation of the decision. The Court stated explicitly that it was not "applying equity simply as a matter of abstract justice, but applying a rule of law which itself requires the application of equitable principles, in accordance with ideas which have always underlain the development of the legal regime of the continental shelf". [22] Equity was used, not to fill a gap in the law, but because a gap-free law prescribed the application of a rule pegged to a standard based in equity.

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19 "Judicial Innovation – Its Uses and its Perils" in *Cambridge Essays in International Law* (1965) p 24 at 24–25.

20 At worst, one could always resort to the scoundrel's trump card, quoting the mischievous and utterly misconceived dictum from the *Lotus* case, PCIJ Rep Series A, No 10 that "[r]estrictions upon the independence of States cannot...be presumed".

21 ICJ Rep 1969 p 3. But see the remarks of Judge Morelli (at 213–214) arguing that the Court was engaged in a *renvoi* to equity which necessarily put it outside the scope of the law.

22 At 47.

It is, however, possible that gaps in the law may be deliberately created in the context and for the purposes of judicial proceedings involving the application of international law. The judge interpreting the law (for convenience, I will refer to the "judge" at this stage, and defer consideration of the non-judicial uses of equity until later) may determine that the law stops short of regulating a particular matter. This is, if the above argument is correct, a conscious choice made by the judge, who could otherwise choose to extend the application of an existing rule or principle to the case.

It is difficult to find clear instances of this use of equity in international law. Something of this kind was done by the tribunal in the *Cayuga Indians* case,[23] where reference was made to the need to have recourse to "generally recognised principles of justice and fair dealing" in order to deal with anamalous cases. But the tribunal's use of such principles, which was criticised for being at variance with earlier practice,[24] merely reinforced a decision based on the interpretation of a treaty provision;[25] and furthermore the tribunal was expressly directed to decide "in accordance with treaty rights and with the principles of international law and of equity".[26] Similarly, the Tribunal in the *Abu Dhabi* arbitration was directed to apply "principles rooted in the good sense and common practice of the generality of civilized nations",[27] and the award in that case consequently cannot stand as an instance of the use of equity to fill a gap in the law which the tribunal was directed to apply.

One of the clearest modern examples of a use of equity *praeter legem* appears in the case of *Harza v Iran*, decided by the Iran-US Claims Tribunal, where it was said:[28]

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23 Reprinted in Nielsen FK, *American and British Claims Arbitration* (1926), p 307; 6 UNRIAA 173. The award contains a lengthy analysis of uses of equity in arbitral practice.

24 Nielsen n 23 at 273-286.

25 As the tribunal said (at 321):

> "Our conclusion on this branch of the cause is that, according to general and universally recognized principles of justice and the analogy of the way in which English and American courts, on proper occasions, look behind what in such cases they call 'the corporate fiction' in the interests of justice.. on the division of the Cayuga Nation the Cayuga Indians permanently settled in Canada became entitled to their proportionate share of the annuity...
>
> But it is not necessary to rest the case upon this proposition. It may be rested upon the strict legal basis of Article IX of the Treaty of Ghent, and in our judgment is to be decided by the application of that covenant to the equitable claim of the Canadian Cayugas to their share in the annuity."

26 See Article 7 of the Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain, August 18, 1910, reproduced in Nielsen n 24 at 5.

27 *Sheikh of Abu Dhabi v Petroleum Development (Trucial Coast) Ltd* (1951) 18 ILR 144 at 149.

28 (1986) Il Iran-US Claims T R 76 at 110.

> "shareholders such as the claimants ordinarily may not assert claims belonging to their corporation. To the extent that the Claims Settlement Declaration provides otherwise and permits shareholders to raise corporate claims, equity requires that they take such claims subject to the defences and counterclaims that could have been raised against the corporation."

But even here the conclusion is one which could surely have been justified by an interpretation of the Claims Settlement Agreement itself, or by the application of general principles of (procedural) law, without reference to equity.

It is not necessary to decide whether or not there be clear examples of tribunals opting to apply equity *praeter legem*. The question considered here is whether this use of equity is necessary in international law, and this I have answered by saying that it appears that it is not. There will, it seems, always be other techniques which can be used in international law to ensure that there are no gaps which need to be filled.

The tasks fulfilled by equity *infra legem* and equity *praeter legem* can be fulfilled within the law. There is no need for a separate concept of equity in the juridical tool-kit in order to reach just decisions. There is a closely related issue which must not be forgotten, which is the role which equity plays in influencing judicial choices between the range of available legal options in deciding cases. But for the moment the concern is with the question whether it is possible to do justice in international law without a distinct normative source in the form of equity.

(c) *Equity contra legem*

We are left with the category of equity *contra legem*. By definition, the application of equity *contra legem* cannot be merely an application of law. It should, however, be noted that what may appear to be an application of equity *contra legem* may be no more than the application of a complex legal rule. It is not uncommon for legal rules or presumptions to be defeasible on equitable grounds. For instance, the Civil Codes of a number of Arab states contain a provision which reads as follows:[29]

> "If, due to exceptional, general and unforeseeable events, the performance of the contractual obligation, without being impossible, becomes onerous on the obligor, with the result of threatening him with exorbitant loss, the judge may, after taking into account the surrounding circumstances and the interest of both parties to the contract, alter the onerous obligation to a

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29 See Article 205, Jordanian Civil Code and Article 249, UAE Civil Code. For similar provisions see the Civil Codes of Egypt (Art 147(2)), Syria (Art 148(2)) Libya (Art 147(2)), Yemen (Art 209), Sudan (Art 117(1)), Algeria (Art 107(I)), Qatar (Art 48), Iraq (Art 146(2)), and Kuwait (Art 198, and Article 244 of the proposed Unified Arab Civil Code. I am indebted to Mr Adnan Amkhan, of the Research Centre for International Law, Cambridge, UK, for this information.

reasonable level if equity so requires. Any agreement to the contrary is null and void."

