NEOAEQUITAS: A MODERN APPLICATION OF THE PRINCIPLES OF EQUITY JURISDICTION IN CONFLICT MANAGEMENT AND DISPUTE RESOLUTION IN INTERNATIONAL LAW

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BY
GEORGE L. SALIS, M.A., DIP. LAW

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ABSTRACT

This dissertation explores how the principles of equity jurisprudence can be used to manage international conflicts and resolve international crises effectively. *NeoAequitas* is a modern system of dispute resolution that blends principles of equity and international law with scientific methods of conflict resolution. Here we examine the use of *NeoAequitas* to maximize resources in settling international disputes. Although primarily qualitative, this study draws on quantitative analysis to examine concepts of conflict management and balance of interest in classical and alternative methods of resolution.

The bulk of published work in this area has taken the political or legal positivist position; few have integrated genuine equitable principles into the international dispute resolution process. This approach blends positive international legal norms with global, transculturally effective definitions of equity.

This dissertation comprises two parts. Part I has three chapters that examine how equity relates to law in international jurisprudence. Chapter 1 includes an introduction to the history and principles of equity jurisprudence. Chapter 2 explains the substance, purpose, and effect of equity and introduces *NeoAequitas* as a new system of international dispute resolution. Chapter 3 looks at the roots of conflicts and disputes in international relations and defines the process of conflict analysis using interactive models of assessment, multilevel approach analysis, and conflict interests analysis.

Part II consists of three chapters reviewing the classical and alternative methods of dispute resolution. Chapter 4 defines the process of equitable management, and describes how it can lead to equitable settlements of disputes through input-output and cost-benefit analyses. Chapter 5 focuses on the procedure of conflict resolution, surveys methods for alternative dispute resolution (ADR), and examines the causes of war. Proposals to restructure the current justice administration scheme focus on creating new equity forums that apply *NeoAequitas*. Chapter 6 concludes that the current approach to international conflict resolution is defective and restructuring must be based upon equity in synergy with international law. This approach should resolve disputes efficiently, and thus arrive at a progressive system of political equality and social justice among nations, leading to permanent and stable resolutions.

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INTRODUCTION

This study develops an ideal. The project is a response to widespread perceptions that current methods of managing conflicts and resolving disputes are falling short of their goals. Not only is this true in the domestic arena, but it is even more evident in the international environment. After defining the problem and researching alternatives from multiple perspectives, I have arrived at what I believe is a workable—and perhaps most reasonable—approach to conflict settlement. This rational approach is based upon the concept of natural law and the ideals of justice and fairness imbedded in the rule of law, and highly necessary in due process of law.

Responsive and progressive social jurisprudence requires a revisit to the concept of equity. The phrase *to do equity* in common legal parlance implies that a decision maker has reached a fair and impartial resolution in a conflict.[1] Although this approach to settling international disputes has been attempted, it has not enjoyed consistent application. Presently, some quasi-equitable principles of jurisprudence are applied in international law but not a broader, historically and philosophically rooted concept of equity jurisprudence complete with equity jurisdiction and remedies *in toto*. Further, many scholars, including the father of international law, Hugo Grotius (or Huigh van Groot in Dutch) have proposed the ideal of a more equitable international legal system.

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[1]ELAINE W. SHOBBEN & WILLIAM MURRAY TABB. REMEDIES: CASES AND PROBLEMS, 4 (1989).

However, equity jurisprudence has never truly been absorbed into our international legal system or, for that matter, into international public substantive law. One barrier to adoption of a more direct use of equitable principles in international dispute resolution is the lack of political, social, economic, and legal flexibility. In addition, the lack of commitment to solving international crises, and the concomitant failure to bring about fair resolutions of conflicts continue to present difficulties.

The present body of positive international legal rules is no longer adequate to solve the myriad of complex issues confronting the globe. *NeoAequitas,* a conceptual framework central to the system of dispute resolution I develop in this study, combines the flexible principles of equity jurisprudence and modern scientific and interactive methods of conflict analysis, management, negotiations, and dispute resolution. The principles of equity go back to ancient history. However, the application, analysis, and use of multidisciplinary and extraordinary considerations to solve transnational disputes efficiently is in itself an innovative approach. The old principles of equity jurisprudence have flexibility and pliability and, when applied with consideration of multiple factors, provide a truly adjustable approach in the resolution of disputes and adjudication. Contrast this with the traditional and "mechanical" approach to polity and legality so prevalent in the international system of crisis intervention and dispute settlement.

This treatise has been influenced by the doctrines of the modern critical legal studies movement and writers such as Hugo Grotius, A.V. Dicey, Ronald Dworkin, George C. Christie, Alan Watson, Roger Fisher, William Uri and many others. One person in particular, Judge Roscoe Pound, perhaps one of the United States' best known

jurists, wrote discourses against the habitual use of "mechanical jurisprudence." NeoAequitas is in some respects a response to the problem of the "mechanization" of international jurisprudence. Mechanical jurisprudence has infiltrated the international legal structure, and promotes political and economic domination of international crises and compromise, rather than seeking a truly justiciable and equitable resolutions within international law. This inefficient structure should be replaced with one that seeks equilibrium within the rule of law and the balance of global interests. Responsive social jurisprudence—including the principles found in equity coupled with the selection of appropriate scientific methods of dispute resolution within the norms of international law—is the basis for *NeoAequitas*. As an integrated qualitative system, NeoAequitas, when properly used with other legal rules, may provide an effective alternative for resolution of disputes in international law and policy.

For some time social scholars have defined a conflict as the result of competing interests. Conflict and dispute are quite natural to humanity and will always arise in society and among nations. Committing ourselves to resolving them by balancing interests of the parties is the focal and central theme in this inquiry. If we, as concerned citizens, commit totally to the balance of the interests in global society, improved relations among nations must result.

Hence, we must constantly seek rational and synergistic methods for resolving disputes to avoid the worst expressions of human emotion—violence and rage. With new methods we can avoid the unnecessary and sometimes unconscionable—loss of lives and destruction of property. The reality of our era beckons us to develop better

methods of conflict resolution, to alleviate armed conflict, forced intervention, and the horrors of war in the twenty-first century and beyond. Our past failures need not give rise to a more perilous future. These disasters can be avoided—we owe it to our posterity to try.

PART ONE: EQUITY AND LAW IN INTERNATIONAL JURISPRUDENCE

CHAPTER 1

AN INTRODUCTION TO THE PRINCIPLES OF EQUITY JURISDICTION

Law, in a generic sense, is a body of rules of action or conduct prescribed by controlling authority and having binding legal effect and force upon all in a society.[1] Law is also a solemn expression of the will of the supreme power of the state.[2]

Law and order are pivotal to our society. In every civilization and in every community, humanity has sought to control itself to some extent. This is a basic social requirement. We have recognized that it is necessary to regulate ourselves in every aspect—from the rights and duties of all individuals, to group relationships, and finally to our association with the state. All human activity and behavior is regulated at some point for the benefit of the greater society. Some acts are prohibited or regulated only by virtue of legislation (positive norms), and others by morality (ethical norm), and yet others by both. Law seeks to protect the rule of the majority and the rights of the minority, while at the same time protecting that same minority from the ever-encroaching power and influence of the majority. That is, law seeks to attain some sort of symmetry and balance within our society which, in turn, results in a sense of order.

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[1]United States Fidelity and Guaranty Co. V. Guenther, 281 U.S. 34, 50, (1930).

[2]BLACK'S LAW DICTIONARY, 6th ed. s.v. "Law."

Our social and economic station in life determines our legal rights and duties and often determines our ideological and political associations and alliances. With few exceptions, self-interest lies at the core of most organized social and political activity.[3] Survival, however, qualifies our basic needs, as it is most significant and constant in our toils of daily life, and it keeps our preoccupation very focused. The protection and security of our self-interest compel us to always act pursuant to those interests, whatever they may be. In order to ensure our welfare, we strive for our interests, protect our own rights and make others adhere to their own obligations. Sociologists have long known that competing interests will bring about conflict. This is true whether we are acting individually or collectively, as a community or a nation, against one another or as public and private institutions. Humans tend to unite more often when they have related interests that can better be policed by coalition—thus, together they become a binding force and influence.

Conflict arises when our interests are no longer compatible. Thus, after postures collide, we defend our own interests by whatever means are warranted.[4] At precisely that moment, we engage in dispute and only afterward realize that we have a conflict. Conflict, by nature, is adversarial. It is due mostly to incompatible objectives and competing interests amongst individuals and institutions in a community. A primary

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[3]HENRY KISSINGER, DIPLOMACY 17 (1994)

[4]Note that *conflict* in its Latin root form, *conflictus,* means the act of sticking together, at the same time, or colliding. *Dispute*, on the other hand, means to discuss, or engage in discussion, from the Latin *disputare*. Hence, it can be said that the conflict comes first and the dispute thereafter, WEBSTER'S NINTH COLLEGIATE DICTIONARY.

function of any legal system is dispute resolution. Whether in a civil or criminal process, the law defines the rights, duties, and obligations of the parties involved in the dispute and will provide a relief, a remedy, or a punishment by assigning liability to one of the parties. The main objective of the law and its institutions is to balance the interests of the parties in a dispute, while maintaining certainty, uniformity, and integrity of legal rules for the future, hence, incrementally and *ad hoc,* balancing the interests of society as a whole. s Berman and Greiner identify three general and classical social functions of any system of law:

> The first is the function of restoring equilibrium to the social order (or to some part thereof) when that equilibrium has been seriously disrupted . . . A second general function of law in any society is that of enabling members of the society to calculate the consequences of their conduct, thereby securing and facilitating voluntary transactions and arrangements . . . A third general function of law in any society is to teach people right belief, right feeling, and right action—that is, to mold the moral and legal conceptions and attitudes of a society.[5]

Courts of law must achieve an impartial, yet fair, resolution of conflicts by balancing the interests of the society they serve by applying the proper and most applicable rules and legal principles; but this cannot always be accomplished. Many variants may frustrate the purpose and the goal of law and prevent the most "justiciable" resolution of a dispute. Sometimes, legal rules are not flexible enough to accommodate the best possible resolution in disputes; and, if the ultimate objective of law is to mold the moral, legal, and ethical conceptions of a society, then we should turn to other bodies of jurisprudence to achieve that objective. This is why equity was born. Equity was

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[5]These three main functions of law in society are central and universal to all legal systems. They vary in priority among legal systems, and emphases are placed differently. HAROLD J. BERMAN & WILLIAM R. GREINER, THE NATURE AND THE FUNCTIONS OF LAW, 31–36 (4th ed. 1980).

born out of inflexible legal rules and norms and from the frustrated purpose of courts and litigants as they attempted to remedy for unusual or extraordinary situations. Although the chancery courts (as equity courts are called) became contaminated by mechanical rules and inefficiency, the principles embodied in equity jurisprudence have remained with us as a true reflection of justice, fairness, and consciousness of rights. This concept of equity as corrective justice was categorized by the Romans as:

1. *Aequitas intra legem*, or equity within the law, or the power of a court to choose and achieve the most equitable result
2. *Aequitas praeter legem,* or equity as the gap-filler or void in the law
3. *Aequitas contra legem*; or the use of equity in the derogation of the law when exceptions from rules of law are needed in order to achieve justice, given the facts of a case.[6]

When considering the law from a global perspective, the same principles of justice and fairness in the resolutions of dispute must be observed and maintained as the ultimate objective. Thus, the use of equity principles and its jurisdiction within the realm of international law should also become the ideal in a complex world where the problems resulting in conflict are multilateral and often interrelated. We no longer live in an individualistic, isolated world. Everything from our economy to our communication is now related, integrated, and interglobal. Truly it has become a "one for all and all for one" scenario.

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[6]Louis B. Sohn & Russell Gabriel, *Equity in International Law*, 82 AM. J. INT'L. L. 278, (1988).

1. A Brief History of the Development of Equity Jurisdiction

Equity will not suffer a wrong to be without a remedy.

To understand the principles of equity, we must understand the historical circumstances that led to its development and modern-day form. Equity enjoys a complex and detailed history, which cannot be dealt with justly in this treatise. The purpose of this section is partly to introduce the principles of equity and present the function of the jurisdiction as a separate body of jurisprudence designed to result in justice and fairness. Equity can also be understood as an alternative approach to law in general, not simply an alternative collection of rules. A second purpose to this section is to suggest that the history of "equity" in western legal thought invites a more sustained investigation by practitioners and scholars of law in today's global context.

The term *equity* derived from the Latin *aequitas* and stood for equality, justice, and fairness. This Graeco-Roman ideal represented flexibility and fairness—justice from morality, natural right, and reason in law. Equity, founded upon the sources of divine law and natural law, exemplified the virtues of "conscience and reason." Equity developed into the principle of clemency and fairness frequently invoked in courts in order to prevent miscarriages of justice or "inequities" and to mitigate hardships.[7] Equity, as we know it today, was born out of the frustration and neglect of the rule of common law to provide more practical relief tailored to daily needs. It arose out of the mechanical application of the common law rules and the inflexible, inadequate legal remedies

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[7]BERMAN & GREINER, *supra* note 5, at 73.

provided by the common law proper, those that missed the mark of fair resolution in private disputes. Although equity was highly developed in England, it was not created there.

The principles and concepts found in equity are ancient and distinguished. Earliest references to equity are found in ancient Hebrew law. The classical main repository of Hebrew law is the Deuteronomic Code, which comprises the core of the Biblical Book of Deuteronomy. This code, partly based on ancient Hebraeic (legal) traditions, exhibits remarkable similarities to the legal thought of the ancient Babylonians. The ideals of justice and fairness may be found throughout this code, and its general provision portrays a more "altruistic and equitable" perspective than those in the old Babylonian Code of Hammurabi.[8] This may serve to demonstrate that the ideals of justice and fairness contained in equity may have been around much longer than we once thought, and may perhaps have been present in non-western legal thought and history.

The principles of equity were also understood by the early Greeks. The term τό επιεικια or *epieikia* symbolized the "correction of the undue rigor of the law." To the Greeks, this principle stood for a corrective measure to the injustice which results from the fact that the abstract rules (of law) cannot take into account all the specific circumstances that are relevant to a case.[9] It is this particular inflexible and rigorous legal

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[8]MORRIS R. COHEN, REASON AND LAW, 50, 52, (1961), and see also, ROBERT E. LEARNER, ET AL, WESTERN CIVILIZATIONS 85 (1988), for more discussion on Hebraeic Law and the Book of Deuteronomy and equity.

[9]*Id.*, at 63., here Cohen goes on to discuss the Greek or Aristotelian concept of "equity" as a corrective measure, specifically, as a means to correct injustices through fairness.

standard (or *rigor legis*) that the common law of England, with its doctrine of *stare decisis* and dogmatic devotion to precedence was supposed to eradicate. The classical concept of equity was defined by Aristotle in his Nicomachean Ethics as " . . . a correction of law where it is defective owing to, or by reason of, its universality." He also stated, "equity is justice."[10] Equity also developed later in Roman law and was dispensed by the Praetors[11] (hence the Latin term *aequitas*). The Romans, who initially absorbed much of the Greek civilization, probably borrowed from Greek legal concepts during the period of conquest of Hellenistic Greece, just as they borrowed the art, religion, philosophy, and Greek customary life, and eventually spread the Greek culture throughout their own empire. In A.D. 395, the Roman Empire split into east and west, and Greece became a part of the Eastern Roman Empire. By A.D. 476, the Roman Western Empire would collapse, leaving behind only fragments of its former influence. However, it was not until "The Eighth Period of The History of Roman Law" (the most important period in the development of Roman jurisprudence), that Roman law was compiled and effectively developed into a body of principles, or a codex. Around A.D. 565, during the reign of the Emperor Justinian, a revision of Roman law was carried forth. Justinian appointed a commission of lawyers, known as jurisconsults, under the supervision of his minister Tribonian, to compile and codify the principles of Roman jurisprudence. This

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[10]Aristotle explains the concept of *epieikia* in his NICOMACHEAN ETHICS, BOOK V, in THE BASIC WORKS OF ARISTOTLE 1020 (Richard Mckeon ed., 1941), and see generally, GEORGE C. CHRISTIE, JURISPRRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 41-42, 57-72 (1973), where a deeper analysis on Aristotle's perception on equity is examined in light of modern jurisprudence. I is also interesting to note that in Spanish law the term equity is *"equidad"* is more of a financial term, but the term *"epiqueya"* is more synonymous with fairness and justice, and is the literal pronunciation of the Greek term *epieikia*

resulted in what is known today as the *Corpus Juris Civilis*, or the "body of the civil law."[12] During this period of great influence exercised by the Christian Emperors of Byzantium, or the Eastern Roman Empire, equity truly evolved as a legal doctrine in Roman law. Equity eventually infiltrated other legal systems, including the churches, where it developed along with the canon law, or *Juris Canonici,* which applied particularly to the church and its Eccleciastical courts, and was also based upon Roman ecclesiastical jurisprudence and framed around the twelfth, thirteenth, and fourteen centuries.

Strictly as a legal premise, the term equity has a different variation in meaning and definition in Ancient Greece and Rome than it does under the English legal structure during the twelfth, thirteenth, and fourteenth centuries. The legal culture that later provided a framework for equity probably crossed the English Channel in A.D. 1066, with the Norman invasion led by William the "Conqueror," Duke of Normandy, who even carried a papal banner. With the military invasion came the bureaucracy of the Roman Catholic (Apostolic) Church, bringing along with it canon law and the remains of Roman law and equity jurisprudence, now mostly integrated into the Juris Canonici. The Romano-Canonical legal system had a profound influence on all European legal systems of the Middle Ages and subsequent centuries. In England, this influence was strongly

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[11]PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA, 74 (1980).

[12]LEARNER, *supra* note 8 at 240. See also, MARY ANN GLENDON, MICHAEL W. GORDON & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 14-16 (1982).

felt, particularly during the reign of Henry II and the rise of the office of the Chancellor, a cleric, and the influence of ecclesiastical courts.

Soon, royal authority became widespread throughout England, and the royal courts became the general courts of the land. These new courts, known as the *Curia Regem*, administered the King's justice under a law common to all England, not the former local and customary Anglo-Saxon law. These English national courts, which were secular royal courts, developed rather quickly during the thirteenth and fourteenth centuries. Their growth was spearheaded by the chief royal court of importance—the King's Bench. In time, these courts developed their own rules, remedies, and procedures and became known as the common law courts; the system of common law came into existence.

The Chancellor, who in time became the monarch's closest advisor, also became the highest of all royal officials. He represented the King in all matters of the Crown and could even act on behalf of the King himself to make certain that all the affairs of State were carried in accordance to royal will. He was, therefore, endowed with special jurisdiction delegated directly by the monarch to carry out justice and maintain order in all of his royal courts.

At first, the Chancellor's Court was established to hear grievances that other royal courts, such as the King's Bench, could not efficiently handle or would not properly resolve. This is significant because the Chancellor's jurisdiction was said to arise out of "(the king's) grace and conscience," which meant that he was not bound to follow or act according to the rigorous (*strictum jus*), and at times, mechanical application of the

common law. The Chancellor was not bound by the forms of action at common law, nor by it procedures, but his decisions were expected to be consistent with settled law. Thus, this meant that he could accept any case for review in Chancery. A petition in the royal courts was requested by a litigant as a matter of right, but in Chancery, admission of a case was a matter of discretion by the Chancellor.[13] The equity jurisdiction of the chancery court was royal and the Chancellor was a high cleric whose outlook was strongly Romano-Canonica,l[14] and there was a striking resemblance of the office of the Chancellor and that of the *Praetor.*

The Chancellor was to act also in accordance with the principles embodied in the natural concepts of justice and grace. He was expected to duly exercise equity; he was "to do equity" always. This was his ultimate objective if and when the common law failed in this endeavor. During this time, Chancellors where picked from among high officers of the clergy or "ecclesiastics." Most were Bishops and Cardinals of the (Roman) Catholic Church, and they borrowed much from canon law, and hence from ancient Roman law, the *lex praetoria*, particularly, in order to do equity. But, it was their link with Rome that allowed them to draw heavily from the ancient Roman equitable principles. Roman law and jurisprudence was a core subject studied in most European universities and monasteries of the day. In England particularly, Civil/Roman law was primarily studied as a university subject at All Souls College, Oxford, and at Trinity Hall,

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[13]BERMAN & GREINER, *supra* note 5 at 74–75.

[14]R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 106–107 (1973). Here, Van Caenegem discusses "the precocious nature of the common law" and its imperfections.