How should such provisions be regarded? Do they represent a general principle of law allowing the adjustment of contractual bargains in the limited circumstances (such as war and drought) in which such provisions have been applied by courts in the countries concerned? Or a general principle allowing adjustment in the context of any unforeseen change of circumstances? Or do they represent, not examples of the law enshrining an equitable doctrine, but rather of equity prevailing against the law, *contra legem*, perhaps so as to establish equity *contra legem* in the widest sense as itself a general principle of law? Should the answer be any different if we look, not to specific codified norms, but rather to the effect of the interplay of common law doctrines such as frustration and commercial impracticability with the common law principles of contractual obligation? And does it make any difference whether the "excuses" operate by modifying the original contractual bargain or by excusing nonperformance of an (unmodified) bargain?

These questions are, of course, aspects of the problem of controlling inferences from practice in determining the content of the category of "general principles of law recognized by civilized nations", remarked upon above. It is relevant here because what might appear to be an attempt to apply equity *contra legem* might in fact be justifiable as an application of a more sophisticated and exact interpretation of the law. The contrast between these two views is illustrated clearly in the jurisprudence of the Iran–US Claims Tribunal. In some cases the Tribunal has applied broad equitable doctrines, such as the doctrine of unjust enrichment. For instance, in *Sea–Land Services Inc v Iran* the Tribunal said:[30]

> "The concept of unjust enrichment had its origins in Roman Law...It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals... The rule against unjust enrichment is inherently flexible as its underlying rationale is 'to re–establish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense'. Its equitable foundation 'makes it necessary to take into account all the circumstances of each specific situation. [footnotes omitted]"

Yet even the possibility of "doing justice" by invoking this enormously flexible doctrine did not commend itself to one of the arbitrators, Dr Shafeiei, who sought to apply what many would describe as equity *contra legem*:[31]

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30 (1984) 6 Iran–US Claims T R 149 at 168, 169.

31 Opinion of Dr Shafei Shafeiei in *Gould Marketing Inc. v. Ministry of Defence* (1984) 6 Iran–US Claims T R 272 at 293–294. It is not entirely clear that Dr Shafeiei intended to seek the application of "pure" equity; but his words serve as a useful illustration of that approach.

> "According to this theory [of breach of contract], even the slightest violation suffices for us to deem a party to a contract to be in default on the contract as a whole, and to hold that said party is liable for all damages resulting from non-performance of the contract. Nevertheless this theory, which the American arbitrators invariably advance and rely upon, is entirely superficial and artificial, and it completely fails to address the facts, in addition to disregarding human factors. Enforcement of this totally materialistic and unmerciful formula leads to results which a judge cannot easily accept. In reality, the nonperformance of the contract was occasioned by external events and occurrences. The contractual relations of the Parties were severed, and now their account should be settled equitably."

This seems to be a plea for the application of "pure" equity rather than the equitable application of law.

The point I want to make at this stage is that the *outcome* sought by those seeking the application of "pure" equity could be secured by the equitable application of law. The Tribunal could have inferred the existence of a general principle of law allowing adjustment of contractual obligations from municipal provisions such as those in the Arab Civil Codes cited above. It could have inferred from such provisions a general warrant to approach the issue by seeking "to re-establish a balance between two individuals". Either option could have supported the same result as that following from the approach urged by Dr Shafeiei. No reference to equity *contra legem* was necessary to reach the desired result.

There is one other decision of the Iran-US Claims Tribunal which deserves mention here. In *Foremost Tehran Inc v Iran* the Tribunal was faced with the argument that certain shares in an Iranian company, registered in the name of a third party, belonged to the claimant, whereas the respondents argued that Article 40 of the Iranian Commercial Code, which, they said made the nominal registration conclusive on the question of ownership of shares, should be applied to dispose of the question. The nominal, and only other possible, owner had stated and acted upon the basis that the shares belonged to the claimant. The Tribunal said:[32]

> "the particular circumstances of this Case would make a contrary result both inequitable and illogical... Taking account of all these considerations, the Tribunal concludes that, as a matter of equity and for the purposes of the present Cases, Foremost Foods must be regarded as the true owner [of the shares registered in the name of the third party]."

Here equity was applied to overcome the effect of the apparently unequivocal rule contained in the Iranian Commercial Code. Indeed, the Tribunal relied on equity and did not construe the relevant Iranian Law. The decision appears to be an example of the application of equity *contra legem*. But even in this case the

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32 (1986) 10 Iran-US Claims T R 228 at 240.

decision could surely have been rested upon established legal principles, concepts and techniques, such as piercing the veil, beneficial ownership and perhaps an extended version of estoppel.

Again, it has to be admitted that all that has been shown is that in some instances where recourse to equity *contra legem* has been suggested or perhaps made, similar results could be obtained by the dexterous application of legal rules and principles. This does not show that this would be possible in every case where the "equitable" result was desired. There is an interesting argument advanced by Martti Koskenniemi in his important book *From Apology to Utopia*[33] which suggests that it might be possible in every case to achieve the desired "equitable" result, regardless of the content of the rules of positive law. It is worth outlining that argument here.[34]

According to Koskenniemi, international law, based as it is on the consent of States as inferred from their practice, faces a dilemma. To the extent that the rules of law simply reflect States' practice it can be argued that the law is no more than whatever States might choose to do – that the law serves as an apologia, legitimating state behaviour without being an effective constraint upon it. On the other hand, to the extent that rules of law differ from what States actually do, it can be argued that the rules are merely utopian inventions of individual commentators, which cannot be shown to be legally binding upon States. Similarly, he writes, in hard cases international lawyers may argue that only the broad outlines of legal decisions are legally determined, the actual determination of hard cases being left to the discretion of the problem solver. In this case decisions may be challenged as unprincipled exercises of discretion unsupported by the law: here again law functions as apology. Alternatively, it might be said that decisions in hard cases are indeed ultimately controlled by law; but this can be done only by resorting to principles such as systemic coherence or presumptions in favour of the autonomy of States. In this case it may be objected that the utopian approach is being applied – that decisions are being based on principles which, in a consensual legal system, ought not to be applied to States without their consent.

Parallel alternatives exist in styles of reasoning in international law. Koskenniemi argues that there are two characteristic modes of reasoning: the "ascending" mode, which infers legal rules from State practice – from what States actually do and consent to; and the "descending" mode, in which obligations may be derived ultimately from fundamental concepts such as justice, common interests and so on. Ascending arguments are essentially apologist; descending arguments are essentially utopian attempts to revive natural law in a different form.

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33 Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

34 The following account does little justice to the elegance of Koskenniemi's original. A fuller and more critical account appears in my review of Koskenniemi's text in (1990) *Journal of Law and Society* 384.

One conclusion of Koskenniemi's argument is, in brief, that every decision based on ascending reasoning is open to criticism by using descending reasoning: inferences from State practice may be criticised as contrary to fundamental principles of justice or whatever. Equally, every decision based on descending reasoning is open to criticism by using ascending reasoning: the application of fundamental principles unsupported by State practice is incompatible with the consensual nature of international law. But there is no criterion according to which either ascending or descending reasoning (or either of the alternatives in any of the other manifestations of the apologist/utopian dilemma) can be consistently preferred to the other. International law suffers from a fundamental indeterminacy at its very core.

If Koskenniemi is correct, then in any case where a tribunal feels the need to reach a conclusion which is the reverse of that to which it feels driven by positive law, it has only to resort to the ascending, or more usually the descending, mode of argument, as the case may be. The conclusions entailed by such approaches might be focused by a number of techniques, such as the restrictive interpretation of some principles and the broad interpretation of others, in the light of the dictates of equity. To the extent that broad principles which will do the work of equity can be found within the legal system, there is no need to apply equity *contra legem:* equity may motivate the decision, but the decision will be based on an interpretation and application of the law. While I am far from convinced by many of the aspects of the thesis which Koskenniemi advances, and in particular by what strikes me as an oversimplification in the starkness of his polarization of the utopian and apologist positions, there is great force in his observation that international law has *within itself* the potential for reaching different conclusions on the same set of facts; and I shall proceed on the basis that it is substantially correct. If this is wrong, and there are hard cases in which no amount of juggling of legal principles can produce an equitable result, then there would remain a (moral) necessity for recourse to equity *contra legem* in international law, and for the overriding by equitable norms of laws whose application appears inescapable. The question addressed next is whether there is such a necessity even if Koskenniemi is right.

(II) *When Might Recourse To Equity Be Necessary?*

I believe that there may be a necessity for equity *contra legem* in international law, and that it is likely to be felt in two contexts. The first was hinted at in the passage from Dr Shafeiei's opinion quoted above. He referred, it will be recalled, to "results which a judge cannot easily accept". Without wishing to characterise Dr Shafeiei's views, it seems plausible to regard his statement as an example of a case where, although the judge could reach the *result* which, she or he thought correct, he or she could only do so within the law by adopting reasoning which she or he found (morally) unacceptable. In such

cases, where the judge is as much, if not more, concerned with the rules and the reasoning than with the outcome, equity *contra legem* will clearly have a role.[35]

An extreme example might be constructed by imagining that international law contained no prohibition on, say, treaties providing for forced labour. If a dispute were to arise out of such a treaty, the judge might not wish to enforce the treaty. But if the parties do not challenge the basic validity of the treaty it may be difficult, if not impossible, for the judge to refuse to enforce it on the basis of the invalidity of the treaty in law. She or he would, of course, be able to uphold whatever legal arguments are advanced by the party resisting enforcement and give them as reasons for not enforcing the treaty. But she or he may feel as a judge, morally constrained to spell out the invalidity of the treaty; and she or he would presumably do so on the grounds of conflict with rules of *jus cogens*.[36]

The second context where the necessity for having recourse to equity *contra legem* might be felt is similar. It is the case where the parties to a dispute are concerned with the reasoning behind a decision. This may arise where they are "playing for rules" – ie, where they are at least as much concerned to have articulated rules and principles for the regulation of future behaviour as they are to have the particular dispute settled. It may also arise in the case of "one-shot players" – ie, where the parties are concerned primarily with settling the particular case – where the grounds of argument are particularly important to the parties.

Examples of these categories are easier to find. Cases of the expropriation of alien property, where the host State may wish to have recognition given to "equitable" standards of compensation, even in the face of rules of positive law prescribing some other standard (for instance, a duty laid down in a treaty to give full market value compensation) would be instances of the first category. The host state would be as much concerned with the impact of the decision on future conduct as on the case in hand. Continental shelf delimitations illustrate the kind of demands in the second category (although the cases in the International Court are not true examples of this category, since the law or the *compromis* in each case directed the Court to refer to equity) The States concerned in the delimitation may wish to be seen by their domestic constituencies to be arguing

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35 A difficult question is concealed here. Would equity operate as a set of norms on which a judge might draw in order to decide a case? or as a set of norms which, because of their force within the normative system applied by the tribunal, the judge must apply? or as a set of moral norms binding the judge as an individual ("whatever the law, I must not enforce this treaty")? Does equity limit the power of a judge to decide cases in a certain way, or empower judges to decide cases in another way? Or is it part of the normative system binding on the litigants coming before the judge? Or does that system itself include moral norms binding judges individuals? These distinctions are not without importance. If it is asked how principles of equity emerge and are changed and, for instance, whether state practice can effect such a change, the answer must surely differ at least according to whether equity is seen as applicable to judges or litigants or both. Space precludes pursuit of this particular hare at this point.