Cambridge. The former awarded the D.C.L. or Doctor of Civil Law, and the latter the Doctor of Law, or LL.D.[15] In this manner, the equitable jurisdiction of the Chancellor slowly developed into a separate body of jurisprudence with its own rules and procedures, as well as its own court and jurisdiction.[16] Roman/Civil law was also the central focus of the admiralty courts, the Courts of the Exchequer, the Court of Chivalry, and the ecclesiastical courts. It was also the law of diplomacy and foreign relations, thus international law of the day.[17]

In many ways, the chancery court and equity principles further developed in England beyond that of the Roman perspective. This was due to the inadequacy of the common law courts to render relief in certain circumstances or their failure to solve disputes based on the rigid application of the law common. Examples of this can be observed when equity was eventually applied in areas were the common law had never been even considered. The Chancellor would order the specific performance of a contract, adjudicate on the validity of of a will (due to its nexus with ecclesiastical roots and Roman law), protect the interests of a married woman, and enforced a trust, thus gaining jurisdiction in matters of real property and future interests in land.[18]

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[15]BRIAN P. LEVACK, CIVIL LAWYERS IN ENGLAND *1603–1641:* A POLITICAL STUDY 2-8, 11 (1973); *see also* R.C. VAN CAENEGEM, JUDGES, LEGISLATORS, AND S 120–121 (1987).

[16]ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW, 143–147 (1966).

[17]LEVACK, *supra* note 15, at 3, 26–28; VAN CAENEGEM,, *supra* note 15, at 122-126.

[18]HARDING, *supra* at note 16, at 148.

Other scholars have deduced that the origin and development of the chancery court arose from the frustration caused by the fact that petitions to the King, who was considered the fountain of all justice, fell short of their aim to give adequate relief. Hence, relief given from the positive law, or *lex scripta,* became deficient.[19] Equity became an ancillary system of justice, a jurisprudence that could give a petitioner the kind of "moral" (conscience) relief it should have. In fact, although today as it was then, equity is still dispensed only in circumstances where there is no other remedy found within the common law proper, it is mostly considered a preservation or even an extension of special procedures and/or expanded judicial reach. Equity today is created generally created by statute, applicable in certain kinds of cases and circumstances, i.e. family law, company law, and property law and contracts, were hard and fast rules are particularly difficult to apply. Thus, to this day, equity has always been considered a part of the law, not separate but inclusive of law, as much as it was in the canon law courts.[20]

Note, however, that equity was introduced to aid in the administration of the common law, not replace it. Hence, equity courts were created or developed to complement the ancient courts of common law, to provide a more efficient system in the administration of justice in England at that time, and to provide relief for traditional common law in cases where the old process was either inadequate or inappropriate.[21]

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[19]Thomas v. Musical Mut. Protective Union, 24 N.E. 24 (N.Y. 1992)

[20]HAROLD J. BERMAN, LAW AND REVOLUTION; THE FORMATION OF THE WESTERN LEGAL TRADITION, 519 (1983).

[21]W.H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER, ITS JURISDICTION, ADMINISTRATION, PROCEDURES AND RECORDS 7-9 (1975).

Due eventually to the contest for power between the monarchy and Parliament, the authority and discretion of the chancellor, a minister of the king, became viewed as another way the monarchy could impose its will upon the realm. Such authority was greatly reduced when the contest for political control of the kingdom was eventually won by Parliament during Queen Anne's "Augustan" reign, and royal authority was largely curtailed. Berman observes that since the common law courts had sided with the parliamentary forces during the struggle, they emerged as the predominant courts of England.[22] With the coming of the Reformation to England, the link between the legal ecclesiastics (and Rome) were also broken. With the establishment of the Anglican Church, the chancellors ceased to be selected from the hierarchy of the Canonic Catholic clergy, and the vinculum between Roman equity and Roman canon law was also officially severed to a great extent. At this point, the chancellors began to apply only legal precedent (much as the common law courts), royal prerogative, and policy. Eventually, equity, like the common law, was formed into a rigid and rather systematic body of legal rules, which at times was more inflexible and more harsh than the common law it was supposed to relieve. This condition of two parallel legal systems persisted for centuries as competing socio-legal forces in Britain, and eventually the two systems ceased to be complementary to one another; they even became contradictory in principles and doctrines that further developed a widened the gap between the two systems, and consequently, their respective jurisprudence.

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[22]BERMAN & GREINER, *supra* note 5, at 74–75; BERMAN, *supra* note 20, at 458–459.

By the early nineteenth century, the two systems were not only incompatible, they had become competitive and the procedure in the chancery court, as in the common law courts, became stale. Procedures were slow, extremely expensive, and time consuming. Something had to be done. One of the best social commentaries on the state of the law in England during the Victorian Era (1800's) came from Charles Dickens. Although Dickens was not a legal historian, we can observe the musty and stale machinery of the administration of justice in many of his works. As a lawyer's clerk, he witnessed firsthand the inadequacies and the false promise of a system of equity ostensibly designed to remedy the formalities of the common law and the lack of action on the part of the government to cure the growing dissatisfaction with an inefficient legal system. In *Bleak House*, Dickens gives us a glimpse of the conditions at chancery at the time:

> . . . Sir Leicester has no objection to an interminable Chancery suit. It is a slow, expensive, British, constitutional kind of a thing . . .

In another segment he adds:

> . . . Equity sends questions to Law. Law sends questions back to Equity; Law finds it can't do this. Equity finds it can't do that; neither can so much as say it can't do anything, without this solicitor instructing and this counsel appearing for A, and that Solicitor instructing and that counsel appearing for B . . .[23]

Consequently, such clutter and disarray led to reforms. In 1873 (and later again in 1925), the British Parliament enacted the Judicature Act, which basically provided ". . . that any and all equitable defenses were to be available in any Division of the High

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[23] THE OXFORD LAWYER'S QUOTATION BOOK: A LEGAL COMPANION 31, 52 (John Reay-Smith, ed., Barnes & Nobles 1991); See also CHARLES DICKENS, BLEAK HOUSE 49-55 (Norman Page ed., Penguin Books (1971) (1853)

Court. . . ," thus merging law and equity in England.[24] More significantly, the statute also provided that where law and equity differed or conflicted, the rules of equity would prevail over the rules of the common law. This same dual court system of law and equity was earlier brought to America by the colonists in the seventeenth century, but like the courts of England, here too, reorganization of the court system occurred and law and equity eventually merged in the nineteenth century.

The early history and nineteenth century career of equity, are in some measure the history of a good idea gone bad. The good idea was to use a less rigid set of procedures and a forum of high authority to resolve legal issues that ordinary courts were ill equipped to handle. As equity itself became routinized and highly technical during the early modern period, some of the value of the alternative framework was lost. Nevertheless, the history of Anglo-American equity contains some valuable lessons for international law and jurisprudence. A successful legal system needs to preserve a dimension from within which judges can have recourse to fundamental principles of justice and fairness as well as of positive law.

[24]Supreme Court of Judicature Act, 1873, 1875, 39 & 40 Vict., ch. 66 (Eng.); and see subsequent amendments in Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 5 ch. 40-50, (Eng.).

CHAPTER 2

THE SUBSTANCE OF EQUITY

Equity regards substance rather than form.

In early history, the rules of equity were originally contingent upon the sense of justice and conscience of the Chancellor and through a endowment of royal grace. Today, judges are limited to dispensing equity practically ad hoc, except were granted special power and authority by statutory or constitutional provisions. Following the nineteenth century reforms of civil procedure, equity proceedings were merged into the regular civil procedures of most Anglo-American jurisdictions. Nonetheless, equitable remedies and procedures survive, and are available specifically in cases where pressing and extraordinary circumstances exist, and where a court must act quickly and fairly, although they remain flexible and easily adaptable.

Equity today has little or no jurisdiction in criminal matters, depending on venue. Equity jurisdiction is: (a) exclusive of common law jurisdiction (this does not refer to the civil law), and (b) concurrent with common law and auxiliary to it. At first this may seem contradictory to the principle that the jurisdiction of the equity courts is confined only to those cases to which the common law offers inadequate or no remedy. This is not the case. This contradiction tends to dissipate when emphasis is placed upon the fact that common law remedies must be adequate if courts are not to apply equitable principles

and jurisdiction[1] As with any other judicial tribunal, there are certain principles and rules guiding the conduct and exercise of equity jurisdiction and its application.

These rules, now embodied into doctrines and principles of equity, are called "maxims." (Some appear in the beginning of each chapter of this treatise.) They usually fall into four major categories:

1. Maxims governing the action of the Chancellor's court
2. Maxims connoting the right or standing of a party to a claim, a remedy or relief
3. Maxims describing the relative standing of litigants where the question is whether one party or another has the prior or superior right or "equity," and
4. Maxims prescribing the mode of disposition of the case where the "equities" of the parties are shown to be of equal dignity[2]

The following were among the original characteristics of equity jurisdiction; some are still quite important today:

1. Moral considerations
2. The assistance to the poor, the weak, and the disadvantaged
3. Relief in cases of fraud
4. The ability to give rise to new remedies, due to its flexibility
5. Specific performance (a positive order feature)

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[1] A.K.R. KIRALFY, THE ENGLISH LEGAL SYSTEM 63–65 (1973).

[2] 646 AM. JUR. 2D § 119, and see W.T. Barbour, *The History of Contract in Early English Equity* in OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (Paul Vinogradoff ed.,1974), 71–72, 151–152. References are to the advantage of retaining equitable jurisdiction rather than that of common law.

6. The injunction (a negative order feature)

These remain very important qualities and, indeed, an integral part of the modern application of equitable principles today. These six main features make equity jurisdiction a prime, rational candidate for an improved substitute system of modern international dispute resolution and conflict settlement.

As mentioned before, equitable jurisdiction has been traditionally divided into three main categories:

1. Exclusive jurisdiction, consisted of all subject matter foreign to the common law
2. Concurrent jurisdiction, existed for the petitioner who had a right to damages at common law but desired a more satisfactory or enhanced form of remedy
3. Auxiliary jurisdiction, consisted of a procedural mechanism that might be needed as a preliminary to a claim at common law.

The third feature of equity jurisdiction may be particularly attractive to international dispute resolution since it indicates that the nature of equity jurisdiction is flexible enough for other systems and forums of conflict resolution, such as diplomatic settlements and legal tribunals of competent jurisdiction and other international organizational resolution. This is not a novel approach, however, for as stated before equity jurisdiction was created and developed to complement the ancient courts of common law and provide a better administration of the legal system.[3] Due to this history

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[3]W.H. BRYSON, EQUITY SIDE OF THE EXCHEQUER 10-15 (1995). for review a of the administration of justice and the legal ystem. *See also*: R.C. VAN CAENEGEM, JUDGES, LEGISLATORS, AND S: CHAPTERS IN EUROPEAN LEGAL HISTORY 120-125. (1987).

of complementary and concurrent jurisdiction of equity, it is a primary candidate for the substitution of the current system of international legal administration. As a sort of legal catalyst, the hybrid nature of equity can complement and become concurrently applicable with present principles and positive norms of international law. In the following section we will explore ways in which the specific content of equity jurisprudence has been useful in resolving disputes in the international arena. It may well serve as a model for future application of equitable principles and procedure in the international legal system and its administration.

1. The Doctrines of Good Faith and Clean Hands

He who comes into equity must come with clean hands.

It is very important to note for the sake of practical discernment, that the more modern expansions of equity jurisprudence were laid down by two principle British jurists, Lord Harwicke and Lord Nottingham, who developed and untangled the web of principles and doctrines contained in over 400 hundred years of equity jurisdictional chancery practice. This is important because albeit the foundations were already laid, these two principal judges took the narrow and compressed concepts of equity and broadened the remedial features of equity, as well as the jurisprudential character of equity jurisdiction.

Equity is no longer just a complementary body of rules used solely to supplement the legal jurisdiction of courts. Although this image of equity prevails, it has been cultivated into a body of jurisprudence that can at times stand alone in the resolution of conflicts and the settlements of disputes.[4] As stated above, *he who comes into equity must come with clean hands.* Good faith (or *bona fide* in Latin) is, in essence, honesty of intention and belief. It is the absence of malice and the absence of design to defraud another. In equity, it includes ". . . the honest intention to abstain from taking unconscientious advantage of another, even through use of technicalities of the law . . ."

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[4]KIRALFY, *supra* note 1, at 66–67.

It has also been defined as that state of mind that denotes honesty of purpose and freedom from intention to defraud, and more generally, being faithful to one's duty or obligation.[5]

This concept of good faith is also essential in all stages of international dispute resolution. From the negotiation stage to the final drafting of the agreement and the enforcement of compacts, this concept is an ideal and an objective that should be placed in the forefront of all crises and conflicts, facilitating the honesty and purpose of all parties involved. Good faith dealings between nations is a necessary requirement and a basic element in international law. The use of this term in international law cases and literature is quite extensive. Good faith, when combined with the doctrine of "clean hands," results in a better, if not the best possible, environment to produce an honest and justiciable resolution of the conflict at hand. Clean hands and good faith are inseparable. These are ancient and long enduring favorite rubrics of the equity courts and these has been given wide and continual application. They are joined in equity and by good conscience—not by mere appearance. The principle underlying the maxim above is that were a party's conduct has been inequitable, dishonest, unfair, deceiptful, and unconscionable in regards to the to the matter in conflict, a court of equity will estop or deny relief on those grounds.

The clean hands doctrine embodies the equitable principle that a party seeking an equitable relief will be so denied if such party in its prior conduct has violated good conscience, good faith, or any other equitable principle applicable. Clearly, if the party

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[5]BLACK'S LAW DICTIONARY 5th ed. s.v. "bona fide," and "good faith."

seeking the equitable remedy has indulged in any impropriety in regards to the transaction negotiation or matter for which relief is sought, it will not be allowed to recover, and thus will not be permitted to take advantage of its own wrong or fraud.[6] Therefore, a party that approaches a court of conscience, such as an equity court, with "unclean hands" and solicits satisfaction with the full knowledge of malice, deceit and fraud, will not be permitted to prevail and may be held accountable for any such actions thereafter, through the court's civil contempt power.

Pomeroy, in his well-known treatise on *Equity Jurisprudence*, illustrated the notion underlying the relationship between good faith and clean hands, as well as the clean hands maxim:

> ..."[T]he principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside the strict rules of the law, or even in contradiction to those rules, while it could act *upon the conscience* of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain....This fundamental principle is expressed in the maxim, He who comes into a court of equity must come with clean hands."[7]

The importance of applying these principles of equity (and its jurisdiction) to international negotiations is crucial if the desired objective is to be based upon fairness, honesty, and intentional seriousness of purpose to resolve the conflict and balance the interests that are competing and in conflict. Hugo Grotius, (mentioned ealier in

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[6] *Id., s.v. "Bona Fide"* and compare with ROBERT T. KIMBROUGH, SUMMARY OF AMERICAN LAW 265-266 (1974).

[7] 2 POMEROY, EQUITY JURISPRUDENCE § 398 at 93-94 (5th ed., 1941) as quoted in ELAINE W. SHOBEN & WILLIAM M. TABB, REMEDIES 131-132, (1989)

Chapter1) who wrote extensively on the developement of international law and its legal principles, makes allusion to equity and natural law principles, and also analyzes the equitable concept of "good faith" among states throughout his works. In *De Jure Belli ac Pacis* (on *The Law of War and Peace*), Grotius deeply analyzes the benefits and elements of good faith in international law and conflict settlement. He also covers the topic in his two other works on international law: *De Jure Predae* (on *The Law of Prize*) and in *Mare Liberum* (*The Free Sea*). His Roman-Canonist influence is apparent in his analysis of legal principles and rules interpreting treaties, and the validity and relevance of the customs and traditions within the Roman-Dutch civil law. In Book II, Chapter 10, and Book III, Chapter 19 of his *De Jure Belli Ac Pacis*, seven chapters detail the concept of good faith in international law.[8]

In Chapter 10, of Book II, in his *De Jure Belli Ac Pacis,* Grotius emphasizes the importance of good faith which is required in international relations, and hence, in international law. Speaking on *The obligations Arising out of Ownership*, and defining the rights to private property to be observed among nations whether they are uniting in peace or conquered by war, he relies a great deal on the notion of good faith and "bona fides" purchase and possession in order to maintain those rights to private property. Most significant are his analyses of good faith as related to international law and the "law among nations," and these are too numerous to mention in this work, particularly, in

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[8]HUGO GROTIUS, THE LAW OF WAR AND PEACE, 390–441 (Louise R. Loomis, & P.E. Corbett trans., 1949) In Chapters 19 through 25 he depends greatly upon the classical interpretation of "good faith" as according to Greeks and Roman philosophers and jurists. He begins by analyzing Quintillian's and Xenophon's ideals of good faith.

Chapters 19 through 25. However, in Chapter 19 where he deals with the topic of good faith between enemies, he quotes Quintillian in saying:

"Public good faith...is what makes truces between armed adversaries and upholds the rights of states which have surrendered," and "...Good faith is the strongest bond in human society; the praise of religion is given to good faith between enemies."[9] Quoting Ambrose and Augustine, Grotius stated that: "Plainly then good faith and justice are to be maintained even in war," and " ...[Good][f]aith must be kept even when promised to an enemy."[10]

Grotius not only speaks of good faith during time of war, but he strongly proposes that good faith is also, and certainly as important in time of peace. He placed great meaning upon the value of equity, natural law and good faith the preservation of order and law among nations, and thus, it may be considered today as well; that such good faith is essential to the keeping of good international relations, diplomacy and international law. This can be clearly seen at the end of his Chapter 25, Book III, again of his *De Jure Belli Ac Pacis,* entitled: *Conclusion, with Admonitions to Good Faith and Peace*, where he suggests that without good faith among nations in war as in peace, peace would not last because not only does every state rests upon its good faith, but "...destroy good faith, and intercourse between men comes to an end." He goes on to conclude that... "Peace once made on whatever terms should be absolutely kept because good faith is sacred"...[11]

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[9]*Id.*, at 390.

[10]*Id.*, at 391.

[11]*Id.*, at 441-443, Grotius quoting both Cicero and Aristotle on good faith in human relations and between nations.

2. Law and Equity in Nonwestern Nations

If you want to solve the world's problems, you have to put your own household, your own individual life, in order first.
Buddhist Thoughts, Chogyam Trungpa

Equity jurisprudence relates to ideas of justice, fairness, and natural law long recognized in legal cultures other than Anglo-American. These ideals of justice, fairness, and natural law, have been acknowledged by many civilizations throughout history. Legal systems based in both the Roman civil law and the English common law recognize the principles of equity jurisprudence and its application in the settlement of civil disputes. Western legal systems were not the only systems that conceived this concept. Other legal systems around the globe also understand and exhibit similar concepts to those found in the Romano tradition of equity. However, not all states and nations of the world see the law as central to their society, as ours does. In fact, in many nations, law is the last resort in a long line of resources employed in the resolution of civil disputes. Islamic and Socialist nations also embrace the philosophy and the understanding of equity derived from Aristotelian thinking.[12]

In many nations, cultural and religious rules are the preferred modes of dispute resolution; while in other nations, the family and the immediate village, town, or tribal hierarchy are responsible for keeping and balancing harmony within the community. In some cultures the family (sanguinial) ties are responsible for any sort of conflict

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[12]Louis B. Sohn & Russell Gabriel, *Equity in International Law* 82 AM. J. INT'L L. 278 (1988). *See also* Judge Hudson's remarks *infra*, in the Diversion of Water from the Meuse Case, in Ruth Lapidoth, *Equity in International Law*, 81 AM. J. INT'L L.. 141–142 (1987).

settlement within the tribe or village; while in others, the individual is solely responsible for his conduct in accordance with moral and ethical rules. Thus, the state, at first and at best, is kept out of the dispute resolution system until all other measures are exhausted. Only then, will the dispute be brought to mediation, arbitration, or other tribunals until it finally reaches the law courts. The law is viewed as an external force, and is not the preferred intervenor in community affairs. Legal intervention may even bring a kind of cultural stigma and dishonor. Sinha calls this the "non-universality of law."[13]

In China, for example, classical Confucian tradition requires each person to live harmoniously within society. Each individual must maintain harmony with the internal and external environments. This sense of harmony is the basis for the regulatory aspects of Chinese life. Their attitude toward the law and the settlement of disputes is much different from ours. The most central and essential principle in Chinese life is that of *Li.* Li stands for "reason" with harmony. It is considered internal to the human condition and behavior, and is not imposed by government or heaven. This guiding principle is practiced and enforced *internally* by an individual as proof of the ability to promote universal harmony and balance in society.