36 See above.

for a wide range of interests – support of traditional fishing communities, ecological principles, nutritional dependence, and so on – which might be regarded as irrelevant to a strictly legal approach to the problem. Such states might want the ground of argument broadened out even if they were unlikely to become involved in any similar dispute in the future.

This leads on to the next section of the paper, which asks what particular features equity has which might render its application useful or desirable, even if it is not strictly necessary in international law. But before turning to that question, it would be well to summarize the conclusions of the present section. Here the question asked was whether recourse to equity, as distinct from law, was necessary in the international legal system in order to "do justice". It was argued that references to the use of equity *infra legem* were unnecessary, because that technique of applying equity is no more than a routine way of applying law. It was then argued. that there was no need for the use of equity *praeter legem*, because the characteristics of international law are such that there is no need for gaps to arise: any "gap" can be filled by an extended reading of the neighbouring rules and principles. Finally, it was accepted that there might also be no need to use equity *contra legem*, because the fundamental indeterminacy in international law alleged by Koskenniemi to exist would always provide a choice of decisions. It was, however, finally accepted that there might be reasons why the judge or the parties would be unwilling to accept a just *decision,* and might insist on the decision being reached by particular *reasoning.* In that latter case it might be necessary to have recourse to equity.

Is The Use of Equity Desirable?

One of the features of equity which makes its use appear desirable to judges and parties alike is obvious. Its invocation strengthens a decision made on other grounds, and particularly decisions taken on narrow technical grounds. Equity buttresses legal arguments. A decision based on technical legal rules may be shown to be consistent with principles of justice and fairness. This function is critical. It is in this manner that the flexibility which the law contains, and which was discussed above in the context of equity *infra legem, praeter legem* and *contra legem*, can be directed so as to lead to a just conclusion. Flexibility is of little, if any, benefit unless there are criteria for choosing among the alternatives available. Moreover, the normative "weights" or "densities" of the various options available are likely to differ: on some points the weight of authority or principle, or the clarity of argument, may make that alternative a more likely outcome than the others. This says no more than that some arguments are more likely to succeed than others. But those which are most likely to succeed are not necessarily those which would lead to the most just solution. Here, deployment of arguments sounding in equity can have a powerful effect in increasing the weight of arguments otherwise unlikely to succeed and lessening the weight of technically powerful arguments which would lead to unjust decisions.

This, it must be admitted, is what many people might wish to regard as the primary function of equity, and it might be thought that I have taken an

unnecessarily long and circuitous route to reach an anodyne conclusion. The only justification I can offer is the desire to preserve the clarity of the distinction between the different roles that equity plays. As a body of norms of fairness and justice it underlies specific legal rules and principles. Where there is a choice between the legal rules and principles which might be applied in a particular case, the equitable norms may incline the judge in one way or another: but what the judge applies is not the equitable norm, but rather one of the alternative legal rules. Only in the case of equity *contra legem* need norms of quity be applied as such. And this is the second manner in which the use of equity might be thought desirable.

(i) What Can Equity Do That Law Cannot?

What are the particular characteristics of equity which render it suitable for fulfilling these roles? In recent studies Friedrich Kratochwil[37] and Robert Alexy[38] have argued that legal reasoning is a sub-set or special case of practical reasoning, from which it is distinguished by certain peculiar characteristics. In terms of that distinction, reasoning based on equity can be regarded as practical reasoning and so distinct from legal reasoning.

Kratochwil asserts that "reasoning with legal rules differs substantially from the type of reasoning appropriate for making policy decisions".[39] He lists the following distinctions: moral arguments utilize mostly principles, whose range of application is unspecified and debatable, whereas legal arguments use specific rules whose ambit is defined; moral arguments depend on the actors' intentions more often than do legal arguments; the finding of "truth" in legal argument is subordinated to rules concerning proof and the admissibility of evidence, whereas moral argument does not so clearly specify what is relevant *ex ante*; and moral arguments often lead to insoluble dilemmas, whereas legal arguments (at least in court) always lead to decisions.[40]

Alexy, who presents a rigourous analysis of the characteristics of legal reasoning, distinguishes between different forms of legal discussions, including legal science, judicial deliberation, debates in law courts, legislative treatment of legal questions, discussions among legally qualified persons in administration, and so on. He describes what he considers one of the most important differences between legal reasoning and general practical reasoning in the following terms:[41]

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37 *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

38 *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (1989).

39 Op cit, n 37 at 207.

40 Op cit, n 37 at 207, and see chapters 7 and 8.

41 Op cit, n 38 at 212. The remark on the involuntary presence of the defendant is not, of course, appropriate in the context of international law.

"In the context of legal discussion not all questions are open to debate. Such discussion takes place under certain constraints.

The extent and kinds of constraint are very different within the different forms [of discussion]. The freest or least constrained is discussion of a legal scientific kind. Constraints are greatest in the context of a trial. Here roles are unequally distributed, the participation of the defendant is not voluntary, and the obligation to tell the truth is limited. The reasoning process is limited in time and regulated by the rules of procedural law. The parties are entitled to be guided by their own interests. Frequently, perhaps even commonly, they are not concerned with arriving at a correct or just outcome but rather at one that is advantageous to themselves. The other forms can be ranged between these extremes with respect to the extent of the various constraints."