Li is an *internal* system of social organization and control with the *external* demonstration of that ability. For the Chinese, the resolution of disputes is largely an appeal to conscience, much as in the western form of equity, but approached in a distinct manner. The appeal to conscience and reason (Li) is considered superior and, indeed, is

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[13]SURYA PRAKASH SINHA, JURISPRUDENCE; LEGAL PHILOSOPHY 57–72 (1993).

pursued more often than the enforcement of rights, duties and obligations in a court of law. In fact, law (called *Fa*) is considered a moral distortion. It is used only for the criminal or the corrupt individual, or the foreigner that is unfamiliar with the Chinese character or values.

Law, in Chinese society, is the last resort used when all else has failed, and only when an outside or *external* expression of regulation becomes necessary. The classical Confucian system of dispute settlement and resolution appeals first to human sentiment or conscience (Ch'ing). Second to reason (Li), and finally, to the law (Fa). Social harmony is maintained by conscience and reason, not by litigation. Conflicts are resolved by alternative methods, rather than by tribunals.[14]

In Japan, as in China, the idea of legal rights enforced by courts is contrary to their Confucian-founded traditions, and is a consequence of their history. The Confucian ideal of hierarchy is deeply rooted upon the natural order of things. It is considered shameful to seek redress publicly and involve oneself in open public affairs. Hence, the idea of law as a dispute-solving mechanism is thought to be depersonalizing and considered to be proper only in matters of business, government, industries and so-called open matters. The idea of equality across the culture is foreign to both the Japanese and the Chinese (in spite of the years of communist political control in China). Equality is repugnant to the ideal of a hierarchical structure of society and the natural order and harmony in nature and the universe. Therefore, these cultures are relatively "private" when it comes to the

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[14]*Id.*, at 32–35.

resolution of disputes in their society. This is why it has been frustrating for the western countries transacting business with China and Japan (and also South Korea, Taiwan and other traditional Confucian-based societies); it has been difficult to import Western legal machinery and enforce their intellectual and commercial rights.

Sinha states that, "the notion of personal rights is contrary to the Confucian hierarchy and it is deemed to depersonalize human relations by putting all persons on an equal basis."[15] The law is viewed appropriate only in public, not private, matters. In Japan, the preferred method of dispute resolution is segmented into three stages. The first stage, *Jidan*, is the mediation stage, designed to allow the party flexibility to solve the dispute amicably. In the second stage, *Wakai,* a judge brings the parties to a settlement. In our western system, we would call this arbitration. In the third and final stage, *Chotei*, the parties petition the court to appoint a panel or board of conciliators charged with planning and proposing equitable resolutions and settlement.[16] This is a adequate and more flexible system that takes the parties through phases in the negotiations, without the need for a more formal legal procedure. It is designed to defuse the conflict and accommodate the parties through dispute management and arrive to an equitable settlement.

Westerners can learn much from dispute resolutions and settlement strategies and methods like these. They are structured to allow the parties to "will" or forge a resolution themselves. We in the west, prefer going to a court of law from the onset and permiting

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[15]*Id.*, at 56, 57.

[16]*Id.*, at 57-58.

the State to become involved too soon in the dispute. We give much power to the State and deprive ourselves of the societal responsibility to manage our private and public affairs properly. No wonder we have become a very litigious society that is ever losing its own moral stability, the value of its law, and the integrity of its judicial system.

Our society has become an adversarial one, ready to "sue" anyone, at any time, forever in the constant pursuit of enforcing our rights and another's duties and obligations. This is is pretty much the reality in many Western countries. We, particularly here, in the U.S., consider ourselves free, yet we hand so much power over to the government (the State) through the "third branch," the judiciary. By increasingly employing the courts to resolve the smallest and most insignificant of civil disputes, we upset the delicate balance of interests in our society as a whole. We have very similar approaches to international dispute settlement and resolution. Since the UN Security Council is dominated by the powerful nations of the West, and is strongly influenced by the industrial might of the G-7, or the Group of 7, which are the most economically and technologically advanced nations of the world, we inculcate our Western values and subjective moral standards upon both other Western and non-Western nations. Thus, we tend to solve international disputes and crises by force and intimidation; whether that force is diplomatic, political or legal, economic, or social. We impose our mechanical legal rules, process, and dispute resolution procedures upon nation-states that cannot, at times, discern our methods or are confused by our intentions.

Islamic nations and non-Islamic African nations are familiar with equitable and natural law principles. The sense of conscience and justice is easily understood by all

cultures, since most religious systems inherently bring with them a moral or ethical code founded upon natural justice and equity, although the same term may not be used or the concept fully interpreted in the same psycholinguistic frame. The idea of "fairness" is universal however and does predominate in all societies. Fairness is a concept that is constant in all idioms and languages, hence, we can use it to maintain as much harmony as we can among nations. This can be accomplished through the principles of equity jurisprudence. But law is not universal. Civilizations create their own principles of life and social regulatory systems, according to their history, customs, experience, and mechanical, unilateral legal, and diplomatic conflict settlement and resolution systems.

Lastly, J. Krishnamurti made the following observation upon the relationship between education and world peace:

> To rely on governments, to look to organizations and authorities for that peace which we must begin with the understanding of ourselves, is to create greater conflict; and there can be no lasting happiness as long as we accept a social order in which there is endless strife and antagonism between man and man. If we want to change present conditions, we must first transform ourselves, which means that we must become aware of our own actions, thoughts and feelings in everyday life . . . Peace is not achieved through any ideology; it does not depend on legislation; it comes only when we as individuals begin to understand our own psychological process. If we avoid the responsibility of acting individually and wait for some new system to establish peace, we shall merely become the slave of that system.[17]

The statement above symbolizes an ideal. A vision of what would perhaps occur if there would be a grand scale effort to individuals to diminish conflict and war by engaging in more dialogue and practice more civility between nations. It stands for a

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[17]J. KRISHNAMURTI, EDUCATION AND THE SIGNIFICANCE OF LIFE 67-68 (1981).

image, a glimpse of hope for humanity in a distant future, based upon good faith, fairness and responsible, self-standing human relations and communication, and not on political organizations. Equity is but a seed, a first effort. It could be the beginning.

3. Equity in International Law and the Concept of *Ex Aequo et Bono*

Equity follows the Law.

Approached from the perspective of the essentially human, we could say that entire world has a fundamental understanding of the substantive concepts and ideal of equity. Hence, equitable principles may be said to be generic. Since most countries can find equity or a similar concept of justice and fairness in their own legal or dispute resolution systems and structures, it is not necessarily difficult to translate, interpret, and then apply the principles embodied in equitable jurisprudence. Thus, it would not be as perplexing to invoke equitable jurisdiction in matters of international conflict and dispute resolution. However, the domestic or municipal interpretation of equity may vary between countries in procedural definition more than in substantive meaning.

The global concept of equity is considered to be very much a part of the conception of *jus Cogens*, or a peremptory rule or norm of international law that is universally accepted by all nation-states as natural law, and that nation-states cannot escape. *Jus Cogens* are legal rules which are accepted and recognized as an international legal principles by the whole world community, and thus states cannot evade or modify such norms unless this is done by the entire international community.[18] Therefore, it can be stated that similar universal notion of equity and justice, are *jus cogens*, as they are recognized the world over in some form or another.

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[18]ROBERT L. BLEDSOE AND BOLESLAW A. BOCZEC, THE INTERNATIONAL LAW DICTIONARY, s.v. "jus cogens."

Legal scholars are aware that Aristotle originated another classification of equity comprised of two distinctive types of justice: *distributive justice* and *commutative* justice.[19] These two types of justice are quite distinct from one another and have disimilar means to the same end. Distributive justice is the distribution of an item or thing *(res)* in shares which is apportioned equally to the parties in accordance with the rights and deserts of each. Commutative justice consists of corrective measures in certain transactions between the members of society, and it is founded upon equality, fair play, and reciprocity. Distributive justice defines the type of equity that describes the relation between an individual and its community, whether that community is the village, province, city, nation, or the globe; commutative justice defines the type of equity that describes the relation between the individuals within any given community.[20] When equity as the ideal of fairness and justice is classified or categorized in this manner, it becomes evident why equity, a body of rules and (legal) principles, does and should play a more predominant role in the scheme of international law today, particularly in the area of conflict settlement and dispute resolution.

During the nineteenth century, equity, in principle, was used quite often in international law, particularly, by international arbitration tribunals. In the twentieth century, the use of equity in international law declined and was eventually forgotten. But the concept re-emerged in the midst of the twentieth century with the creation of the

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[19]THE BASIC WORKS OF ARISTOTLE, 1020 (Richard McKeon, ed, 1941); and see also Ruth Lapidoth's, *Equity in International Law*, 81 AM. J. INT'L L.. 138-139 (1987) for a discussions on Aristotle's distributive and commutative justice as applied in international law.

[20]*Id.*, at 1020–1022.

League of Nations, the Permanent Court of International Justice (PCIJ), and, in 1945, the United Nations and the International Court of Justice (ICJ). Article 38 of the International Court of Justice Statute (1945), established by United Nations Charter, fully recognizes the principles of equity as an integral part of the international sources of law. Chapter II, Article 38 of that statute entitled "Competence of the court," provides:

> 1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
>   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
>   b. international custom, as evidence of a general practice accepted as law;
>
>   c. the general principles of law recognized by civilized nations;
>
>   d. subject the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.
>
> 2. This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto."[21]

On many occasions equitable principles have been engaged for the resolution of international conflicts and disputes, particularly boundary settlements, modern international trade and economic problems, and natural resources issues. In a number of situations, international tribunals used equity jurisprudence to bring about an enhanced variation of equitable resolution to an international conflict. Many international publicists, jurists, and tribunals, however, back away from engaging the full application of equitable principles and jurisdiction. They dilute the established principles of equity

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[21] International Court of Justice Statute, Article 38(2) as cited in WILLIAM W. BISHOP, JR. INTERNATIONAL LAW, CASES AND MATERIALS 1083 (1971).

proper, and use a broader, but resembling concept of equity. Some international scholars do not agree with the use or application of equity rules in international law due to the wide variety of domestic definitions, interpretations, and legal perspectives.

Ex aequo et bono (good and just) is rooted in Roman principles of equity (*Aequitas Romanus*) as a reference to fairness and justice. It appears in Article 38, Section 2 above, and is quoted as an alternate means of decision making in place of the ordinarily employed legal rules of treaties and customs. This phrase first made its appearance in 1928 in treaties beginning with the General Act of Geneva.[22] This Act and subsequent arbitration treaties provided that: (1) the ICJ was to decide cases mainly on the basis of Article 38, paragraph 1 of the Statute of the Court (the four basic sources of international law), and (2) Article 38, paragraph 2 above, allows the court to decide cases *ex aequo et bono* when the parties agree and when treaties provide for it. There was another group of treaties in the 1950s that included the European Treaty on Peaceful Settlement. It also provided for the resolution of disputes *ex aequo et bono* when the court could not find an adequate legal rule on the matter in conflict.

The International Law Dictionary defines the principle of *ex aequo et bono* as: "somewhat analogous to, but not exactly the same as, the Anglo-American legal concept of equity."[23] It explains the broader concept of *ex aequo et bono* and gives the court

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[22]The General Act of Geneva, also known as the General Act for the Pacific Settlement of International Disputes (1928) was first eneacted by the League of Nations, and it provided for the peaceful resolution of disputes among nations by the use of arbitration tribunals. In 1958, the United Nations adopted a revised edition of this convention.

[23]ROBERT L. BLEDSOE AND BOLESLAW A. BOCZEC, THE INTERNATIONAL LAW DICTIONARY, s.v. "ex aequo et bono."

greater license than equity does. This concept allows the court greater flexibility of consideration toward other non-legal norms and even the flexibility to defy those norms, so that justice and fairness can be attained.

Philosophically, it is not clear yet whether these two concepts are really the same, but they are similar and closely related. In fact many scholars believe that there is no real distinction at all between the two, except in the reluctance of the ICJ to name equity exactly, or term any judgment "equitable." Mark Janis has stated that legally speaking:

> . . . ex aequo et bono looks a lot like equity, or the nonconsensual forms of international law. So in using equity, the courts fear objections to its rulings on the grounds that it is developing rules of law, much like a common law court . . . The court is trying to use its discretion in developing rules of law. It sometimes looks for justice and cannot find decisive legal rules from treaty and custom. [24]

This is the current judicial reality. The main distinction between equity and *ex aequo et bono* is procedural rather than substantive. If the parties agree to it, the court may hand down a holding that incorporates equitable principles found in the concept of *ex aequo et bono* or the tribunal may hold for a decision in equity. Thus, if the parties agree and ask for an "equitable" decision, then they are provided with decision *ex aequo et bono* (Article 38, (2)), or if the tribunal acts of its on volition upon equity, then it is so considered. The International Court of Justice, arbitrators, and other tribunals have successfully applied the principles of both *ex aequo et bono* and equity proper to solve and settle international conflicts and disputes. Whether a tribunal uses *ex aequo et bono*

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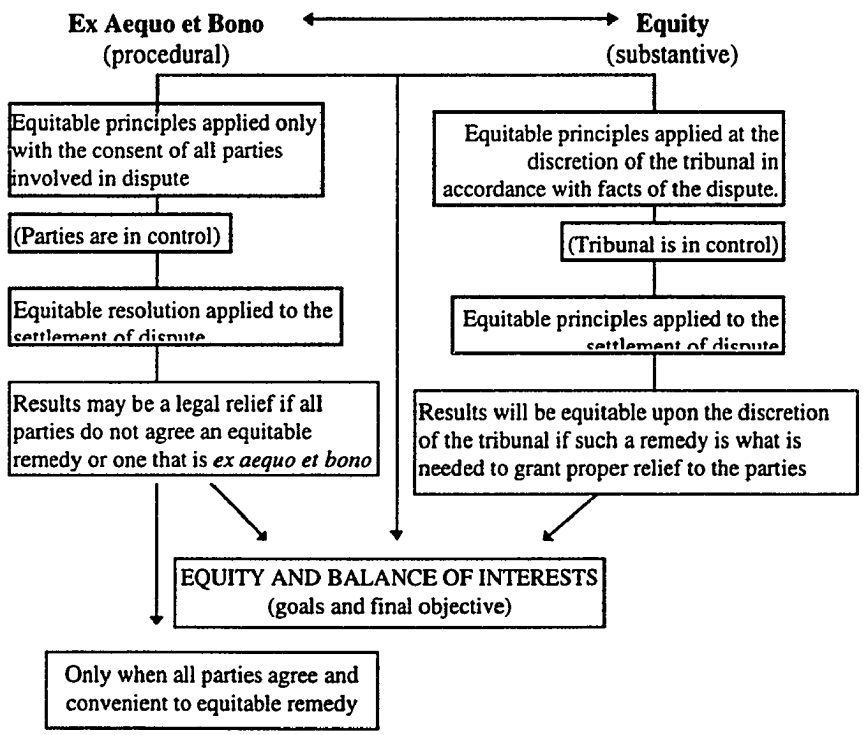
[24]Sohn & Gabriel, *supra* note 8, at 283.

or equity, it still relies closely upon the principles found in equity jurisprudence in the resolution of international conflicts. Again, this is due to the greater flexibility inherent in equity. *Ex aequo et bono,* as presently interpreted by international law forums, resembles natural equity (*naturalis aequitas*) exercised by Roman magistrates and by the Praetorian Edict during the evolution of civil law (*Jus Civile).* Figure 2.1 illustrates how an international tribunal may apply equity principles and how it may miss the objective of resolving the conflict and settle the dispute when the parties are in control, but not when the tribunal is in control of the applicable principles.

Figure 2.1: Comparitive Analysis of the Use of Ex Aequo et Bono and Equity



Ex aequo et bono may look like equity and is at best an equitable principle (*intra legem*), or within the riles of law and equity, but it is not equity per se. It is an intermediate principle of justice in the abstract, to be procedurally applied by a tribunal at the asking of the disputants as the best acceptable compromise in the settlement of a dispute. It is not, however, equity or the foremost, and best probable resolution or settlement in a dispute in accordance with principles of fairness and justice, as applied under rule and the conscience of a tribunal. This is equity and justice, and not compromise by convenience or equitable appearance. Perhaps, here lies the fine line differences between the application of equity *en toto* and the selective application of an equitable remedy or principle. *Ex aequo et bono* appears to be equity, but under close examination, it dilutes the principles of equity. The principles of equity in themselves, address the intrinsic relationship and the philosophical interaction between law in process and equity in substance; justice It is this relationship between law and justice; the ideal goal or end, that equity addresses and provides a bridge, a gap or void fill in the law. The Romans called this *Praeter Legem.*[25]

Although some scholars consider *ex aequo et bono* to be the equivalent of the Anglo-American concept of equity, it is not its counterpart, as is stated above.[26] In fact, some international jurists argue that the court has not really included the straight or pure principles of equity proper, but consider equity only a "possible source" of equity in

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[25]*Id.*, at 278.

[26]GERHARD VON GLAHN, LAW AMONG NATIONS; AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 477 (2d ed. 1971).

international law.[27] Thus, the issue is focused on (a) whether *ex aequo et bono* is a part of, and included within (*intra equitas*), the principles of equity, or (b) whether *ex aequo et bono* is the same as equity. The terms have been used interchangeably, confusing the parties and scholars alike. This confusion happened during *The Chaco Boundary Dispute* between Bolivia and Paraguay (finally settled by treaty on July 21st, 1938). This dispute focused on an area of land on the border between Bolivia and Paraguay. The respective presidents of Chile, Argentina, Brazil, Peru, Uruguay, and the United States were to act: ". . . in their capacities as arbitrators in equity, who, acting *ex aequo et bono*, will give that arbitral award."[28]

The arbitrators rendered "equitable " award of the boundary line based upon the needs of the parties, aerial surveys, and geographical data, and on the mutual military security and economic requirements of both nations.[29] Many other arbitral tribunals and PCIJ decisions reveal this equivalence of terms between equity and *ex aequo et bono* and use it without distinction. This confuses the meaning and interpretation of both terms and further dilutes the true purpose of equity in international law.[30] In the past, international tribunals have used equity jurisdiction and its principles to decide difficult dispute cases where the complexity of the facts and the necessity to bring about a just and equitable

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[27] BISHOP, *supra* note 21, at 51.

[28] The Chaco Boundary Dispute, (Bolivia v. Paraguay) ,1938 Report of U.S. Delegation to the Peace Conference held in Buenos Aires, July 1, 1935–January 23, 1939, AM. J. INT'L L. 180 (1939).

[29] *Id.*, at 171–172.

[30] *See* Guatemala-Honduras Boundary Dispute and Arbitration of 1933, 2 U.N. R.I A A 1307, [1933–1934] (Ann. Dig. No. 46), and also In Re: James Pugh, 3 U.N. R.I.A.A.

resolution was the priority for the tribunal. For example, in the *Orinoco Steamship Arbitration Case* which took place in 1910 between the United States and Venezuela, the international tribunal was to "determine, decide, and make its award, in accordance with justice and equity."[31]

Another case between the United States and Venezuela was also decided upon "in accordance with justice and equity and the principles of international law." This was the case of the *Steamships Hero, Nutrias, and San Fernando* in 1892.[32]

However, the inetrnational courts have also used the term equity and employed pure principles of equity on a number of occasions in order to accomplish fairness and justice in particular cases where the mechanical rules of law and procedure would have resulted in a less than equitable or justiciable solution. In the well known case of *Great Britain v. United States*,[33] better known as the *Cayuga Indians Case*, the UN Arbitration panel eventually relied upon the principles of equity to solve that particular dispute due to its intrinsic unfair and unjust qualities. In this case, Great Britain filed an *equitable claim* for breach of (international) treaty against the United States on behalf of the Cayuga Indians of Canada to re-enforce treaties signed in the 18th and 19th century, that provided for payment to the Cayuga Nation by the U.S. for taking and using their land. It was strictly decided on the merits of equitable principles both in the interpretation of the

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[31]Lapidoth, *supra* at note 19, at 126.

[32]*Id.*, at 141-142.