Alexy notes that legal reasoning is characterised by its relationship with valid law. There is a necessity for establishing in relation to legal reasoning both internal justifications (ie, logical consistency) and external justifications (ie, the assumptions made concerning the validity of the rules of positive law, empirical statements, and other premises). Noting that both general practical reasoning and legal reasoning involve claims to the "correctness" of their processes and conclusions, he summarizes the distinctive feature of legal discourse thus:[42]

"the claim to correctness is raised in legal discourse, but this claim, unlike that in general practical discourse, is not concerned with the absolute rationality of the normative statement in question, but only with showing that it can be rationally justified *within the framework of the validly prevailing legal order*".

Alexy and Kratochwil put forward a subtle and complex picture of legal reasoning; but it is not possible within the confines of this paper either to give their views full consideration or to cover all the points which they discuss. Instead, this discussion will focus on one key issue. This is the constraint which limits the scope of legal argument.

(ii) The Scope Of Equitable Argument

A good illustration of the difference between the scope of equitable and legal argument may be drawn from the *Diplomatic Hostages* case, where the non-appearing respondent state, Iran, had suggested that the events in Iran could only be understood against the background of "more than 25 years of continual interference by the United States in the internal affairs of Iran", and that the Court should therefore not take cognizance of the narrowly-conceived US claims.[43] The majority of the judges on the International Court rejected this

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42 Op cit, n 38 at 220 (emphasis added).

43 ICJ Rep 1980, p 3, at 20. Cf, the views of Judge Tarazi, who said (at 63) that "the responsibility of the Islamic Republic of Iran ought to have been envisaged in the

argument, stating that Iran had not made "any attempt to explain, still less define, what connection, legal or factual, there may be between the 'overall problem' of its general grievances against the United States and the particular events that gave rise to the United States' claims in the present case... [N]ever has the view been put forward before that, because a legal dispute submitted to Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them."[44]

The contrast between the Iranian approach and the approach of the majority of the Court mirrors the contrast between equity and law. Legal argument narrows down the issue, and excludes as irrelevant a host of surrounding circumstances. It turns a complex relationship into a one-dimensional relationship susceptible of legal analysis. The legal argument proceeds within the conceptual framework of the law, and according to its standards of proof and procedural propriety.[45] This approach is not only peculiarly legal, it also derives from a peculiarly western conception of legal dispute settlement. The idea of isolating a handful of narrow issues in order to resolve a dispute is in many respects uncommon. In many societies and legal systems the normal approach would be to examine all the characteristics of the parties and the whole range of circumstances surrounding the dispute. The emphasis would be on talking out the whole conflict, rather than the narrow legal dispute which can be constructed within it.[46]

Equity does not narrow down the argument in the same way. It allows the decision to be based in part on consideration of the surrounding circumstances. The very notions of good faith and "clean hands", which are typical of equitable principles, refer plainly to the overall position and intention of the actors in a manner characteristic of practical reasoning. Similarly, reflection on the manner in which the continental shelf delimitation cases were pleaded before the International Court in the 1980's will show that there are few, if any, constraints upon the factors which may form the basis of an argument in equity.[47] Switching the argument from law to equity allows a broadening of the scope of the enquiry. Equally, of course, once the relevant factors have been considered the person making the decision is freed from the necessity of making the

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context of the revolution which took place in that country and brought about, as it were, a break with a past condemned as oppressive".

44 At 20; see generally at 18–20.

45 Bartlett, "Feminist Legal Methods" (1990) 103 *Har L R* 829 at 830–831.

46 See eg Roberts S, *Order and Dispute: An Introduction to Legal Anthropology*, (1979), and references therein; Bailey, "Peaceful Settlement of International Disputes" in Raman (ed), *Dispute Settlement through the United Nations* (1977) p 73.

47 As the International Court put it in the *North Sea Continental Shelf* cases ICJ Rep 1969, p 3 at 50, "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures".

reasoning consistent with established legal rules and principles;[48] and even though the absence of a system of precedent from international law weakens that necessity, this freedom is a significant distinguishing characteristic of equitable decision making.[49]

These characteristics make equity particularly suitable for discussions in contexts where there are competing interests which have not hardened into specific rights and duties. This will be true primarily in areas where the law is not highly developed. The nascent concept of intergenerational equity, and of equitable principles in environmental law, are examples.[50] For similar reasons equity also represents a fruitful approach to questions concerning access to shared resources, such as international watercourses, where it is more important to secure a solution which can be sustained in the future than one based upon a strict vindication of legal rights and duties which arose in the past. These contexts arise in combination in cases where the need is not for a once-and-for-all allocation of rights, but rather for the establishment of an elastic framework for the building of a continuing relationship between the parties. As Professor Schachter has noted, this is so in the case of the allocation of radio frequencies under the International Telecommunications Union Treaty, where the need to ensure access to frequencies for states not presently capable of using them is intertwined with the issue of the most efficient present use of the resource.[51]

(iii) Equity In And Out Of Court

This freedom to frame the argument and frame the reasoning leading to the decision must not be overstated. As Neil MacCormick has pointed out in relation to "decisions in accordance with equity rather than strict justice", even equity must be consistent:[52]

> "I cannot for the life of me understand how there can be such a thing as a good reason for deciding any single case which is not a good generic reason for deciding cases of the particular type in view, that is to say, the

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48 But the reasoning may be limited by the legal institutions with which it deals. For example, delimiting the continental shelves of adjacent States by giving the States alternating plots of the seabed in a chequer-board pattern, or as a layer cake giving each state strata of certain depths, would arguably be so fundamentally incompatible with the concepts of the continental shelf and of delimitation that even a purely equitable decision could not adopt such solutions. See text at n 57 below.