[33]Claims Arbitration Under the Agreement of August 18, 1910, Nielsen Rep. 203, 307, (1926) also know as the "Cayuga Indians Case," 6 R.I.A.A. 173, 189, (1926).

treaties and in the final judgment of the UN Arbitration panel. This case related to issues of tribal sovereignty and conflict of laws between municipal laws and procedures and a nation's international obligations. The dispute was resolved by employing the principles of equity. In 1926, the Permanent Court of International Justice upheld the United States' obligation under Article IX of the Treaty of Ghent (1814) and the Jay Treaty of 1794. After the Revolutionary War, the United States (more specifically the state of New York) agreed to pay a perpetual annuity of $1,800 to the Cayuga tribe, since most of its members had relocated to a reserve on the Canadian side after the war. During the war, most of the Cayuga nation sided with Great Britain and felt they should relocate to the Canadian/British side. The treaty between the United States and Great Britain, in Article IX, ratified the arrangement and guaranteed the rights of the Cayuga Nation. After 1810, the United States (New York) paid only the required annuities to the Cayugas living in the United States side and not the Canadian side. Great Britain sought payment for the Cayugas by filing an equitable claim against the United States. The court ruled in favor of the Cayuga Nation stating that New York (U.S.) had made a covenant with the tribe and its posterity and that the Canadian Cayugas had not surrendered all claims or interests in the annuity or property in New York by virtue of their emigration to the Canadian side. Hence, the court ordered the payment of back annuities to the Cayuga Nation "based on the principles of international law and equity, and on the covenant in Article IX of the Treaty of Ghent."[34] The court went on to recognize that the international community held

[34]6 R.I.A.A. 173, 188–89 (1926).

the U.S. and Canada to the obligations they made under the treaty and with the treaties with the American Indians, and "... it is therefore clear that when either nation does not abide by the terms of those treaties, it is violating *pacta sunt servanda* and thus, international law."[35] Pacta sunt servanda is the ancient theory originating in Roman law which states that promises and stipulations by the parties to an agreement must be observed and kept. This notion has been carried over to international law, and its has become a fundamental element of international legal theory for over three centuries. This concept is very important since it is the bedrock for all international agreements and the binding force of treaty obligations. Bishop states that "[o]ne of the most fundamental rules of international law is that treaties must be performed in good faith; the rule of pacta sunt servanda."[36]

Roscoe Pound, who sat as chief judge of the arbitration panel, determined that even when it is not clearly specified, an arbitral tribunal should apply international law and equity to the facts. Perhaps the principal case by which international tribunals and the ICJ began to set trends that marked the beginnings of the modern use of equity jurisprudence in international law and conflict resolution. In this case, there is no mention of *ex aequo et bono*, there is only mention of equity, clearly demonstrating that the distinction between equity and *ex aequo et bono* is finite at best.[37] There have been

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[35]*Id.*, at 189–190.

[36]BISHOP, *supra* note 21, at 141, see generally, for a full analysis of *pacta sunt servanda*, HYDE, INTERNATIONAL LAW 1369, 1454 (2nd ed. 1945)

[37]*Id.*, at 51–58.

many other occasions in which international arbitration tribunals and the court employed equitable principles to address issues of international significance, and prevented disputes and resolved conflicts. Under the 1794 Jay Treaty terms, as cited in the Cayuga Indian Case, the commissioners were to "decide the claims in question according to the merits of the several cases, and to justice, equity and the law of nations."[38] In 1903, the Venezuelan Claims Commissions were empowered and directed to "decide all claims upon a basis of absolute equity without regard to objections of a technical nature, or the provisions of local legislation."[39] Also in the case of *Spain v. Venezuela*,[40] which is better known as the *Padron Case,* Judge Gutierrez-Otero of Mexico, stated: "The creation of tribunal of equity in which the arbitrator decides according to his conscience has been frequently put into practice."[41] Both Mexico and Venezuela follow a legal system based on the Civil law, one that includes Roman law principles brought over first by the Spanish during and after the conquest, and subsequently by the French during the Napoleonic era and the German-Austrian period of Maximillian I, Emperor of Mexico. Hence, there is much of Roman equity *(aequitas romanus)* in the legal analysis of the Venezuelan Claims conflict. This is another clearly defining case of equity used in international dispute settlement. Similar cases of that time employed equity in

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[38]Lapidoth, *supra* note 19, at 140.

[39]*Id.*, at 140-143, see also Ralston Reports, Venezuelan Arbitrations Awards of 1903 (1904).

[40] 57 R.I.A.A. 741, 743. As cited in Lapidoth, *supra* note 19, at 140-143

[41]*Id.* at 741,743-744.

international law as a major jurisprudence applied toward conflict resolution and as a part of international legal customs.[42]

In the case of the *United States - Norway Arbitration Award* (1922) an award was made pursuant to Article 1 of that agreement which read that the decision would be reached ". . . in accordance with the principles of international law and equity."[43] In the famous case of the *Netherlands v. Belgium* (1943),[44] known as the Diversion of Water From the Meuse case, the Netherlands asked that Belgium's operation of the Neerhaeren Lock that alters the flow of the Meuse River be declared contrary to their Treaty of 1863, and hence Belgium be ordered to cease and desist from such operation. The court refused to do this, and held that: ". . . [i]n equity, the Netherlands was in no position to have such a relief decreed to her . . .," since the Netherlands itself was then engaged in taking the same action as Belgium, in the Bosscheveld Lock, and the situation was similar both in law and in fact.[45] Again, the main issue was whether the principles of equity could be used as a principle of international law, and again the court held that, under Article 38 (2) of the Statute of the International Court of Justice, the court (or competent tribunals) was authorized to apply equity as distinguished from law.[46] The court made

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[42]See equity in: *Georges Pinson/France v. United Mexican States*, French-Mexican Claims Commission, Oct. 19th, 1928, 5 R.I.A.A. 327, 349, *et seq.*(1929).

[43]1 R.I.A.A. 307, 17 AM. J. INT'L. L. 362 (1922).

[44]1937 P.C.I.J. (ser. A/B) No. 70, at 73, 76–78 (June 28); 4 Hudson, 4 WORLD CT REP 231 (1943).

[45]*Id.*, at 233.

[46]*Id.*, at 234–235.

use of the principles of equity exclusively, without the use of, or reference to, *ex aequo et bono.*

Since the beginning of this century, the international courts and other international tribunals, have re-discovered the use and application of equity in international law. In fact, the trend in the international adjudication of boundaries and maritime dispute cases leans toward the use of equity as a method of "corrective and distributive justice," as van Dijk calls it in his article on the function of equity in international economic law.[47] Since the 1960s, we have seen a remarkable reinstatement of equity in international conflict settlement. This is evident in the notable *North Sea Continental Shelf Cases* [48] (and subsequent cases) when the court began to consider maritime disputes related to undersea boundaries in accordance with equity principles. In this famous case, the court once again faced the familiar issue of whether (*inter alia*) a decision of international law be influenced by equity principles. Here, the Netherlands and Denmark made claims that the undersea boundaries between their Continental Shelf territories and the West German territories should be determined under the principle of equidistance as provided in Article VI of the Geneva Convention of 1958. However, Germany was not a signatory to the Geneva Convention on Continental Shelves at the time. The court held that the principles of equidistance set forth by article VI of the Geneva Convention of 1958 were not

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[47]P. van Dijk, *The Nature and Function of Equity in International Economic Law*, GROTIANNA, 1987, as quoted in Sohn & Gabriel, *supra* note12, at 277.

[48]Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands, 1969 I.C.J. 3, 18 I.L.M. 340 (1969).

applicable in that instance, and the baseline delimitation was the best equitable solution under these circumstances. Hence, Germany was not entitled to any "special circumstances." Also, Germany's notion that its population and smaller coastline entitled it to a larger section of the continental shelf was not accepted by the court. Instead, the court provided its own equitable remedy based upon a baseline delimitation principle. The court also ruled that equity may be used as a rule of construction for existing international laws so that states with similar circumstances will not be subject to an unjustifiable difference in treatment.[49]

The court considered all the equity issues involved, including the definition of equity in the realm of international law, equitable principles, and the application of equitable remedies. With these cases, the court astonished the international legal community by announcing a broad intention to employ equitable principles to settle the boundary disputes. The court stated that it was doing so because it did not want to apply the doctrine of equidistance in these cases. The court chose not to apply international law, but elected instead to apply the principle of equity because use of equidistance principle in this case would have been "clearly unjust and unfair." The court preferred to adjust the law and take corrective measure through the use of equitable principles.[50]

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[49]*Id.*, at 341–343.

[50]*Id.*, at 341.

In another international undersea boundary maritime case, the *Tunisia-Lybia Continental Shelf Case*,[51] the court also elected to use equity to resolve and settle the conflict. The court stated:

> [The] application of equitable principles is to be distinguished from a decision ex aequo et bono. The court can take such a decision only on condition that the parties agree (Article 38., para. 2 of the (ICJ) Statute, and the court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result . . . Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf. It is thus stated that boundary is to be delimited on the basis of equitable principles.[52]

In other words, the court deliberately and boldly stated that there is an abstract (legal) rule of equitable principles, that multiple factors are indeed pertinent to the boundary delimitation, and that all relevant issues are to be considered in order to bring about an equitable settlement result. The court and all international tribunals should have a certain amount of imagination and judicial creativity. All courts must have the freedom and discretion to decide what principles should apply in a particular case and which are irrelevant. When the court decides upon the proper and relevant principle, then definite results or consequences can be determined from it and followed thereafter. This line of reasoning allows the court to select the applicable principles and rules of law and equity

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[51]Tunisia -Lybia Continental Shelf Case (Tunisia v. Lybia) 1982 I.C.J. as discussed in Sohn & Gabriel, *supra* note12, at 286.

[52]*Id., see also* the Aegean Sea Continental Shelf Case (Greece v. Turkey), 1976 I.C.J. 3.

so that the conflict of interests can be balanced and/or reconciled and dispute settlement and resolution accomplished. This implied license can be a useful device in international conflict resolution and dispute settlement today. The courts have the amplitude to move from the rigid, harsh application of legal rules and a transnational legal system toward a process more in harmony with our times.

Many jurists, publicists, and scholars of international law reject or restrict, in part or in whole, the use of equity international law for miscellaneous reasons. One of the main notable concern held by some jurists is a fear of a central world court with too much power to make new laws. They are extremely concerned and vigilant of any central judicial judicial or legislative control, *ex abundanti cautela*, or excessively cautious. Others believe that equity cannot truly be a jurisdictional part of international law due to the various interpretations of the concept of equity by some nations and cultures. Yet others are concerned about the application and enforcement of equitable principles. For centuries, scholars have considered equity an integral part of international law. In fact, *ex aequo et bono* was never mentioned prior to the 19th century—only equity. In most treaties written in the nineteenth century, and some which were relied upon by Pound's reasoning in the *Cayuga Indians Case*, no reference was ever made *to ex aequo et bono*, but rather to "international law and equity and justice, fairness, and equity." It was upon this premise that Pound decided that an international arbitral tribunal should always apply the principles of law and equity in international law where it is not clearly specified it should not do so.

Whether an arbitrator or judge in an international tribunal may refer to equity (*or ex aequo et bono*) without express authorization of the parties poses an interesting challenge to international legal scholars. The court should have the ability to apply equity and equitable principles as a matter of duty and judicial discretion. Ideally, using equity is the ultimate expression of the most justiciable and fair resolution as a matter of duty, and the primary function of any court, anywhere. Equitable resolution of any dispute, *de jure* or *de facto*, should be the most desired result in the application of international law and equity, if an international legal order is to function fairly and pragmatically. To do less would cause nation-states to loose confidence in the international system of justice. This loss of confidence has already occurred, and is the underlying cause of the decay of legal order in our world.

Judge Manley O. Hudson wrote an opinion of the *Diversion of Water From the Meuse* case of 1937. In this document he discussed infra and expressed that the court may refer to equity even if the parties have not authorized it to decide *ex aequo et bono*:

> What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they often have been applied by international tribunals . . . The court has not been expressly authorized by its Statute to apply equity as distinguished from law . . . Article 38 of the Statute expressly directs the application of 'general principles of law recognized by civilized nations', and in more than one nation principles of equity have an established place in the legal system. The court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it to decide a case ex aequo et bono, if the parties agree thereto . . . It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the court has some freedom to consider principles of equity as part of the international law which it must apply . . .[53]

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[53]Sohn & Gabriel, *supra* note 12, at 290.

The trend toward an expanded use of equity principles is occurring not only in the case law of international arbitral tribunals and the ICJ, but also in the codification of international law and other positive legal rules. Although current international agreements also embody many equitable principles, most of the codification towards international law, either municipally or internationally, has mainly occurred in the form of treaty. For instance, ***The Law of the Sea Convention***, Chapter 16, provides for some basic terms that broadly rest upon solid equitable principles. Sohn remarks that although these were added at the last minute, 160 countries accepted and signed the agreement "without a murmur," thus crystallizing further the acceptance of equitable principles as a part of the sources found in international law and importing those rules into the jurisprudence of the court.[54] The court has currently developed a body of law of generally accepted international legal principles, some of which can be safely termed "equity," and others, strictly legal.

It is worth reemphasizing the point that equity, as a body of western legal thought, and *ex aequo et bono*, as a still larger body of legal and quasi-legal concepts, are firmly rooted in Roman law. Roman jurispudence, wrote Henry Summer Maine, ". . . has the longest known history of any set of human institutions," and knowledge of Roman law has been persistently used as a measuring yard of succcessful societies. He calls it, ". . . the indispensible condition of success" for any society.[55] Even the Anglo-American

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[54]*Id.*

[55]HENRY S. MAINE, ANCIENT LAW, 22–32 (Raymond Firth, ed., 1963).

version of equity as developed by the English chancery court is still implanted in Roman jurisprudence since it evolved from the Roman-Canon law and the Ecclesiastical legal system. Grotius not only borrowed heavily from from natural law, but also from Roman legal principles and Roman equity jurisprudence as well, in order to further develop the principles of international law. He recognized that equity was instinctive and substantively inseparable from any legal structure under international law, but there is still more evidence that indicates this to be a legitimate proposition.

Aside from the Law of the Sea Convention, other international treaties and agreements make reference to equity or equitable principles; for example, Article 11(7) of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979),[56] Article 33(2) in the International Telecommunication Convention (1973), the Article 44(3)(C) of the Vienna Convention on the Law of Treaties (1969),[57] and Part V of the Helsinki Declaration on Principles Guiding Relations Between Participating States in the Conference on Security and Cooperation in Europe (1975).[58] Reference to equity not only appears in international agreements and treaties, but also in many other significant non-binding texts, such as the Helsinki Rules drafted by the International Law Association on the Uses of the Waters of International Rivers, Articles 4–8 (1966), the UN General Assembly Declaration on the Establishment of a New

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[56] 18 I.L.M. 1434 (1979).

[57] 8 I.L.M. 679 (1969).

[58] 14 I.L.M. 1293 (1975).

Economic Order (1974),[59] and the related texts, Programme of Action and the Charter of Economic Rights and Duties of States (1975).[60]

Many other cases have been decided by international tribunals specifically on the basis of equity in recent years. The *U.S. v. Canada in the Gulf of Maine Delimitation Case,*[61] and the *Libya v. Malta, Continental Shelf Case*[62] are the best known recent applications of equity in international disputes.

International organizations and tribunals are increasing the use of equity as part of international law, whether as part of generally accepted principles or as part of customary law. This is evident not only by the case law and the jurisprudence of international courts, but also by the inclusion of equity into international positive norms. Equity is expanding beyond its traditional use in settling boundary, natural resource, and economic disputes; its use could be extended to international commercial, political, and social disputes as well. *Ex aeque et bono* is an integrated part of equity, and not equity per se. *Ex aeque et bono* should be applied as an equitable remedy, but not as a substitute for equity. *Ex aequo et bono* is an applicable instrument contained within equity.

According toWilliam Blackstone[63] as well as Henry Summer Maine,[64] *ex aequo et bono* is equity. The phrase, *ex aequo et boni,* is derived from the Roman civil law (*Jus*

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[59]13 I.L.M. 715 (1974).

[60]14 ILM 251 (1975).

[61]Canada v. United States, 1982 I.C.J.

[62]Libya v. Malta, 1985 I.C.J.

[63]3 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND *163.

[64]Maine, *supra* note 55, at 44.

Civile) is a part of natural law (*Jus Naturale*), and its ordinances are considered to be governed by natural equity (*Naturalis Aequitas*), as well as by natural reason. The Romans described their legal system as deriving from and consisting of two main ingredients: (1) the civil law, or the law which a people enact (domestic law), and (2) the law common to all nations (*Jus Gentium*), that is, the Law of Nations. According to the "Institutions" of the Emperor Justinian, "All nations who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws that are common to mankind. The law which a people enact is called the civil law, but that [law] which natural reason appoints for all mankind, is called the Law of Nations, because all nations use it."[65] This part of the law, applicable to all nations through natural reason, was presumed to be executed by Roman Praetor as an undivided part of Roman jurisprudence.

Therefore we can deduce that equity is, and has always been, a "natural" part of international law because it has derived directly from it. A close examination of Roman law and equity principles show that Romans may have indeed formed the foundations for modern international law theories. An analysis of the words used in the "Institutes" of the Emperor Justinian reveals that the definition of *Jus Gentium* is very similar to the wording found under Article 38, Sections 1 and 2 of the ICJ Statute of 1945 under the auspices of the UN and its predecessor, the Statute of the PCIJ of 1920 of the League of Nations. *Jus Gentium* (defined a bit more broadly than just the laws for the combined

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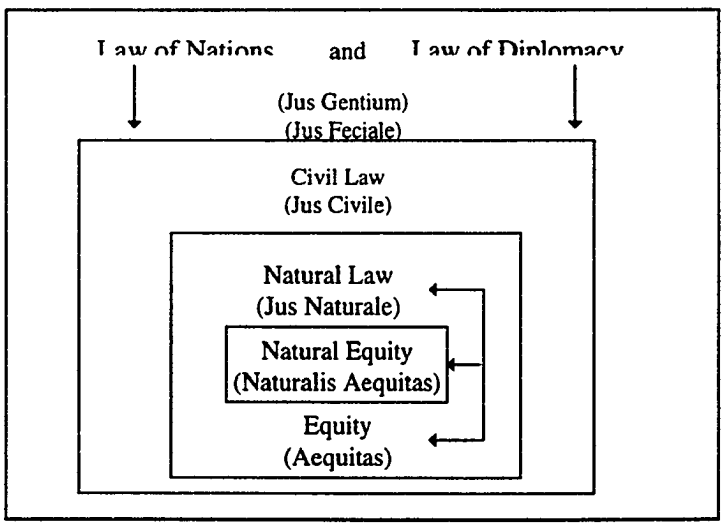
[65] *Id.*, at 44–46.

nations and tribes of Italy), together with the concept of *Jus Feciale* (the Roman law of negotiation and diplomacy), was responsible for the development of *Jus Cogens* (the peremptory rules or norms of international law) which is universally accepted by all nation-states as natural, and the foundation of the international sources and rule of law in our modern day.

Figure 2.2 describes how equity (in the Western legal tradition) forms an integral part of international law from its foundation, beginning with concepts of natural justice, and progressing toward the development of the law of nations. This is the main reason why principles of equity must extend to all areas of conflict settlement and dispute resolution in international law. Although equity has always followed the law, there may be times when the law may have to either follow equity, or even work in concurrent jurisdiction with equity in order to work toward positive dispute settlement.

Figure 2.2: Development of Modern International Law from the Roman Law Concept of Natural Equity



Besides the courts and tribunals, many international publicists, scholars and lawyers have begun to support equity as a comprehensive part of international law. Merignac, one of the best known international publicist on the last century, in his 1895 treatise on international law, explains that "what are widely know 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."[66] The international jurist Lammasch stated that arbitrators and tribunals should "decide in accordance with equity, *ex aequo et bono*, when positive rules of law are lacking."[67]

Finally, in the *U.S. - Norway Arbitration Award Case* (1922), there is a very significant statement which underlines the true, and perhaps, the more modern and forward looking definition of international law and equity:

> The majority of international lawyers seem to agree that these words [law, equity, ex aequo et bono] are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.[68]

These generally accepted principles of lawfulness are, or should be, comprehensible to people of all nations, even if the meaning of the term law differs among cultures. Even the meaning of the term *law* differs immensely between legal

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[66]P. MERIGNAC, TRAITE THEORIQUE ET PRACTIQUE DE'L ARBITRAGE INTRENATIONALE 295 (1895), *see also* RALSTON, LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 53–57 (rev. ed. 1926).

[67]BISHOP, *supra* note 21, at 54. As cited by Bishop from the Cayuga Indians Case in 1926.

[68]R.I.A.A. 307, 17 AM J. INT'L L. 362, 384 (1922); *see also* Judge Hudson's opinion, *supra*, in the case of the Diversion of Water from the Meuse Case (1937) in Lapidoth, *supra* note 19, at 141–142.

between cultures. For example, for most common law countries, law defines a set of rules and codes or a legal system. The term *right* implies a different perspective toward the application of legal rules, and the relationship between the law and an individual. This is true of most civilian countries and non-Western jurisdictions. The French word *droit* means "rights" and includes a broader meaning than that of the English word law, which is generally used to depict an aggregate set of rules of law. In Spanish, the word *derecho* pertains to rights and obligations as well as jurisprudence; whereas *ley*, or literally law, is meant to define the legal system and a code or body of law. The German word *recht* is similar to the Spanish concept of *derecho*, or rights. These countries see the law as a matter of rights, and the advocacy of those rights under the law (or *loi* in French). That is why legal professionals in those civilian countries are called "advocates," or *abogados* in Spanish, *avocat* in French, *advogado* in Portuguese, *rechtsanwalt* in German, etc.

These lawyers see themselves as advocates for peoples' rights under the law. In common law countries, legal professionals are called "lawyers," not advocates, and they favor the application of rules to facts, not necessarily rights, although this does occur in the common law system as well. In common law countries we see the law as a matter of application of rules to individual cases; in other non-common law jurisdictions "lawyering" becomes a matter of discerning duties, obligations, and rights and advocating them under the law. These dissimilar perspectives are innate within the legal systems; one is code based, while the other is law or precedent based; the former is deductive and inquisitorial, while the latter is inductive and adversarial. Thus, when we apply general

principles of law that are accepted by civilized nations as Article 38 provides, we must be clear about what we mean by universal law—equity included.

4. A Novel Application of Equity in International Law: An Introduction to NeoAequitas

Equity regards substance rather than forms.

A. The Substance

NeoAequitas is a method of applying equity in international law and a new type of chancery jurisdiction with conscience. International tribunals utilize equity principles to provide a machinery or process of dispute resolution that balances the interests of conflicting parties in the interest of encouraging world peace and global security. This system of dispute resolution uses the principles found in equity jurisprudence, natural law, and ethics to synergize conflict management, dispute settlement, and resolution. This approach goes well beyond the compromise *(compromis)* because it focuses upon a win/win solution. This is the type of outcome which the needs and goals of all parties involved in a conflict have been met and satisfied, in as much as possible. *NeoAequitas* is also an interdisciplinary system of dispute settlement which is extra-legal. The universal concepts of fairness, ethics, and justice, together with other cultural and municipal principles, relieve tension between parties, install constructive dialogue, begin the negotiation process in stages, and then move toward a resolution.

In the past, we had equitable principles, but we lacked the will and commitment to fully employ them, as evidenced by the resistance of some globalists—from jurists and lawyers, to political leaders and diplomats. We replaced equity with *ex aequo et bono* with the intent that equitable principles would be applicable only when all parties requested the tribunal for it. Since all parties agree, neither the Permanent Court of

International Justice, nor the International Court of Justice have actually been called upon to render a decision *ex aequo et bono* or in equity.[69] If one of the parties wants an equitable decision and the other does not, the principles of equity will not be used in the decision-making process.

This can become a colossal burden for parties seeking justice and fairness, rather than a mechanical or robotic application of law, ideology, political, or economic compromise. This decision of whether to apply law or equity should be left to the discretion of the tribunal, as they are in the best position to ascertain the facts and circumstances of the dispute. Curiously, most of the world has fused law and equity. Although, some legal scholars refuse to accept this concoction of "hybrid" legal and equitable principles, believing that such a fusion is impossible.[70] Equitable relief is usually given upon the discretion of the court on such terms as the court sees fit. This gives the court considerable freedom to maneuver.[71]

Equity, as a body of jurisprudence, is qualified and competent to establish rules and determine the settlement of conflicts in international affairs. Equity is equipped with rules, ethics, and concepts of natural law and justice, *and* the flexibility to effectively solve international disputes. As long as equity remains adaptable and pliable, and as long as it avoids rigidity, it can be the *corpus* of jurisprudence, offering equality, good faith, integrity, and extraordinary relief for demanding situations. With a few modifications of

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[69]BISHOP, *supra* note 21 at 58.

[70]GLANVILLE WILLIAMS, LEARNING THE LAW, 27 (11th ed. 1982).

[71]KIRALFY, *supra* note 1, at 72.

the equity principles of old, we can reacquaint ourselves with our ethical duties and promote the ideal of justice with responsibility.

Just as we redefined our political, social, and economic conditions, so can we redefine our legal and equitable conditions to suit this epoch. Herein lies the sum and substance of *NeoAequitas*; it is a systematic approach to conflict resolution in international law which includes both the substance of equity and the modern qualitative use of present day quantitative strategies. *NeoAequitas* seeks to blend equitable (and legal) principles and processes with contemporary scientific methods of conflict and dispute resolution. This process is impartial, objective, and open to negotiation and diplomacy. Most importantly, *NeoAequitas* seeks to understand and ameliorate (not punish), to deal with all nations and all parties in good faith, and to place justice, fairness, and equality in the forefront of all proceedings and end designs.

Equity is unique because it rose out of the inadequacies of other legal systems, (i.e., civil law, the common law, and ecclesiastical or canon law). Most legal systems were paralleled with a competitive body of jurisprudence which rivaled the strict systems of law. This is true of Greek, Roman, and Anglo-Norman legal systems, and other Western systems as well. This dualism has existed throughout the ages, and in Western and Eastern legal structures and traditions. However, equity has always recognized those interests that strict and mechanical systems of law have rejected. The strategy of equity fills the gaps created by harsh, mechanical legal rules. Equity emerged because parties wanted fairness; they wanted justice. Equity sought to alleviate the technical injustices of the common law and other austere forms of law. Kiralfy states that " [e]quitable

principles reflect a philosophical or moral approach, and it is significant that 'reason' and 'conscience' were at first more common expressions than the word 'equity'"[72]

Equity is flexible enough to weigh all factors. It is influenced by an ideological combination of political, social, cultural, religious, and legal teachings, rather than a bifurcated combination of these. International relations are complex because humanity is complex. Cultural perspectives towards morality, laws, religion, social classes, politics, ideology and economic capacity and ability are not uniform; in fact, they will never be uniform. Conflict among nations is as natural as conflict among humans; so we need progressive, responsive systems of law and jurisprudence that are up to the task of properly resolving them. The more reasonable and flexible our systems of dispute resolution are, the better our understanding will be of one another, both individually and socially. We need a comprehensive system that seeks to understand and to be understood. The better the system, the safer our world will be.

Long ago, thinkers, such as Aristotle, Thomas Aquinas and John Locke, informed us that natural law was a part of humanity because it was founded upon human nature. They told us that natural inclinations towards specific modes of behavior were fixed because human nature has certain fixed features, and the rules of behavior that correspond to these features of humanity are called *natural law*. Natural law is then plainly, natural to humanity. The ideas of natural justice and equity, which are an integral part of the natural law, are also a part of us.[73] In other words, natural law is founded upon the

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[72]*Id.*

natural inclinations of humanity and those same rules of behavior were established because human nature has certain fixed amenities. Hence, humanity is certainly a part of the *schema* of natural things, which is a part of natural law, and in turn, is part of that idea of natural justice that is equity (see Fig. 2.2). We require a system of jurisprudence that reflects our human nature, our complexity, and our weaknesses and strengths. That system must take into full consideration our natural diversity including our religious, political, cultural, economic and ideological convictions, as individuals, as communities, and as nations. As previously discussed, equity was applied successfully a number of times in international law, and hence its principles and jurisdiction ought to be extended to include most international disputes and conflicts. Equity, when applied within the realm of positive norms and customary law in international law, becomes a most efficient and impartial method of settling disputes in areas where care and tact must be employed in order to preserve the delicate balance of relations among nations and international organizations. Although it is not possible within the context of this work to outline all the positive contributions that the application of equity has made to the pacific settlements of disputes in international law, Oscar Schacter has identified the five main uses for which equity is suited for application in international law:

1. Equity as a basis for "individualized" justice tempering the rigors of strict law
2. Equity as a consideration of fairness, reasonableness and good faith

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[73]SAMUEL E. STUMPF, ELEMENTS OF PHILOSOPHY: AN INTRODUCTION, 172–174 (3d ed. 1993). See, generally, THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 55, 105 (Dino Bigongiari, ed., 1953).

3. Equity as a basis for certain specific principles of legal reasoning associated with fairness and reasonableness: to wit, estoppel, unjust enrichment, and abuse of rights
4. Equitable standards for the allocation and sharing of resources and benefits
5. Equity as a broad synonym for distributive justice used to justify demands for economic and social arrangements and redistribution of wealth. [74]

This broad and substantive application of equity, combined with the procedural steps to be introduced in later chapters, could open the door for a new era of managed conflicts and disputes in which all parties can, in good faith and good conscience, resolve and settle their differences. This may not be accomplished by compulsory positive rules alone, but must accompany a system of norms specifically determined for this purpose.

Charles de Visseher believes that international justice can best be achieved by combining law and equity. He sees equity as "the search for an equilibrium between the interests and powers of the parties, in the doctrine of abuse of rights.[75]

The concepts of *progressive* and *responsive* jurisprudence are the gist of the system called *NeoAequitas*. Today, international law has become almost static. The traditional methods of conflict and dispute resolution are at a standstill. Power and influence in all realms of the international community are wielded by a few privileged nations that have great economic or political influence and control, or both. This in turn,

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[74]Lapidoth, *supra* note19, at 145.

[75]*Id.*, at 145.

is transformed into vast transnational social advantage and dominance. By clinging to the *ancien regime,* or the antiquated and decaying socio-political, socio-economic, and socio-legal system of dispute resolution, we relinquish control to a powerful few, a minority of nations which at times confuse leadership with intimidation and force.

The framework of the international legal (and political) system should be transformed to resemble our UN Charter; that is the international constitution that embodies the spirit of international cooperation. This is what is meant by progressive jurisprudence. Roscoe Pound once said: "The law must be stable, but it must never stand still."[76] He also stated in his celebrated article entitled "Mechanical Jurisprudence," that:

> In periods of legal development through juristic speculation and judicial decision, we have a jurisprudence of ends in fact, even if in form it is a jurisprudence of conceptions. The Roman Jus Gentium was worked out for concrete causes and the conceptions were later generalizations from its results. The Jus Naturale was a system of reaching reasonable ends by bringing philosophical theory into the scale against the hard and fast rules of antiquity. The development of equity in England was attained by a method of seeking results in concrete causes . . . Whenever such a period [of growth] comes to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined . Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly. [77]

Written in 1908, this article is significant because it criticizes the blind application of legal rules and principles without regard or reference to the consequences in the twentieth century or any other future society.

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[76]THE OXFORD LAWYER'S QUOTATION BOOK: A LEGAL COMPANION 39 (John Reay-Smith, ed. 1991).

[77]Roscoe Pound, *Mechanichal Jurisprudence*, 8 COLUM. L. REV. 605 (1908); article appeared in LANDMARKS OF LAW 106 (Ray D. Henson ed. 1960).

This form of jurisprudence is termed responsive, because it endeavors to meet the needs of the parties involved and addresses the inadequacy or insufficiency of the present structure of dispute resolution where it has left a void, either by law, diplomacy, or other measure. It offers instead a competent jurisprudence based upon fairness, and one that helps define the containing public interest and benefit. This type of jurisprudence is committed totally to the "achievement of substantive justice."[78]

In recent years, modern legal theorists have been quite preoccupied with the concept of responsive law. Responsive jurisprudence is responsible and selective. It is not open and weak, but discriminate in adaptation. It endeavors to retain integrity while taking into account new forces in its environment, and their impact; "it perceives social pressures as sources of knowledge and opportunities for self correction."[79] This is responsive jurisprudence; it is an essential prerequisite of any free and democratic society, a system of principles which is good simply because it offers something beyond procedural justice. This responsive jurisprudence (and law) is at the nucleus of *naturale aequitas*, or natural equity and law. In the days of the Roman Republic, or the classical era of Roman Law, there were the *Five Basic Principles of the Laws of the Republic,* which were foremost in the minds of jurists, senators and lawyers of that day. These principles are explained by the notable Spanish jurist, Juan De Churruca, who is affiliated

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[78]PHILLIPE NONET AND PHILLIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARDS RESPONSIVE LAW 73–74 (1978).

[79]*Id.*, at 77.

with one of the best known centers for the study of Roman law in the world. These basic Principles were:

1. *Libertas*, or that of individual freedom or liberty, which was important in all areas of public and private life including trade and commerce
2. *Fides,* or the socio-ethical concept of *good faith and fidelity,* or trust, faith, and reliance upon honesty in promises and dealings, etc.
3. *Utilitas*, or utility, that which is beneficial and practical, as well as useful in reality
4. *Aequitas*, or equity, which was used to relieve the harshness of strict law and given as clemency *(pietas)*; it was also the conscience of the ideal concept of justice in all legal proceedings and used in individual business transactions by citizens
5. *Humanitas,* or the ideal of human nature with compassion and natural humane dignity with culture and kindness toward others.[80]

This actually was well practiced during Cicero's time, as he referred to it intensively. These are also the basic principles, or virtues, upon which *NeoAequitas* is founded. These principles, are unconditional if our global society is to respect the unique characteristics of each nation-state who becomes a party in a dispute. From a tolerant, unbiased perspective we can assess conflicts objectively and resolve transnational crises.

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[80]JUAN DE CHURRUCA AND ROSA MENTXAKA, INTRODUCCION HISTORICA AL DERECHO ROMANO (*Historical Introduction to Roman Jurisprudence*) 169–171 (6th ed. 1992).

Figure 2.3 NeoAequitas as an equitable system of dispute resolution. The process of integration into international law and equity scheme

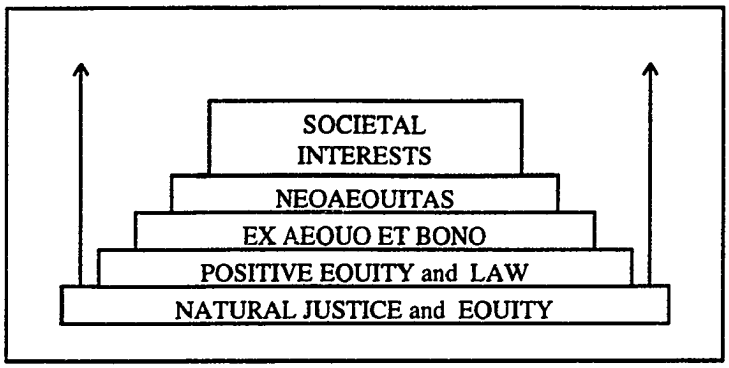

Figure 2.3 illustrates how *NeoAequitas* integrates into an equitable system of solving international disputes. When the law and the legal system stops being progressive and responsive, it then becomes rigid, mechanical, and thoughtless. It becomes "repressive"; this has been called "congealed justice."[81] Congealed justice means that the simple existence of law, legal rules, and a legal system does not guarantee fairness, in substance and procedure, in an equitable setting.

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[81]HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES OF LAW AND ORDER, 4–5 (1968).

B. The Procedure

In most countries, courts have been delegated the authority (statute or *fiat*) and some discretion to decide cases on the basis of legal or equitable principles, or both; such is the case in Canada, U.S., Britain, Australia, India, Germany, etc. This is not the case in international law. Obviously the parties must agree upon the election of the remedy. This then binds the hands and the conscience of the international tribunal to either apply equitable principles when it is not called for, or worse, not to apply it when it is relevant and the best form of relief and settlement. This has been the procedure for years.

We had the principles, and we even had the willingness at times to apply them, but we did not have the proper procedure to enact or apply these equitable principles. We have lacked the machinery that would put equitable principles into place, rather than apply *ex aequo et bono* by international tribunals. Equity, like any other legal principle, must have its own machinery. The process allows for the application of all substantive principles, and to have substance with no process or form for application amounts to little more than an empty exercise of the intellect and theory. Just as all substance must have form, all form must have substance.

In the law and with legal systems much is the same. Legal theories and principles of jurisprudence must find a fixed and practical method of utilization. Theories, concepts, and impressions must have a definite structure of application in order to incorporate the idea with the reality, i.e., the expression. Therefore, all (legal) notions must have an exclusive process of application. That is the task of procedural or adjectival law. Without the ideals of the scholars, thinkers and the learned, it would never find its

way to the ultimate users and beneficiaries: our society. Substantive law is the foundation of any society; it will establish the rights, duties, liberties, power and authority of a people. Adjectival (or procedural) law correlates to the enforcement, and even the administration of those rights and duties, specially with the concerns of process, procedure and evidentiary matters.[82] This is the machinery of the law.

NeoAequitas is the contemporary device that provides for the scientific application of equitable principles, modern systems analysis, and scientific approach to conflict and dispute settlement in international law. Some international jurists, scholars, and lawyers either reject altogether the notion of equity in international law or they partly refuse it, and apply a distilled version of equity application called *ex aequo et bono*. This may be because the proper procedure of "how" to apply equity may be missing and hence, not clear to those involved in the process. On procedural and substantive application of equity in international law, Sohn explains that it is much easier for lawyers and jurists to accept a principle if it is a procedural one; substantive principles clearly present more of a problem. Courts, like lawyers, find it easier to apply the general rules of procedure of civilized nations.[83]

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[82]Williams, *supra* note 70, at 19–20.

[83]Sohn & Gabriel, *supra* note 12, at 37–38.

Figure 2.4: NeoAequitas Systems Analysis Application in International Law

Employing equitable principles through the process of Neo Aequitas in Conflict Settlement and Dispute Resolution using the Balance of Interests as End Goal

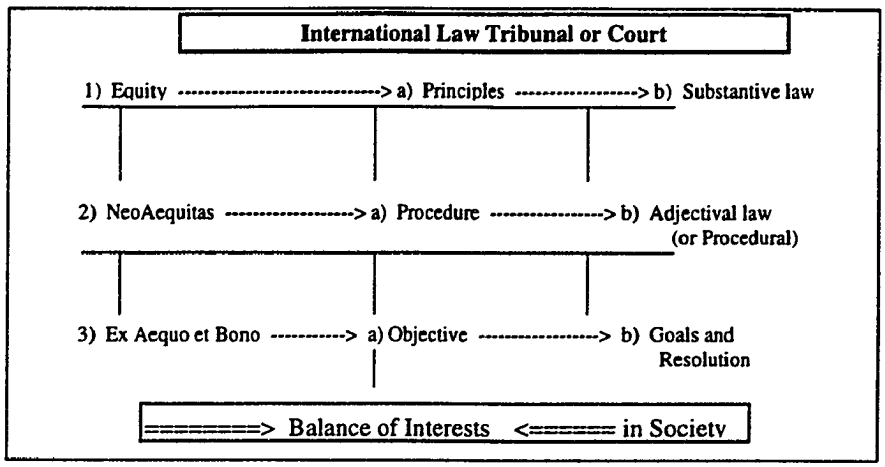

Figure 2.4 demonstrates how *NeoAequitas* works to directly apply equitable principles. This illustrates that one may balance the interests of the parties in conflict, the principles of equity, with the procedural (conflict resolution methods) in NeoAequitas, and holding the positive norm ideal contained in *ex aequo et bono* as the objective, the parties may arrive at an agreed fair and equitable settlement, a type of win/ win. In other words, by employing the concepts of equity, and *NeoAequitas* as its system or procedure, practical applications of equitable principles can be readily utilized. In the next chapter, the conflict settlement and dispute resolution process under *NeoAequitas* shall be discussed in depth.

CHAPTER 3

ROOTS OF CONFLICTS AND DISPUTES IN INTERNATIONAL LAW

Equality is equity.

1. Conflict Analysis: Competing, Conflicting, and Protecting Interests

The key to successfully resolving *disputes* in international law lies in designing the most suitable structural model based upon a system analysis of the conflict, the dispute, and the resolution. Such an analysis must be tailored for, and accommodate the complexities of, the particular the situation. The situation should not be expected to fit a specific structure. The same resolution formulae will not work for all disputes. Using *NeoAequitas* and the principles of equity as a foundation, and then adding to it a multidisciplinary and scientific model of integrated dispute resolution, a responsive and progressive analysis of the conflict and can be built.

First, the best method for solving the dispute must be determined; but regardless of the method, an analysis of the conflict and the potential dispute must be carried out. The differences between conflict and dispute must be understood in order to carry out an effective management system for each independently. To evaluate the causes and implications of the crisis, we must determine to what stage the situation has progressed—is it a conflict or a dispute. With a complete, accurate, and objective assessment of the

situation, a system can be designed to control the damage, contain the conflict, and move toward a resolution.

Strictly speaking, a *conflict* is a competitive or opposing action of incompatible positions. It is an antagonistic state or action of divergent ideas, interests, or persons.[1] A conflict is a stance or position against a certain idea or interest. But the conflict is not the dispute. Parties could disagree and even have conflicting and opposing views on certain issues, ideas, or interests, but this does not mean that a dispute will arise. However, when two or more parties make mutually exclusive claims or assertions on the same interests, albeit in resources, land, population, self-determination, rights, or positions, a conflict exists and, unless carefully managed, may give rise to a dispute.