49 The essential point made here is that equitable reasoning is particularly suited to the kind of rhetorical reasoning involving the use of *topoi* which is associated with the name of Chaim Perelman: see eg Perelman C, and Obrechts-Tyteca L, *The New Rhetoric* (1971); Perelman C, *The Empire of Rhetoric* (1980).

50 See the debates on the role of equity in international law in the *Proceedings of the American Society of International Law (1987),* pp 126-150.

51 "International Law in Theory and Practice" (1982-V) 178 HR 21 at 88.

52 *Legal Reasoning and Legal Theory* (1978), p 97. On my view, equity would admit a much wider range of features to define the "type" of case than would law.

'merits' of any individual case are the merits of the type of case to which the individual case belongs."

The principles of equity are as universalisable as those of justice. They do not give untrammelled discretion to override the law, but represent rather a body of norms capable of remedying a lack of subtlety and flexibility which may affect systems of laws.

It follows from this that applications of equitable principles may harden into legal rules. This process can be seen at work in the successive continental shelf delimitation cases in the International Court. As Prosper Weil shows in his elegant and perceptive study,[53] the Court has taken different views of the role of equity at different times. In the *North Sea Continental Shelf* cases the Court took a narrow view of equity, which was seen as being modulated through legal norms and operating essentially to correct injustice resulting from the strict application of law. A similar view was taken in the *Anglo–French Continental Shelf* arbitration in 1977, where the Court of Arbitration said that it did not have "carte blanche to employ any method that it chooses in order to effect an equitable delimitation."[54] But in the *Tunisia/Libya* case, the Court moved from this narrow view of equity as corrective to a view of what Weil calls "autonomous" equity:[55]

> "[Equity] was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle of law *directly applicable* as law."

By the time of the *Libya/Malta* case the Court had retreated. Libya sought to argue on the ground of autonomous equity, referring to a very wide range of geographical, geological and geomorphological features and asked the Court to reach a decision by balancing up all the factual circumstances. The Court refused, saying:[56]

> "While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained."

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53 The Law of Maritime Delimitation – Reflections (1989), pp 159–185.

54 54 ILR 5 at 121.

55 ICJ Rep 1982, p 18 at 60 (emphasis added).

56 ICJ Rep 1985, p 13 at 55. The Court attempted to reconcile this view with its earlier pronouncement by arguing (at 39) that "even though it looks with particularity to the peculiar circumstances of an instant case [equity] also looks beyond it to principles of more general application. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms: for, as the Court has also said, 'the legal concept of equity is a general principle directly applicable as law'".

Equity could, on this view, be "fixed" by its incorporation within the law. Accordingly, the Court could rule out certain factors as inadmissible bases for legal argument:[57]

> "although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of the continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature."

The view that it is for the Court to determine what factors are and are not "pertinent" presupposes that the reference to equity is controlled by law, and that there can be no recourse to pure equity before the Court – unlike the situation in inter–State negotiations, where the parties can do as they choose. The presupposition is a consequence of the Court's view of its role, not of the inherent nature of equity. Nonetheless, it must be recognized that equity as it operates in courts will tend to harden into rules and legal principles, and that the freedom to frame arguments and frame the reasoning leading to decisions in the court will be correspondingly reduced.

Outside courts, while the "fixing" of equity will have some influence on the manner in which the argument is conducted, the parties will be able to use the entire freedom which recourse to autonomous equity provides. The exact role or roles of equity in this wider context are not easy to pin down. Certainly, in all negotiations 'the Law' is present as an unseen third party, constantly threatening to impose a solution if the parties fail to agree between themselves. The seriousness with which this possibility is taken will naturally depend upon the likelihood of a tribunal or other body reaching a decision based on law in respect of the dispute: in particular, it will depend upon the extent to which the parties have submitted to the jurisdiction of such bodies. To the extent that the operation of equitable norms within an "imposed" legal solution in this sense is predictable, equitable norms will clearly influence negotiations. But the greater role is probably as an alternative basis for decision, along the lines urged by Iran in the *Hostages* case cited earlier. Here the remarks made concerning the effect of references to equity in shifting power, made in the following section, are of particular relevance.

It may be observed in passing that the value of having equity enshrined in clear legal rules is itself a factor to be taken into account in assessing the fairness or justice of applying or departing from legal rules. Rules allow forward planning, to the extent that they can be relied upon. Each departure from a rule weakens the predictability of the law, particularly if the departure is not

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57 At 40.

warranted by some clear alternative set of norms, such as general concepts of fairness.[58]

(iv) Shifting Power

There is a sense in which the choice of the language of equity, rather than law, for the conduct of argument, can alter the relative power of the parties. This point is best approached by recalling that States choose whether to approach their mutual relations on the basis of international law, or some other law, or not on the basis of law at all. Law is, in practice, quite clearly optional as a framework for international relations.[59]

A domestic analogy may illustrate this proposition. If I lend a book to a student and the book is not returned, I would ask for it back. If it is still not returned, despite increasingly urgent informal requests, I might write to the student. By using headed paper I might imply, or I might expressly state, that within the College she or he is a student and I am a Fellow, and that she or he is bound by College regulations on good conduct and so on. The request remains the same; but shifting it into the College context by means of such signals has the effect of suggesting that I regard the College as in some sense party to the argument, and on my side. The shift into the College context increases my power as against the student. Similarly, if that fails I may turn the rachet further, and invoke formal College disciplinary procedures, or University procedures. This will force the College or the University to take a stand, and if I am right in my view that the regulations are on my side, the College or University will stand on my side. If these steps fail, I may hint at the possibility of civil legal action; or I may go so far as to turn the matter over to the police as a case of theft.