A dispute may or may not follow a conflict. A *dispute*, according to Webster's dictionary, means "to engage in an argument or discussion; to debate or call into question; a verbal struggle or controversy."[2] A debate may, or may not, end in conflict. When a conflict arises it may, or may not, lead to dispute. In rare circumstances, a conflict and dispute arise simultaneously, but usually conflicts result in disputes. Refer to Figure 3.1:

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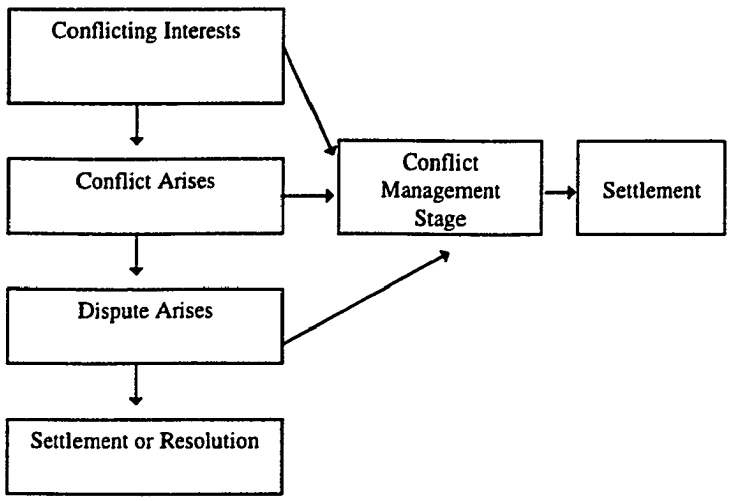
[1]Webster's Ninth Collegiate Dictionary, s.v. "Conflict" and "Dispute."

[2]*Id.*

Figure 3.1: Escalating Model Describing the Rise From Conflicting Interests to Dispute



We must be careful not to prematurely turn a conflict into a dispute. The conflict stage and dispute stage should be managed independently to avoid confusing one with the other, otherwise a dispute may develop when one was not necessarily at hand. An accurate evaluation is important to identify the stage to which the situation has progressed. The *assessment* and *evaluation* of the situation must be a well-designed process in itself.

Most scholars and jurists following a scientific model of conflict and dispute resolution agree that there are three main components in the resolution of disputes: (1) rights; (2) interests; and (3) power.[3] Hence, conflicts and disputes are usually resolved on

[3]WILLIAM L. URI, ET AL., GETTING DISPUTES RESOLVED, 4–5 (1988). The application of this analysis is modified, and varies in the use of NeoAequitas. When employing equitable principles, the balance of the interests will take precedence over reconciling the interests, and *rights* is used within the legal context of determination.

the basis of who is right, the balancing of conflicting interests, and who is the most powerful party. When our interests are at stake, we seek to protect and secure them. Certain criteria indicate what can lead to a positive, fair, and equitable conclusion in a conflict. These criteria may be considered rules and/or rights.

The principle of rights should be examined first. This is remarkable because the Roman-Civilian idea of operational jurisprudence work at determining rights of (opposing) parties. In Roman-Spanish legal tradition, this is called *derecho.* A practitioner does not practice "law," but rather, *derecho* or "rights." In German, this is called *recht,* and, as in the Roman-Germanic legal tradition, the practitioner is called a *rechtsanwalt*, or someone who works with rights, literally. However, in Roman law, the proper term for law is *lex* (*legem*, in plural) which means "rule," whereas, the proper term is *rectus* or *jus,* or even *aequus,* which means "rights." Literally speaking, the Anglo-American legal tradition is more concerned with the application of law as "rules," so we call practitioners *lawyers*. Whereas, in the Roman-Civilian tradition, the main concern is with rights and advocacy, so practitioners are called *advocates*, or *abogado* in Spanish, and *avocat* in French.

All parties have certain rights before the law and tribunals, and also before the natural scheme or order of things. Parties have certain rights that are both *substantive* and *procedural* in nature. Substantive rights can only be suspended by the force of edict in despotism, tyranny, or autocracy, but they cannot be rescinded because they are natural to humanity. They are indivisible with humanity. These natural rights are a great part of natural law, or natural justice, *Jus Naturale*, (see supra, Chapter 2). Procedural rights, on

the other hand, can be revoked almost entirely since they are a part of the legal machinery of a government. When a government decides to circumvent the *due process of the law,* these rights suffer greatly. This type of action leads to rule by the will of the potentate, bringing about law by political control and decree, without any sense of substantive justice or rules. The determination of rights is not a simple process, since these are seldom indisputable and certain. Determining the rights of each party—what rights are common and what are in conflict, what rights are implicated, and who is within their own rights—is important in conflict and dispute resolution, but caution should be added because, if used alone, this type of declaratory adjudication may lead to other types of confrontation. Without a supporting system that determines or assigns rights and balances interests, this style of conflict settlement may intensify conflict and lead to a dispute.

Second, the notion of interests should be examined. In our society, protecting the interests of a particular segment of the population is essential. According to democratic principles, the interests of all the stakeholders, participants, and beneficiaries of any society or community are to be considered, respected, and observed. The same is true in the realm of international relations. Since ancient times, when the interests of diverse groups or nations coincide and are *compatible* with one another, there is unity among those who have those commonalties, or *(C1) I = U/C.* Common interests of a particular group is symbolized by *C1 I,* whereas *U/Syn* stands for *Unity and Synthesis.* This indicates a common cause, a communal stance of support which promotes harmony and cooperation among groups. On the other hand, when these same interests compete, there

is disunity, then antagonism, followed by hostility. Hence, *competing interests* bring about *conflict* among diverse groups, or *(C2) I = C*. In this equation, *C2 I* symbolizes *conflicting interests* and *C* stands for *conflict.* Intensity plays an important part in these elements; thus, if one can intensify *CII* > common interests, the unity will become even stronger: *CII* > = *U/Syn (+),* when diminishing the intensity of the common interests, those interests become increasingly competitive and result in conflict or *(C),* hence, *CII* < + *U/Syn(-) = C(+).* Therefore, the more distant the commonalties of compatibility of interests, the more competitive those interests appear to be and, if left unmanaged, conflict will eventually end in dispute. In sum:

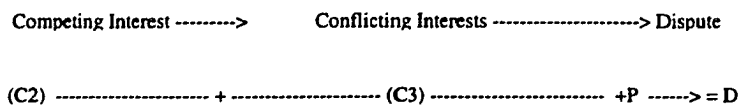
a) *competing interests* or *(C2),* bring about *conflict,* or *C;* thus, *(C2) I = C*

b) *conflicting interests* or *(C3),* in turn gives rise to a dispute, or *D,* hence, *(C3) I = D,* but only when we attempt to secure or protect those interests, or *P.*

Therefore, *(C2) I = C, + (C3) I + P = D,* is the symbolic representation of the core of any conflict analysis. This theorem can measure the elements that comprise a conflict. Once these elements are established, one can decide whether the conflict has intensified to a dispute.

This is what Figure 3.2 demonstrates. If a conflict is not well managed, regulated, or controlled , it will most likely result in a dispute. The dispute can take the form of dialogue, argument, or debate, or it may even intensify into aggression.

Figure 3.2: Interest Base Analysis for Conflict Management



All nations hold certain interests in high priority, some almost sacrosanct. National leaders and political ideologues may believe that *core or primary interests* may not be compromised under any circumstances, and should be protected. In order to conduct an accurate internal assessment of the situation that led to the conflict, the significance of each conflicting interest must be determined. The intervening party must have a good idea of just how critical the situation truly is. *Secondary interests,* although not held as the party's highest priority, may be used as bargaining chips when negotiating settlements. Primary and secondary interests vary with each party and each culture. Their significance is usually imbedded in ideological and cultural perspectives.

When employing equitable principles, the final objective in conflict settlement and dispute resolution is the (equitable) *balance of interests.* The primary goal of *NeoAequitas* is to promote an equitable balance of interests toward a pacific, legitimate resolution of the controversy. A balance-of-interest-directed system analysis of conflict and dispute resolution should always be the goal when employing equitable principles as the foundation to solving conflicts and settling disputes. A balance of interests is likely to occur when a resolution addresses all major concerns of all parties and assigns priorities

with all the stakeholders in mind. A win/win solution is created—not compromise *(compromis).* All parties must triumph to be satisfied with the results.

Professor Bing Cheng suggests a more comprehensive image of international justice and equity: "The essence of justice consists in the proper balance of interests of the parties." He asserts *ulpians dictum* in that justice consists in the "constant and preserving will to give everyone that to which he has right" (*Justicia est constans et perpetua voluntas jus suum crique tribuendi).*[4] He further explains that this end is achieved:

"By making each one bear the consequences of his own wrong or negligence by allowing everyone to exercise his rights, by restoring to everyone losses which he has unjustly suffered, and by making everyone return that which he has unjustly acquired. Justice is achieved, moreover, by holding a proper balance between the parties when, in accordance with general principles of law, international law forbids excesses in the carrying out of acts of legitimate self-defense and self-help, prohibits the abusive exercise of rights, safeguards the wrongdoer from liability for losses which he has not caused or from paying the same loss twice over, and limits the duty of returning any benefit received without cause to the actual enrichment."[5]

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[4] Sohn & Gabriel, *Equity in International Law* 82 AM. J. INT'L L. 278 (1988). See discussion of Judge Hudson's remarks *infra*, in the Diversion of Water from the Meuse Case in Ruth Lapidoth, *Equity in International Law,* 81 AM. J. INT'L L. 141–142 (1987).

[5] *Id.*

This means that the disputing parties must rise to a level of consciousness that allows full participation in the process. The intervening party, whether mediator, arbitrator, tribunal, or court of law, must create a sense of commitment in the disputants to allow them to solve their problems together. The parties must define their own needs, desires, and interests. To achieve balance, *equitable symmetry* must be assembled. Equitable symmetry is a state of balanced proportions. In economics, this is usually called *equilibrium*, or a state of balance between opposing forces and divergent influences. Some of the latest theories in leadership and management can help build a basic platform of cooperative interaction. These theories are like a breath of fresh air in the stale field of international conflict resolution and dispute settlement. To strike a balance between opposing interests also takes *synergy*, that is, a spirit of combined cooperation. Synergy is achieved with the mutual cooperation of parties; it is an interest-based problem-solving approach. The parties must become negotiators and facilitators, and they must be committed to absolute cooperation. This is not an easy task. Dr. Steven R. Covey, of the Institute for Principle-Centered Leadership, calls synergy "the principles of creative cooperation." He states: ". . . the essence of synergy is to value differences—to respect them, to build on strengths, to compensate for weakness . . . The challenge is to apply the principles of creative cooperation, which we learn from nature, in our social interactions."[6]

6STEPHEN R. COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE, 262–263 (1989).

Synergy includes communication. In fact, Covey states that when communication is a priority and its level is high, trust and cooperation are also high, and synergy exists. This is when the win/win results can be obtained. However, Covey also states that when communication levels are low, trust and cooperation are also low. This creates defensive postures that lead to either win/loose or loose/win, and anything in between is a compromise or a polite level of communication.

To achieve a balance of interests, parties must become *proactive*, rather than reactive. They must take the initiative, become responsible for and responsive to the process, make decisions, and not act upon mandates and conditions; that is, they must build a serious, detailed strategy of conflict management and dispute resolution that balances interests for everyone's benefit. They must create a win/win situation. Professor Roscoe Pound believed that there are certain legally protected interests, that the task of social jurisprudence is to protect those interests, and that legal progress could only be achieved by balancing these interests. Commitment is not to compromise, but to seek alternative solutions that accommodate all parties as much as possible. Compromise is the last expectation and should not become the focus of any equitable system of dispute resolution or conflict settlement. In the following chapter, the procedures for conflict management and dispute resolution shall be discussed in detail.

The main objective in the use of *NeoAequitas* is to design a system that is based on a solid foundation of equitable principles while simultaneously balancing the interests of the parties, thus avoiding further dispute or retaliation. The goals are to settle the controversy with the cooperation of the adverse parties, to obtain maximum efficiency

of the distribution of interests, rights, and obligations, and to result in equilibrium or balance. No only is this equity, but also distributive social justice, based upon sound substantive legal principles.

2. Conflict Between an Individual and the State: Vertical and Horizontal Analysis

Conflict may arise among individual citizens, and also between governments. When an individual's interests conflict with that of the state, we are called to perform what is called a *vertical analysis* of conflict of interests between the state and the individual. Conflicts and disputes between individuals and governments are quite different than those between governments. The analysis of the situation differs because governments have more power and control, which can easily be misused, and there is a great disparity in rights and duties. The use of abusive and discretionary power is always a possibility and, consequently, an analysis of a conflict between government and individuals should always include an examination of legal issues such as constitutions, charters, agreements, treaties, duties, rights, and obligations on the side of both the government and the citizen.

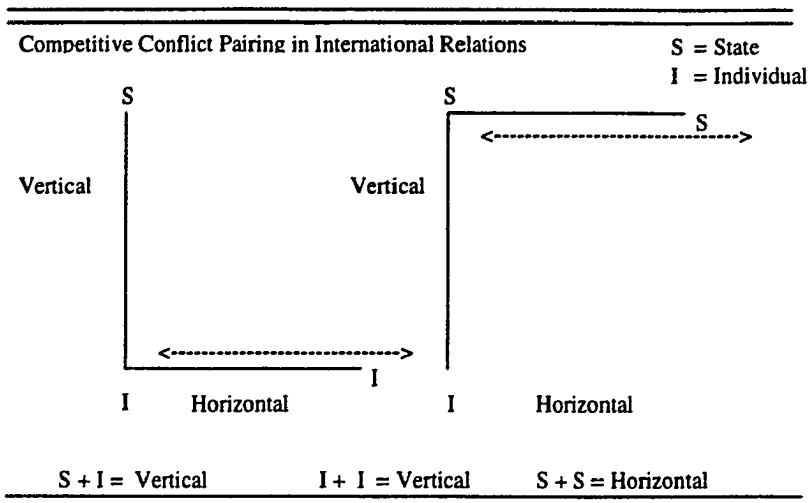
On the other hand, when the interests of individuals conflict with one another or when governments dispute among themselves, the inquiry shifts to a *horizontal analysis* because we presume that similar entities have similar power and capacity. This is specifically true of international conflict and disputes. Most often in public international law, conflicts and disputes among governments disrupt peace. In private international law (also known as *conflict of laws*), conflicts occur between individuals or among business enterprises. At times, there is an interplay between private and public international law that supports one another structurally and has both horizontal and vertical effect and applicability.

When a government creates an obligation in citizens by virtue of law or policy and the implementation places the individual in a position of either competing interest or conflicting interest with its government, there is a vertical effect of the applicability. When those laws or policies have a much wider effect in applicability, as when they place individuals (including business associations, such as corporations) at odds with one another, their interests compete and may create a conflict, creating a horizontal effect. Also, by private matter, when individuals' interests conflict socially, economically, legally, and politically on their own, there is also a horizontal effect. In the supranational scheme of European Community law and policy, concepts of vertical and horizontal analyses, as applied to direct effects and applicability is well-known.[7]

Figure 3.3 illustrates the conflict of interests in both vertical and horizontal effect and applicability of law and policy which place conflicting and competing interests between individuals and governments, thus creating adverse parties.

[7]EUROPEAN COMMUNITY LAW 42 (Robert M. MacLean ed. 3d ed. 1989).

Figure 3.3: Vertical and Horizontal Effect and Applicability Analysis in Law and Policy



Most often *S + S,* in horizontal conflict falls within the realm of public international law, whereas, *I + I,* conflicting horizontally, falls within the realm of private international law, or conflict of laws. *S + I,* conflicting vertically, may fall within either the public or private international legal realm, or at times, it may be a *hybrid* conflict of interests analysis where both international private and public law and policy may be involved, again having an interaction of support between the two.

3. Using a Multidisciplinary and Interactive Model of Inquiry and Assessment: Finding the Roots and Causes of the Conflict

Many factors can lead to conflict and subsequently, to dispute. Although this is true in any social sphere, this is particularly true in international law. When one employs the equitable principles of *NeoAequitas*, the assessment of the conflict should be open and objective without regard to alliance, ideology, religion, cultural beliefs, values, or traditions. That is, one must seek to find the reality of the circumstances, the authentic and actual cause of the conflict. General systems theory approach to the resolution of conflict and dispute may result in liberty from the archaic and musty traditional methods of strict legal and political assessment of crises in global conflicts. In accordance with the dynamics of a general systems perspective, all independent factors merge to form an aggregate whole, the "big picture." This perspective allows us to see exactly how all living things and their systems interact with one another, and how deeply all are affected by the environment, substantial forces, and the endless interplay between internal and external stimuli.

For the international or global scholar concerned with relational matters, legal frames, and diplomatic solutions to conflict and dispute, this general systems theory presents another effective mechanism to comprehend the relationships between different domains within our environment and how they impact our global society. For the modern international conflict specialist, thinking and attitudes must be shifted toward a more interconnected infrastructure of culture, responsive social jurisprudence, and economic

legalism that aims for complete balance of societal interests to fully realize the significance of this "big picture."

Using a multidisciplinary approach to evaluate the conflict is the best method for revealing latent motives that contribute to conflict of interests. In other words, leave "no stone unturned." A multidisciplinary approach integrates all considerations to identify the root of the crisis from many perspectives. This approach uses historical analysis, social policy analysis, traditional geographical and demographic contentions, ethnic and racial hostility, discriminatory claims, traditional legal reasoning, economic development and policy concerns, and political and ideological factors. All of these and more, may be the root cause of a conflict. These factors are crucial to the assessment of the conflict and attempts to contain it before it escalates to dispute. The present traditional approach that employs only political, economic, or legal analysis is no longer sufficient because of the cultural complexity of our modern world, the ascent of individual freedom, the concept of constitutionally protected liberties, the recognized right of a people to self-determination, the idea of devolution, and the relatively modern concept of wealth distribution and equality.

The military, economic, and political ideological forces of the past are being replaced by a more modern and communal style of world order. Present trends indicate that the diplomatic analysis of the past will no longer be adequate in transnational, global relations. When approaching the area of cognitive theory in the communication process, Dr. Christer Jonsson, explains that:

> [p]articipants in a recent interdisciplinary colloquium on international negotiation agreed that 'analyses that ignore the context in which negotiations take place, the meaning of the language the negotiators use, and the impact of cultural, social, institutional, political, and psychological factors on the process of communication and choice, are inadequate as explanations of international negotiations. [8]

The multidisciplinary approach is advantageous because it employs much more than traditional international legal analysis. It does not exclude traditional international legal principles and analysis, it supplements them by integrating political, economic, and social concerns, with the elements of cultural awareness, ethics, and broad international social policy based on tolerance, respect for human dignity, integrity, traditions, religions, beliefs, and ethic, national and cultural historicity. Perhaps this is the best rationale for fully incorporating equitable principles in modern international theories of conflict settlement and dispute resolution because it allows for the extraordinary, factual, and circumstantial factors that are not accounted for in the present traditional legal methods of inquiry and power politics.

By incorporating equitable principles with modern scientific conflict and dispute resolution techniques, the assessment, strategy, and settlements of conflict may be better attained since this approach seeks to equitably distribute substantive justice. This, in turn, will give rise to a distinct type of international communal jurisprudence that aims to be both responsive and progressive by balancing the interests of the parties and maintaining an equilibrium in world relations. The final objective, of course, is practical harmony—to maintain the stability of that delicate peace, illusive and ideal, yet essential for the

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[8]INTERNATIONAL NEGOTIATIONS 242 (Victor. A. Kremenyuk, ed. 1991).

survival of humanity. Peace among nations is the ideal state of affairs in international relations, but tranquillity can be achieved readily by using an efficient method of conflict settlement and dispute resolution.

An interactive correlation model of cause and effect can also to be employed jointly with equitable principles and the multidisciplinary approach. Societal components do not exist in a vacuum; all intricate phases of a society interact with one another. The interactive correlation model represents an interdependent system of international relations made up of the complex social, economic, political, and legal elements of our society. These elements interact with one another; they are relative and inseparable. To properly design a broad conflict settlement system, each factor listed above must be included in the analysis and examined individually as a possible root of the conflict. The widest conception of an interactive system perspective—one that integrates multidisciplinary inquiry, finds a nexus between all economical, political, social and environmental factors—is by far the most significant. Most of the time the root cause of any competing interest may lie with one of these influences.

In his *Spirit of Democratic Capitalism,* Michael Novak, the celebrated socio-economist, explains that "every society is a mixture of economic, political, and cultural influences, each generated by its own system of people, institutions, and ideas." He goes on to write that our environmental reality is nothing more than a fusion of economic, political, and cultural forces that constantly influence our lives.[9]

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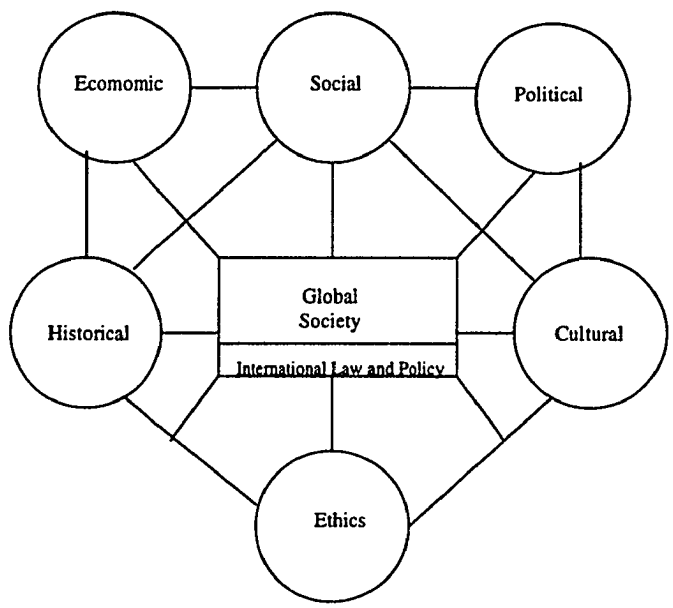
[9]MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM, (1982) quoted in WILLIAM C. FREDERICK BUSINESS AND SOCIETY: CORPORATE STRATEGY, PUBLIC POLICY, ETHICS, 5-6, (1982).

These powerful forces are so tightly intertwined that each inevitably influences the other. Each needs the other to maintain equilibrium in the intricate order of our society. In our present global condition where communications are advanced, the connection between these forces are so close, that the lines of demarcation between them are almost invisible. Figure 3.4 depicts the wide and abstract applied systems analysis perspective of the interconnections between the social, economic, and political realms and its relationship to international law and global society, with its derivative concerns.

Figure 3.4 Interactive Systems Model of Interdependent Elements and Influential Forces



These interactive elements are always identifiable as core values or primary interests of society. Particularly to nations, these types of interests are worth protecting,

defending, and perhaps, even dying for. Once they are identified as primary interests by a nation, one must be sensitive to the perceived competing interests that are viewed as a matter of survival or self-determination to a people. Hence, these interests should always be highly respected.

By employing equitable principles and wide, abstract interactive methods of conflict assessment and inquiry, parties can move carefully through the process until a valid, open, and objective settlement is achieved. The assessment begins with a wide abstract perspective and progresses toward the process of negotiation and settlement. Gradually, issues are narrowed until conflicts have been worked out. Then the process finally converges into the remaining alternative. This is the moment of conciliation and resolution. It is reached by a process of gradual and systematic conciliation, and depends upon fairness in both substance and procedure, and on the historicity of a people, their traditions and their interests. Parties ought to leave the conference table feeling that the solution reached is the best solution possible for both parties and in the interests of all concerned; they should feel that they have all won.

NeoAequitas involves both lateral and trajectory thinking; it is intentional and attentional because it is based on commitment and cooperation and allows for the best possible design necessary for the conflict at hand. The joint use of equitable principles, legal positivist theories, a multidisciplinary approach of analysis, and an interactive system perspective based upon interdependent elements of the societal environment, provides for a more engaged and valid process of conflict and dispute settlement in international law. It is based on the reality of our complex global culture and the actions

and reactions of nations and their peoples, which accounts for their history, value systems, traditions, and beliefs, as well as their natural ideology. Only with equity can this be properly achieved. Rigid legal rules, with their constraining formulae of social expectations and resulting behavior, will not work in a world with intricate cultural diversities and where there is not one single set of quantifiable results that can be predicted successfully. The flexibility found in the principles of equity as a body of jurisprudence enhances the international legal framework and ought not be excluded, circumvented, or ignored in this process. In this manner, we may progress toward a communal jurisprudence perspective of international law inclusive within a system that is expansive, responsive, progressive, flexible, and equitable.

PART TWO: EQUITABLE METHODS OF DISPUTE RESOLUTION

CHAPTER 4

CONFLICTS AND DISPUTES: EQUITABLE MANAGEMENT, SETTLEMENT AND RESOLUTION

Equity delights to do justice and not by halves.

1. Objectives and Goals of Equitable Management

The procedure used to settle or resolve conflicts is quite different from that used to solve disputes. At the onset, the process is similar, but special care must be taken to place all participants' interests in perspective in order to keep the situation under control. Control at every stage of both conflict management and dispute resolution is essential. Progress must be constantly monitored to ensure successful resolution. Should panic overtake the proceedings, control will be lost and the results could be catastrophic. This process should also be an equitable process that fully employs the principles of fairness and justice to balance those competing, conflicting interests. This process defines the concept of equitable management in a conflict. A dispute may arise out of a basic disagreement, risking the ultimate reaction—violence (*ultima ratio).* After all, war is the last resort. As Walter Lippmann stated, war is ". . . the way in which the great human decisions are made."[1] War is one way to resolve disputes, but it always results in a win/loose or a loss to all result.

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[1]Walter Lippmann, *The Political Equivalent of War*" ATLANTIC MONTHLY, August 1928, at 181–187.

Once the root of a conflict has been identified and competing interests are defined, we are ready to move toward conflict management. The presumption is that the parties are willing to resolve the conflict because they have approached a third party to aid in crisis intervention. This is the ideal situation since the parties at least have an inclination to work out some of the differences. This is called *voluntary intervention.* However, when the feuding parties are already in conflict or the conflict has already escalated to a full-blown, possibly violent, dispute, international organizations such as the United Nations, the European Community, the Organization of American States, or N.A.T.O., intervene and bring the parties to the negotiating table; this is *involuntary intervention.* This is a difficult situation to control since the disputing parties have made no attempt to resolve their differences.

When employing *NeoAequitas*, the *first* stage is to objectively analyze and evaluate the issues, interests, and alternatives. The *second stage* is to bring the parties to a dialogue. At the start, parties talk informally to discuss the predicaments and difficulties at hand. At this point, formal negotiations may begin if the parties are prepared. The *third* stage involves the utilization of alternative dispute resolution methods. By using mediation, and later arbitration, discussion continues and confidence in the process builds until the matter is resolved without resorting to armed conflict. If the parties have already resorted to violence, alternative modes of conflict and dispute settlement may bring them to cease hostilities and use a less costly, more constructive vehicle to settle the crisis. In the *fourth* stage—when all attempts to settle the conflict have failed—the parties engage in a full dispute. Again, attempts must be made to bring

the opposing parties to the conference table and to carefully manage the dispute as equitably as possible. At this time another mediator may be used, but an international tribunal, such as a Board of International Arbitration, should be retained to try to resolve the conflict.

This type of conflict and dispute containment is the best effort because it permits the parties to seek redress or relief by alternative means. When, in spite of their best efforts, the parties have failed to conciliate and have exhausted alternative resolution means, they should be allowed to formally file a cause of action or claim with the International Court of Justice at the Hague. Only then should the dispute be allowed to be removed to a world adjucatory body. For as long as the parties resort to peaceful resolution of the dispute and to processes that guaranty the settlement in a tranquil manner, the machinery should support their efforts. The aim here is to be preventive and not reactive, and not to anticipate the escalation and expansion of the crises. Equitable management in conflict and dispute resolution means to objectively assess and evaluate the conflict in the light of best effort and good faith, to advance the premise of fairness in negotiations and in alternative resolution methods, to attempt to reconcile competing interests in good faith while engaging the parties in creative problem solving, synergy, and proactivity in balancing those interests.

When the intervening third party encourages good faith and best efforts, open objectivity, and a sense of distributive justice and substantive equitable principles, the integrity is maintained and trust builds between all parties. As a matter of duty and

ethical commitment, the opposing parties and the intervenor find common ground and work toward a mutually satisfactory resolution for the sake of peace.

Figure 4.1 The NeoAequitas Approach to Equitable Management in Conflict / Dispute Resolution & Settlement

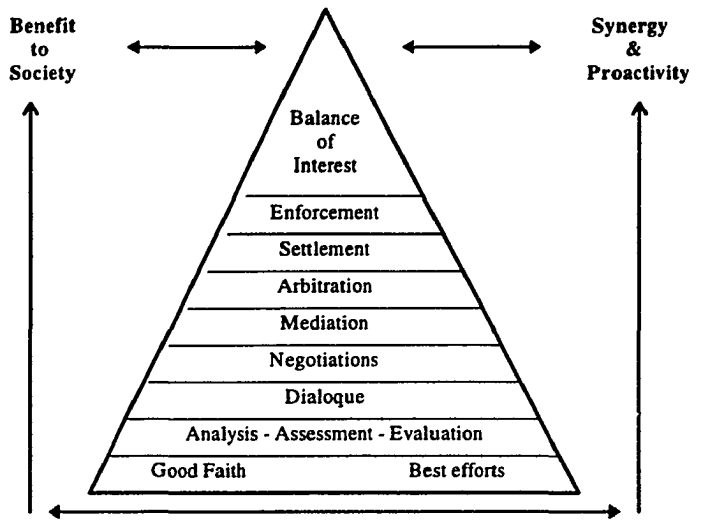
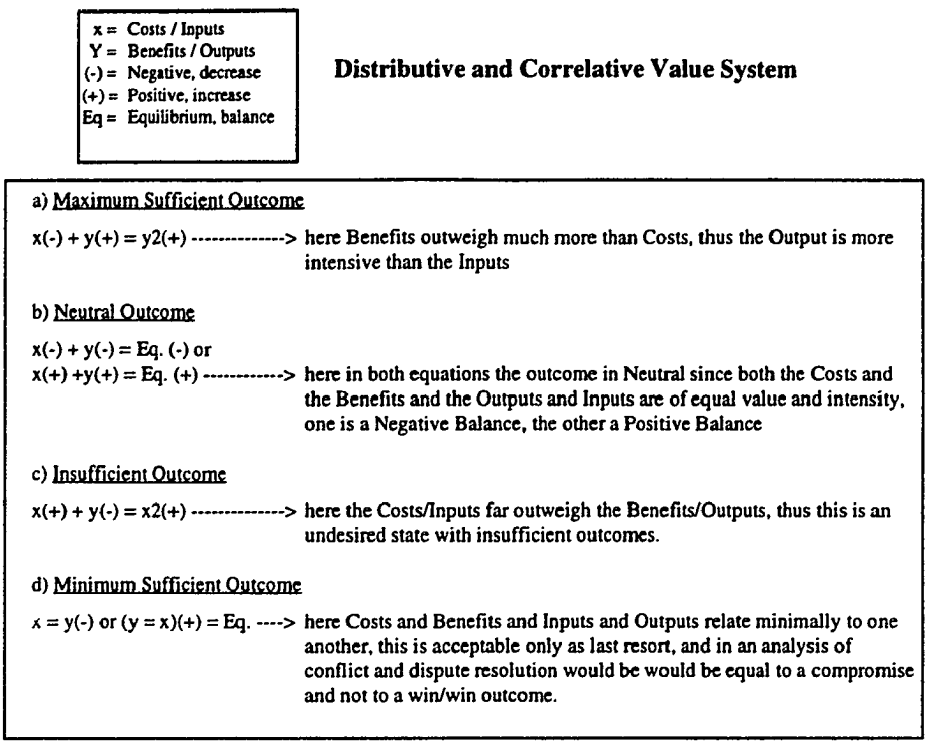


Figure 4.1 illustrates the principle of equitable management in international conflict settlement and dispute resolution. It is based upon the foundation of equitable principles. When parties seek a remedy to a conflict based upon equitable principles, it is difficult to use coercive power, albeit economic, political, social, etc., to manipulate the outcome. With the balance of interests also comes balance of power. Parties must stand equal in the eyes of any tribunal or intervenor before honest, frank negotiations can be carried out. Remember, the axioms are that "he who seeks equity must do equity" and "he who comes to equity must do so with clean hands." Influential power in world politics is simple to detect, but once detected, diplomacy must shift from the use of

arbitrary and discretionary power as a form of persuasion to a process-oriented mechanism that strives to do justice through equitable jurisprudence.

As with any other scientific structural system, quantification supports the notion that, according to the input, the output attained should be correlative. The same occurs in a cost/benefit analysis. The cost should never outweigh the benefits and the benefits should always outweigh the cost, but if in either equation one outweighs the other, equilibrium will be lacking. In one instance balance is desired, in the other, balance is not necessary if the outcome maximizes the benefits. This means that if one party has an unfair advantage at the onset of the process, equilibrium will not be achieved; there cannot be a balance of interests and a unilateral resolution may result. Of course, the potential exists for a more serious conflict of interest to arise later, leading, perhaps, to an all-out dispute settled on the battlefield, rather than in the negotiation room. Therefore, the equitable process in conflict and dispute management is of the utmost importance and deserves accurate and prudent planning as well as tactical and strategic application. Figure 4.2 describes the distributive and correlative factors involved in a balance of interests analysis for the purpose of conflict settlement and dispute resolution in international law and relations.

Figure 4.2 Analysis of the Input/Output and Cost/Benefit Analysis in Balancing of Interests.



The objective of conflict management is to first *contain* the conflict so it does not escalate, and then to resolve the conflict; that is, to harness the confronting and opposing forces until a resolution can be obtained. The use of *engaging dialogue* and *debate* may well serve that purpose by keeping the channels of communications open at all times. This is of high priority. Settlement should be achieved through the proactive interest-based system of problem solving between all parties. Each party should take responsibility for its own initiative in resolving the conflict.

2. Goals of Settlement and Resolution

The goal of any conflict settlement or dispute is to arrive at an outcome that is not merely satisfactory, but conciliatory between the opposing parties. This is especially true in international relations. In fact, this is one of the chief functions of any legal system. Professor Berman explains that there are three main social functions of any system of law. The first is to restore equilibrium to the social order when that equilibrium has been seriously disrupted.[2] This is true of any social system, but most essential in international law, since any conflict may lead to war (*ultima ratio).* The slightest misunderstanding among nations may bring about the unthinkable final resolution of a dispute. A legal order is charged with maintaining that balance; thus, it is important to emphasize the process of conflict management, conflict settlement, and dispute resolution based upon fairness, vis-a-vis equity. The greater the integrity of the system, the more trust and confidence nations will have in that system to produce objective and unbiased resolutions that are fair, so that armed confrontations will be avoided more often. Berman also identified that a second general social function of law is to calculate the consequences of its conduct, securing and facilitating voluntary transactions and arrangements.[3] This means that through proper application of legal principles, we can calculate and then inform one another of the potential harm of an unmanaged, escalating conflict, or of the potential benefit of a well-managed conflict. This is when history and other social

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[2]HAROLD J. BERMAN AND WILLIAM R. GREINER, THE NATURE AND FUNCTION OF THE LAW 31 (1980).

[3]*Id.*, at 32.

systems become invaluable indicators of human and social behavior. All parties to the controversy must understand that action taken today can adversely or beneficially affect the future, and that all nations must live with the consequences. Therefore, calculating our conduct today may deter destructive behavior and help improve amicable relations for tomorrow. When we attempt to comprehend the consequences of our present and future actions, we realize that the social function of any legal system, be it international or municipal, goes beyond the settlement of conflicts and the resolution of disputes. The legal system becomes a regulating factor of all social actions, allowing us to predict rationally, competently, and accurately what others can and will do. Lastly, according to Berman, the third general social function of any legal system is to teach people "right belief, right feeling, and right action, that is, to mold the moral and legal conceptions and attitudes of any society."[4] This is highly significant. As a society we should strive to achieve a change in attitude toward other nations. The adversarial attitudes we hold—around alliances, power, conveniences, economics, and politics—have failed us in foreign policy and foreign relations. Our attitudes must shift from an isolationist perspective of national or ethnocentric singularity, to a more interdependent, open, and pluralistic view of our globe. Although this seems to be the trend, as a world society we have not identified peaceful negotiation and conflict settlement as the final objective in international relations. To do this, changes in beliefs, values, feelings, attitudes, and actions have to come about through education and reformation. Perhaps this is the most

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[4]*Id.*, at 34.

difficult task of all, since as a society, we persistently resolve conflicts through violence, both before and after we discuss our differences. This is true even during dialogue, as in the Bosnian-Serbs/Moslem controversy in the Baltic. The task of any legal system is to not only to seek resolutions to conflicts, but also to calculate our actions and learn from the consequences of our past actions. Attitudes and behaviors can change through education, guidance, and knowledge of moral and right action.

Although conflict settlement and resolution in domestic legal systems may aim at the same objective, international law, due to its delicate multicultural and diversified nature, is inherently more unstable; hence, conflict analysis should be conducted in the manner most consistent with a balance of interest resolution. The nature of international law is not punitive per se, although often it is applied in this manner.

The basis for diplomacy is conciliation. Diplomacy is the art of conducting negotiations between nations and handling such negotiations without arousing hostility.[5] According the *Oxford English Dictionary*, diplomacy is the management of international relations by the process of negotiations.[6] In domestic dispute resolution, the aim is to assign rights to a particular party or to accommodate the parties in order to bring about the best possible result. This should also be the case in international relations. The final objective in international conflict settlement and dispute resolution is to always bring

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[5]WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, s.v. "Diplomacy."

[6]OXFORD ENGLISH DICTIONARY, s.v. "Diplomacy."

about the best possible outcome by balancing and distributing the competing interests of the parties.

The international legal system exists primarily to support transnational relations. The rule of law forms the vertebrae of the international community. Its primary duty is to maintain solidarity among nations, regardless of social, economic, or political conditions and stature. Through diplomacy, the international legal system is charged with supervising, regulating, and even preserving the peace among nations as best as possible. In international law and relations, trust is presumptive and imperative. Until something happens to cause us to question that trust, we honor the standing of nations in the world community and we maintain open diplomacy.

The general principle of international law, known as *pacta sunt servanda,* or "agreements must be kept," exemplifies this by stating that all agreements are binding and must be observed by the impacting nations. Therefore, we should always act toward other nations in a manner which observes that norm. We should always presume that settlements and resolutions arrived at by good faith negotiations lead to proactive solutions, based upon cooperative problem-solving synergy using the principles of equity.

The distribution of interests as a matter of right is at the nucleus of a balance-of-interests analysis. This can be seen in Figure 4.2. By distributing costs and benefits pursuant to those competing interests, the balance of interests according to priority and significance to the parties may be achieved, resulting in a balance of interests involved in the conflict. Once this is determined in a fair and justiciable manner, the enforcement of the resolution can become the next endeavor. Nonetheless, the resolution is at hand, and

the conflict may be monitored until there is no other barrier standing in the way of a solution. Again, the use of equitable principles is essential to achieving an objective and impartial resolution.

In his contribution to the book *International Negotiations* (the chapter entitled "The Outcomes of Negotiation"), Arild Underdal of the University of Oslo refers to what he terms "distributive bargaining":

> In the process of perfectly cooperative problem solving—which, I repeat, is an ideal type of construct—the distribution of costs and benefits would be derived from some normative standards of fairness and justice. From this perspective, evaluating success—individual as well as collective—becomes a matter of determining whether or to what extent each party has obtained what it 'deserves' or is 'entitled to. 'The major problem here, of course, is that no single concept of fairness has been generally accepted as the appropriate standard. The principle of blame implies distributing the costs of solving a particular problem in proportion to one's relative 'guilt' in causing or aggravating it. The principle of equity requires that benefits be distributed in proportion to one's relative contribution to the provision of the good in question.[7]

This process of cooperative problem solving is called synergy. Synergy occurs when two (or more) people, organizations, or nations come together to develop a mutually beneficial relationship. Individual efforts, when added together, are multiplied in quantity, quality, productivity, and reward.[8] In true cultural synergy, nothing is ever lost. The parties never compromise, they find a way to solve their problems in a cooperative form. Synergy is a dynamic process which usually involves some empathy, sensitivity, adapting, and learning. This signifies that parties to an international crises

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[7]INTERNATIONAL NEGOTIATIONS: ANALYSIS, APPROACHES, ISSUES 112–113 (Victor A. Kremenyuk ed. 1991).

[8]PHILLIP R. HARRIS AND ROBERT T. MORAN, MANAGING CULTURAL DIFFERENCES, 108 (3d ed. 1991).

(indeed all conflicts!) must use combined action and work together to arrive at a mutually beneficial solution without giving up anything.

Harris and Moran represent this by the analogy of *2 + 2 = 5* instead of *4*. This is the essence of the win/win scenario. Due to cultural, social, political, legal, and economic factors in international relations, at times *2 + 2 = 3*, or compromise, which means that one or both parties gave up something. Compromise produces a win/lose scenario. If the cultural synergy sum has not resulted in the negative, then progress has been made.[9] This should be the aim, the goal, and the final objective in conflict management, negotiations, conflict settlement, dispute resolution, and later enforcement in international law and relations. International negotiators should strive to become facilitators as well as collaborators, just as much as the parties themselves.