At each stage I am trying to increase my power relative to the student, to the point where she or he complies with my request "voluntarily". I do so by shifting the context of the dispute. As long as the chosen context is one which has some mandatory force (in the sense that the relevant community recognizes that the relevant rules must be applied to our dispute if either of us invokes them), this choice can be made unilaterally. I do not need the agreement or cooperation of the student to invoke university regulations or the criminal law.

The broad lines of this analogy do, I believe, hold good at the inter-State level. What begins as an informal request may be transformed into a legal

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58 It is an interesting question, worthy of empirical study, whether the maintenance of equity as a distinct system of norms parallel to legal norms tends to produce more or less development in the *content* of the norms of law and/or equity than the incorporation of equitable norms as a part of 'the law'.

59 This is not the same as the question of the "binding force" of international law, which arises only after international law has been chosen as the framework within which the discussion is placed.

dispute, in a process where such transformations are signalled by changes in the language or channels of communication used, and with the likely result that the rest of the "law-abiding" international community and its institutions will tend either to align themselves with the party which has the law on its side or to stand back from the dispute. Certainly, invocation of the rules makes it more difficult for law-abiding members of the community to align themselves with the person who has violated those rules.

It should be noted that the transformation of the dispute into a legal context is a matter of choice. I could, if I wish, leave the matter on the non-legal level. That would not only have consequences for the balance of power between us, but also for the manner in which the matter is handled. Factors which may be thought appropriate to argument in a non-legal context, such as the relative needs or resources of myself and the student, may be irrelevant in legal argument and even inadmissible if the question is put before a tribunal. Indeed, such factors and styles of argument may be so characteristic of a legal or nonlegal context that merely referring to them may signal a shift in the context in which the matter is being handled, akin to the shift signalled by the use of headed notepaper. References to concepts (such as student or Fellow) or instruments (such as College statutes and regulations) or procedures (such as suing or informing the police) indicate that the dispute is being set in a specific normative framework. The indications may differ in their clarity: terms such as "obligations" or "duties" are less clearly characteristic of specifically legal language than are terms such as "bailment" or even "theft". But in principle, the choice of context is signalled, or to be more precise, is effected, by the use of particular language.

The latter point is of particular significance to the argument here, and should be explained a little more fully. The notion of "speech acts" is common amongst linguists. The term signifies a verbal statement which creates a particular status or in some other way effects a change in the position of the person making the statement. The usual examples are the statements "I promise x", and "I will" when uttered in the context of a marriage ceremony. My argument is that the use of legal terms operates in just the same way. The use of characteristically legal terms triggers the shifting of the debate into a legal context, with all the consequences which that entails for the proper scope of the argument, the shift in the balance of power, and so on. They have, in linguistic terms, illocutionary force.[60]

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60 For a convenient summary of the subject of speech acts, as developed by Austin, Searle and others, see Levinson S C, *Pragmatics* (1983), Chapter 5, and references therein. Speech act theory has recently come to enjoy some prominence in the writings on international law of Kratochwil, Koskenniemi, Onuf and others.

In just the same way, reference to "equity" or to characteristically equitable concepts can signal a shift from the legal to the equitable context. This can change the whole character of the conflict. Röling once remarked that:[61]

> "legal rules tend to give every clash of interests which results from changed circumstances an ideological character: a struggle between the just and the unjust."

The remark holds true more generally. Reliance on law tends to favour interests, institutions and actors which have been predominant in the past. By abandoning the language of law for the language of morality – autonomous equity – that inherent bias (and I use the term without intending pejorative overtones) in the established legal system can be circumvented. And because of the truth of that remark, it is common to find the parties struggling to impose upon the dispute the language of law or of morality (of which, in this context, equity may be taken as a variety) – struggling, in other words, to establish the context within which the argument will take place.

The question of the right of one State to intervene in another illustrates this. A study of the issue by the British Foreign Office, which devotes separate chapters to "intervention in international law" and to "intervention: moral approaches", concludes:[62]

> "Legally, as American and Soviet justifications have shown, the case for intervention is bound to be at best ambiguous and at worst non-existent....
>
> Morally and politically, the argument is more difficult and more subjective, and the ground infinitely more treacherous".

Many other examples could be given. Legal debates concerning various aspects of the New International Legal Order are a particularly rich source of such material.

The Content of Equity

With the exception of the adoption of a working definition at the beginning of this paper, practically nothing has been said about the substantive content of equity. There may, indeed, be an argument to be made out for the view that equity is not really about substance – that it is about Who Does What, rather than about What Is Done. Certainly, discussions by judges of equity *infra legem*, equity controlled by law, and so on, often have the flavour of an attempt to prove that there is a legal warrant for what might otherwise appear to be unrestrained judicial discretion. But I will not press that argument here.[63] There are important questions, which this paper leaves unresolved, concerning the content of equity.

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61 Röling, BVA in de Reuck A and Knight J (eds), *Conflict in Society* (1966), 328–350, at 332.

62 Foreign and Commonwealth Office, Foreign Policy Document No 148, *Is Intervention Ever Justified?* (1984).

63 In retrospect I wish that I had made this the central theme of the paper. But I did not.

First, we should recall the problem of determining the source of equitable norms. This issue was touched upon earlier in the paper, and a closely analogous question is explored in depth by Professors Alston and Simma in their contribution to this symposium. I will accordingly merely repeat at this point that the question whether equitable norms are to be inferred from principles evident in the legal systems of civilised nations, or from State practice, is of crucial importance in determining whether and how States can modify equitable norms, whatever their substantive content might be.

The lack of an international consensus on even fundamental substantive principles of fairness and justice, in the form in which they arise for application by tribunals, has often been remarked upon.[64] There is little point in dwelling on the point here. Nor is there space to make any worthwhile contribution to the general theory of justice. Of greater theoretical significance are certain more basic questions about what fairness is in the context of international law. For example, is fairness to be assessed in an historical or a distributive context?[65] Is it fairer or more equitable to leave a State with rights or property which it has claimed in accordance with rules of law which vest those rights or property in the State, or is it fairer to seek to distribute rights and property among claimant States?

Or, to take a concrete example, is it fairer to determine questions of title to territory on the basis of principles of occupation, prescription, *uti possidetis* and the rest, or to do so on the basis of the principle of self determination and the great Dillard dictum that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people."[66] These questions could be multiplied indefinitely. They all give rise to the fundamental question of what justice is.

Another aspect of this question concerns the relationship between the equitable ideas of fairness and justice, whatever they might be, and the legal concepts upon which they operate. Ultimately, equity must work upon something – it is parasitic upon other concepts. This is plainly so in the case of corrective equity. But is not the equity of a continental shelf delimitation equally parasitic

64 See eg Nader L and Starr J, "Is Equity Universal" in Newman RA (ed), *Equity in the World's Legal Systems: A comparative study,* (1973), p 125. Newman identified 12 fundamental principles of equity, but these are of such a level of generality (eg, "The law will not permit the unscrupulous to carry out their plans") as to reintroduce the question of consensus at the level of the application of the principles: see Newman, "The General Principles of Equity", id, p 589. It is perhaps paradoxical that equity, which is claimed to be a system for securing individuated justice, should have identifiable content only at a high level of abstraction.

65 I give these alternatives merely as examples. The body of literature discussing the concept of justice will yield many further possibilities. Rawls J, *A Theory of Justice* (1971); Barry B, *The Liberal Theory of Justice* (1973); and Finnis J, *Natural Law and Natural Rights* (1980), are but three of the better known texts.

66 *Western Sahara* case, ICJ Rep 1975, p 3 at 122. For an (unconvincing) attempt to square this particular circle see the judgment in the *Frontier Dispute* case, ICJ Rep 1986, p 554 at 565–567.

upon the idea of what a continental shelf is; is there not some truth in the International Court's statement that only certain kinds of equitable argument may be applied to questions concerning the continental shelf, "[o]therwise, the legal concept of the continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature."?[67] Do the concepts underlying the framing of the question not make a difference? Why, for instance, should it be assumed to be proper for the German continental shelf to extend horizontally beyond the equidistance lines, but for a comparable extension of Germany's superjacent airspace beyond the perpendicular to the land boundary to be practically unthinkable? Does the answer not lie in the notion of what continental shelves and superjacent airspace are? And does not that notion in some ways limit the manner in which equity may deal with the concept?

If the legal concepts do distort the application of equitable principles which work upon them, is there a case for permitting the equitable principle to "override" the legal concept? Why, for instance, should continental shelf delimitations not re-fashion nature? Why should tribunals not take into account the economic characteristics of the states concerned and of the coastal communities? If the legal concept of the shelf is an obstacle to substantive justice, which should yield? Or to take another example, if the prohibition on the use of force against other States forbids the forcible overthrow of an Idi Amin or a Pol Pot, why should not equity override it, and permit humanitarian intervention on the grounds of an explicit appeal to basic conceptions of justice? If the legal conception of the sovereign State is an obstacle to justice, which should yield? There arises from this an array of questions concerning the hierarchy of equitable principles as a class (should, for example, equitable norms which operate at the level of interpretation of the law be subordinate to more general principles of fairness and justice?), and the relative positions of law and equity (which should prevail, and is the answer the same for custom and treaty, and for *jus cogens*?) These, too, are questions which must be addressed.

Finally, it must be asked whether concepts of fairness and justice worked out in the context of a municipal legal order can properly be translated to the international plane. For instance, how should the "clean hands" operate in the context of successive governments within a State? Should the dirty hands of one infect all? In what circumstances should the wrongdoing of any government operate to deprive the people of the State concerned of the benefit of rights under international law? How do concepts of fairness and equity apply to the actions of governments in circumstances where the government has a clear mandate from the electorate to break an international engagement? How should the approach to concepts of property and other rights be modified to take account of the perpetual existence or succession of the State? Such questions hint at the difficulty of drawing equitable principles from national legal systems and applying them in the international system.

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67 ICJ Rep 1985, p 13.

Does Equity Require Consent?

One final point must be raised briefly. It is the question whether it is necessary for states to consent to the application of equitable norms to them. It was suggested at the beginning of this paper that to the extent that recourse to equity involved no more than the manipulation of legal rules or the application of general principles of law recognized by civilized nations, no special warrant is necessary for its use. Equity is simply applied as part of the law, and any tribunal authorized to apply "international law" could properly have recourse to those equitable principles and procedures. But to the extent that equity is not applied as part of the law, special authorization would be necessary. This could be, and often is, done in the clause on applicable law in the instrument establishing the tribunal. Of course, no authorization is necessary for states to use equity in negotiations.

This account is not wholly satisfactory. It was argued above that almost everything that equity could do could be done by manipulation of legal rules. If that is so, the question whether a particular principle which a tribunal seeks to apply is a principle within the law, or drawn from equity, from outside the law, depends to a very large extent on what the tribunal represents itself as doing. It could claim to be applying law, or it could claim to be applying equity. Not only could no one force it to adopt one formula rather than the other, but there seems to be no way of determining that either claim is false – at least if the tribunal has its law right. While, therefore, it is easy as a matter of principle to say that States must consent to the application of equity *contra legem,* and of equity *praeter legem* to the extent that it supplements the law and does not simply spell out what is implicit within it, that statement is of little help. The real question is how we establish whether or not equity is being applied. That question is an appropriate point at which to end this paper and begin the more important discussion, to which it is a mere prelude.