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[9]*Id.*, at 91–92.

3. Accommodation of the Parties: Striving for Win/Win

Understanding conflicting and competing interests is not easy, since these perspectives are usually imbedded within intercultural problems. Harris and Moran have found an interesting problem-solving formula that can be used across cultures. The strategy they use is comprised of a five-step method of problem-solving that may be incorporated across cultures as an effective part of a system design of conflict management, transcultural negotiations, and dispute resolution in international law. The first step is to describe the problem as understood in both cultures. The second step is to analyze the problem from the two cultural perspectives. The third step, is to identify the basis of the problem from both viewpoints. The fourth step, is to solve the problem through synergistic strategies. Lastly, the fifth step is to determine if the solution is working multiculturally.[10]

This is a very good method of approaching international conflicts and disputes that are already complicated with difficulties on top of cultural barriers. These methods, coupled with principles of equity such as bona fides and good faith, *ex aequo et bono* and *pro bono publico*, can only bring about a high level of commitment from the opposing parties and the intervenor to settle for no less than a win/win resolution of the crises. This is why parties have to become individually and collectively proactive. They must take the initiative and the responsibility for ceasing hostility and for bringing about a

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[10]*Id.*, at 272.

mutually beneficial outcome. Dr. Steven Covey states that ". . . [h]ighly proactive people recognize that responsibility. They do not blame circumstances, conditions, or conditioning for their behavior. Their behavior is a product of their own conscious choice, based on values, rather than a product of their conditions, based on feelings."[11] Proactive negotiators are in control of their own situation and the situation as a whole. Together with synergy, proactivity leads to an interactive relationship of all involved. The major players become interdependent in international conflict and/or dispute. Regarding distributive bargaining which is essential in balancing interests, Professor Underdal states that in interdependent relationships in international negotiations, each actor has some control over the outcomes affecting the welfare of others as well as themselves; and since control is a bargaining power, the higher the interest in a certain outcome, the more willing one is to pay to obtain it. Hence here, contribution is relative and equal to contribution in the negotiations. This is what is called the *exchange rate*.[12] This is nothing more than an enhanced version of a correlative *quid pro quo*, or something for something, for the mutual benefit without giving up anything. Note that here, compromise *(compromis)* is not a goal, nor is it a factor—it is only a hope. Compromise is the final stage before the negotiation process fails in conflict management. This arrangement may be so delicately put together that the parties may one day return to the same or similar conflict or controversy simply because the

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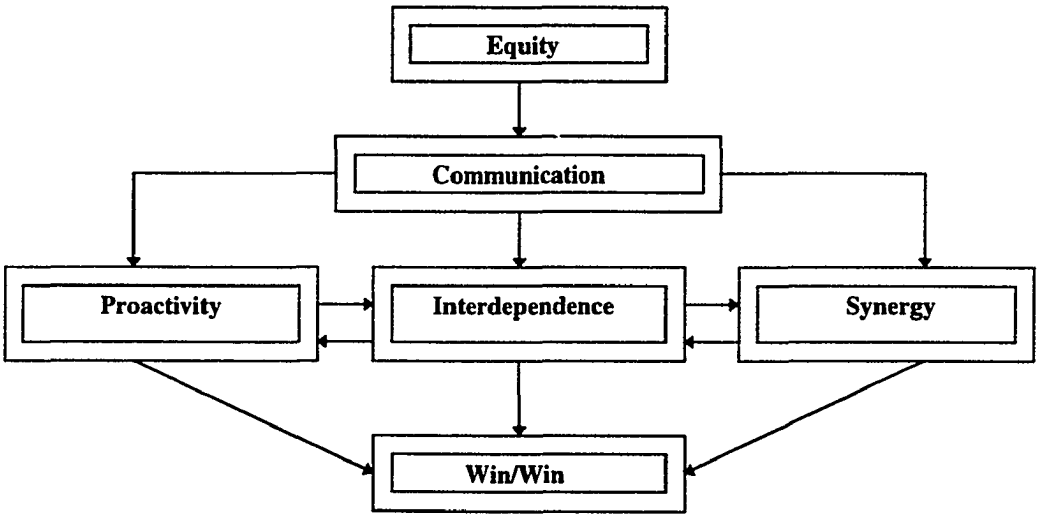
[11]STEVEN R. COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE, 70–7.

[12]KREMENYUK, *supra* note 7, at 111.

difficulties where never really worked out. They were loosely put together until a later time. This is a calmative, an aspirin—not a cure.

High levels of communication lead to proactivity, which leads to interdependence and cooperation and brings about synergy among parties, which in turn leads to win/win based outcomes. This is the objective of any legal system involved in the social function of conflict and dispute resolution. Dr. Covey explains that win/win is not a technique, but a total philosophy of human interaction. It means that agreements or subsequent solutions are to be mutually beneficial and mutually satisfying to all involved.[13] Since all parties will feel comfortable with the decisions, they are committed to the plan of action and design to resolve the conflict. Therefore, the strategy at hand is a *cooperative* one—not a *competitive* one. This is a more certain scenario than one left to competition.

Figure 4.3 The Process of Equitable Management and Negotiations Leading to Win/Win Based Upon the Principles of Equity



[13]COVEY, supra note 11, at 206.

Figure 4.3 represents the process involved in international negotiations pursuant to an equitable management scheme which seeks to understand all the related factors. Equity, being the foundation of negotiations, promotes proactivity, cooperation, and interdependence, leading to synergy, and consequently, to a win/win resolution based upon balance of competing and conflicting interests.

4. Moving Toward Conciliation: Pacts, Accords, and Final Agreements

A balance of interests approach, if the conflict has been managed equitably in the analysis, assessment, and negotiations, should lead to the equitable resolution of conflicts and disputes, and the conciliation of the interests. Conciliation, in this context, means to repair or to make compensations. This is an attempt by the parties, including the intervening third party, to take the process to an even higher level in the resolution of the crisis. That is, to bring the parties to a level of trust, or at least integrity, so that they maintain an open channel of communication through the use of diplomatic interchange.

When all hostility is diminished incrementally, it becomes simpler to overcome the frustration and animosity between the parties. In the end, it becomes much easier to resolve the conflict or the dispute on the basis of balance-of-interests. This can be accomplished by making an agreement to: (a) always return to the negotiation table to continue dialogue prior to the beginning of any hostilities, be it economic sanctions, armed response, or other retaliatory acts in any form, (b) subsequent to the final agreement, express the true intention and commitment of the parties to meet regularly to work out any lingering differences between them, and (c) agree not to act aggressively toward one another and always return to the mediation, arbitration, or even the world judicial body, the ICJ. These agreements should act as a series of safety devices designed to keep the channels of communication open and the level of frustration from escalating into other hostile acts with regrettable consequences. Professor William L. Ury of Harvard University states toward the end of his book *Getting Disputes Solved*:

> . . . A good dispute resolution system consists of a series of successive safety nets—negotiations followed by mediation, advisory arbitration, arbitration, third-parties intervention, and so on—that can ensnare a dangerous conflict before it can do irreparable harm. An attempt is made to catch disputes early. If one procedure fails, another is waiting [14]

Conciliation is recognized in international law as the last stage in the peaceful settlement of any conflict or dispute. This is a very technical, formal stage; parties must discuss and iron out issues prior to the execution of a formal international agreement. Conciliation is not mediation; this process is conducted by a commission, not by governments. It is not like arbitration because it only suggests the final terms of the settlement. *The Dictionary of International Law* states that:

> [Conciliation is] a procedure of third party peaceful settlement of an international dispute by referring the dispute to a standing or ad hoc commission of conciliation, appointed with the consent of the parties' agreement, whose task is to objectively and impartially elucidate the facts and to issue a report containing a concrete proposal for a settlement which, however, the parties to the dispute are under no legal obligation to accept. [15]

Most times in international practice, international commissions for the purpose of conciliation are also arbitral commissions. It becomes confusing when arbitration commissions are also expected to make conciliatory references and decisions thereafter. The purpose of *NeoAequitas* is to allow all these applications and procedures to operate within the realm of equitable principles. The purpose is to always observe fairness and justice throughout the process of dispute and conflict resolution, from the analysis at the

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[14]WILLIAM L. URY, ET AL., GETTING DISPUTES RESOLVED, 172 (1988).

[15]ROBERT L. BLEDSOE & BOLESLAW A. THE INTERNATIONAL LAW DICTIONARY, s.v. "Conciliation."

start through to conciliation and enforcement of settlement in the end. Agreements made pursuant to good faith efforts, which truly seek to synergize or result in win/win for both parties, should also seek to enforce the settlement equitably and within the accorded process. That means to "keep the promise"[16] in accordance with the arrangements of the agreement. Should the final agreement become one-sided, (that is what is known in the common law as an adherence contract), the balance of the interests will be tipped once again and will result in a temporary arrangement until the "loosing" party becomes frustrated enough to begin the conflict once again—this time with little or no trust in a peaceful process, and with suspicion of all the parties involved, including the intervening party. The final agreement must be bilateral, and again, synergistic to the very end; any other way will result in a shortcoming for both parties. There must always be a support which promotes, advocates, and encourages a system that can be relied upon, and one that can be maintained as the forum for the peaceful, legal resolution of conflicts and disputes, respected and binding upon all nation-states, without exceptions.

When employing an applied interactive system approach to solving international crises, the entire process should be viewed from an input/output analysis, as well as a balance-of-interests analysis. From this input/output outlook, the outcome must equal or surpass the efforts of those involved in the process of the resolution. Hence, if the equitable management process and the negotiation was an honest, synergistic, cooperative

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[16]See the definition and use of *Pacta Sunt Servanda*, *supra*, in this chapter and *infra* in the next Chapter. This is the basis for all international agreements and treaties. The Roman understood this concept very well in both public law and private law. *See* JUAN DE CHURRUCA'S INTRODUCCION HISTORICA AL DERECHO ROMANO (A Historical Introduction to Roman Law), 145 *et seq.* (6th ed. 1992).

effort with the commitment of all involved, the agreement will reflect this, as will the subsequent arrangements for monitoring the maintenance of peace and the observance of the accord. Parties cannot expect results they did not bargain for fairly under a strict equitable management process, unless they have intended such an outcome from the start of the process.

CHAPTER 5

THE MECHANICS AND DYNAMICS OF RESOLUTION: THE CLASSICAL METHOD AND ALTERNATIVE DISPUTE RESOLUTION

Equity will not suffer a wrong without a remedy.

1. A Brief Survey of the Classical and Alternative Methods of Conflict and Dispute Resolution in International Law

Due to our human diversity, it is natural for us to have conflicts. Since the dawn of time, every civilization has found itself at odds with another culture, another nation. Once as peoples, we identify those interests that are most necessary and important to us, we pursue them with single-mindedness and with narrowness of purpose. We believe that these interests are essential to our survival as a nation. At times, these interests are not only worth defending, they are even worth killing and dying for. This chapter is devoted to understanding the traditional or classical methods used in international dispute resolution, and understanding the alternative dispute resolution methods that *can* be employed to maintain dialogue, constructive interchange, and the use of synergistic problem-solving techniques.

As in domestic legal systems, current methods for international dispute resolution can be divided into two main forms: the classical or traditional methods, and the alternative dispute resolution methods. These are not quite so distinct in international law as they appear in the municipal legal systems. For example, the classical or traditional method in the international system is mainly judicial and uses the permanent international

courts; the quasi-judicial method involves the use of an arbitration tribunal which may also make adjudications; and the alternative non-judicial methods include the use of formal and informal negotiation, formal inquiry panels, mediation, conciliation, or a mixture of the three combined. Using traditional judicial means, such as the international courts and tribunals, member nation-states of the United Nations may take legal actions against one another or against any international organization.

In the international legal system however, non-traditional, non-judicial methods of conflict settlement and dispute resolution have been used more intensively than any municipal legal system. Perhaps the leading reason for this is that in most national or domestic legal structures, the judicial branch, rather than the legislative branch, is charged with the primary task of resolving disputes. Whereas, in the international legal order, governments have collectively served that role as well. International organizations were created for the specific purpose of forming an international legal and parliamentary system. The UN became the assembly in charge of these organizations who monitor international relations and promote organized, controlled resolution of disputes. Thus, an intricate design of organized diplomacy evolved and became the preferred method of conflict settlement in the world after the post war years.

In time the UN developed into a complex parliamentary system which made use of "parliamentary diplomacy."[1] This type of conference-style diplomacy relies heavily on searching for agreement through the formation of majority blocs within international

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[1] JACK C. PLANO AND ROY OLTON, THE INTERNATIONAL RELATIONS DICTIONARY 244 (4th ed. 1988).

organizations and continuing institutions, such as the UN General Assembly, etc. It operates almost like a national assembly in that it becomes susceptible at times to the maneuvering from many regional, transnational, and special-interests groups. It resembles legislative caucusing, complete with lobbyists and other special interests representatives.[2] This style of international diplomacy does serve its purpose by focusing attention on specific problems. It defines certain issues, and it coalesces certain viewpoints and opinions, but it does not go so far as to become practical in solving international problems and crises. This type of diplomacy usually produces controversy, rather that harmony among the representatives of member-states. Again, international organizations, such as the League of Nations and the UN, have conducted themselves as the solver of conflicts and of world crises. Formal diplomacy can be said to have also developed into a traditional form of dispute resolution, albeit, a non-judicial form of settlement.

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[2] *Id.*, at 244.

A. Alternative Methods to Dispute Resolution: Non-judicial Methods

Negotiations. The alternative dispute resolution methods in international law, as in domestic law, are considered non-judicial, but in the international system, negotiations may serve as the resolution stage, or most often, as the beginning of the long process that solves problems among nations. Negotiation is the most common sort of conflict settlement in diplomatic circles. This is usually carried out by diplomatic correspondence and by face-to-face encounter of representatives and other agents or ministers.

Inquiry. The inquiry may be formal or informal. It pertains to the selection of individuals and/or organizations to act as a fact-finding body in a conflict investigation. The inquiry is conducted by consent of all the parties, and it can be effective under the proper circumstances. Recommendations may or may not settle the issue or conflict, but it will give way to either mediation or arbitration.

Mediation (Good Offices) and Conciliation. As in other legal systems, mediation (and Good Offices) in international law involves the use of a third party, an intervenor, to attempt to solve the conflict. The third party attempts to separate the issues, address them, and solve the discord through negotiations. The mediator brings conflicting parties to the table for dialogue and intermediates between them. The mediator's goal is to offer solutions that would lead to a fruitful settlement. Subsequently, a formal conciliation round requires the consent of all the parties involved because it requires that they agree to submit their grievances to a panel that would investigate further, make findings, and make recommendations for settlement, although

parties are not compelled to follow those recommendations. They choose whether to abide by those findings and recommendations. Sometimes panels are put together to carry out all of the above steps in order to make the process more expedient. The panel members tend to be experts in their fields. They often behave as administrative law courts do in domestic legal systems, except these are not authorized to make adjudications.

Arbitration. The quasi-judicial method of dispute settlement in international law is comprised of an arbitral tribunal and boards. Arbitration is another method of peaceful dispute settlement where the parties are legally bound by the adjudication, or the decision of the judge or arbitrator, unlike mediation. Although the parties have a choice at the arbitral panel, they must agree that they will legally abide by the findings, recommendations, and/or adjudication of the arbitration tribunal. This tribunal often attempts to bring the parties to a *compromis,* which is the adjudication embodied in an agreement. This *compromis* is a lawful international agreement under the doctrine of *pacta sunt servanda*, and failure to abide by the *compromis* is a serious breach of international law, thus constituting another distinct violation of international law. Although, just like judicial decisions, the adjudication of the arbitral tribunal is legally binding upon the parties. Such decisions are not construed or not considered judicial in the strictest sense because the arbitral board is not a permanent body of a court of justice as a rule; hence, it may be comprised of other lay individuals and agencies of non-judicial or legal character.[3]

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[3]THOMAS J. BURGENTHAL AND HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW 68–69 (1985)

B. Classical Methods of Dispute Resolution: The Judiciary

Judiciary. The classical method of peaceful dispute settlement in international law is comprised of a permanent judiciary. The highest tribunal is the International Court of Justice (ICJ) created by UN Statute in 1945, which sits at the Hague, in the Kingdom of the Netherlands. This is the principal judicial body of the United Nations. This Court has two types of jurisdiction: contentious jurisdiction, and advisory jurisdiction. The court's contentious jurisdiction is not compulsory upon states; it is voluntary and must be accepted by nation-states upon submission. It can only hear cases with a controversy between states that have accepted its jurisdiction; it cannot hear cases involving individual citizens or entities which are not nation-states. It also lacks jurisdiction to hear cases of a domestic legal nature, rather than by principles of international law.[4] The advisory jurisdiction of the ICJ applies only to the UN and other organizations and agencies. It does not apply to states or individuals, and they have no legal standing to seek advisory opinions from the ICJ. These advisory opinions are not legally binding for the purpose of policy-making.

Another international court involved in the resolution and settlement of international disputes and delegated by the UN with certain *in rem jurisdiction*, to subject matter jurisdiction, is the European Court of Justice (ECJ). The ECJ, which is the official court of the European Union (formerly the European Community, or EC) was established in 1952 by the EEC Treaty and sits at Luxembourg. Its main function is the interpretation

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[4] *Id.*, at 76.

of European Community law, legislation, and policy. The European Court of Human Rights, established in 1959 by the European Convention on Human Rights, hears cases put forth by member states of the Convention on issues, policy, and violation concerns of human rights within Europe. The Benelux Court of Justice, seated permanently at Brussels Belgium, hears matters concerning the Benelux Economic Union, under the treaty signed by Belgium, The Netherlands, and Luxembourg. Lastly, the Inter-American Court of Human Rights, seated in San Jose, Costa Rica, was established in 1979 by the American Convention on Human Rights. Like the European Convention on Human Rights and its court, this tribunal hears cases from treaty member nations on violation issues and policies concerning human rights in Inter-America, comprising North, Central, and South America, and the Caribbean nations.[5]

Warfare. Another method of dispute resolution is warfare. War, most times, is a result of national or cultural frustration. Frustration may lead to a certain form of pressure that has to be released sometimes as aggression and violence. Although hostilities may exist between nations, a process of equitable conflict management may be helpful in circumventing potential armed conflict by engaging parties in dialogue and processes of peaceful dispute settlement. Thus, keeping the parties constructively involved in proactive, synergistic problem-solving proceedings will allow time for cooling off.

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[5]*Id.*, at 86, 90.

It is essential to design ad hoc systems that solve international disputes in accordance with the cultural content of the conflict, the issues and conflicting interests involved, and the appropriate legal context or procedure which would benefit a particular crisis. This type of systems design, when based upon equity, must be tailored to the special characteristics, cultural distinctions, and diversity of the parties involved within the standards and auspices of an international legal structure. Dialogue between parties must be maintained. The system must be designed with returning loops so that when one stage of negotiations fails, another stage will take its place within the configuration of a peaceful and constructive process of dispute resolution and settlement. The objective is to keep the parties diplomatically immersed, and away from the battlefield.

Interests at issue may be political, social, or economic, but once a nation identifies them as a high priority interest, it becomes a matter of national security to secure them, and perhaps even expand them. It is here that nations will conflict with one another, since, by expanding their own self interests, nations may create friction between those competing, and thus, conflicting interests. Nations will always disagree with one another for many reasons. When competing interests clash, we find ourselves in the midst of a confrontation which can quickly develop into a precarious situation and a crisis. We often react with swiftness and try to anticipate harm that may come from retaliation, rather than taking the time to control real damage, and decide how and when to react, should we need to react. Reaction often comes as a matter of national pride and arrogance, although at times it is a matter of national security and cultural integrity. First aggressors seldom act straight from a defensive purpose. Generally, nations act out of a

sense of insecurity, or out of a belief that national security is threatened. National security may include political or military menace, but it may also include issues of economic, racial, religious, or social intimidation.

Throughout time, nations have resorted to war as a method of conflict and dispute resolution more than any other method in history. However, we have resorted to war for much more than conflict resolution. Although there are many causes of war, modern sociologists, anthropologists, diplomats and other international scholars have identified fifteen main motives for war. In his "Logic of International Relations,"[6] Walter S. Jones, of Long Island University in New York, identified these major causes of war:

1. Power asymmetries
2. Power transitions
3. Nationalism, separatism, and irredentism
4. International social Darwinism
5. Communications failure owing to misperception
6. Communications failure owing to technical irony or error
7. Arms races and security dilemma
8. Internal cohesion through external conflict
9. International conflict through internal strife
10. Relative deprivation
11. Instinctual aggression and sociobiology
12. Economic and scientific stimulation
13. The military-industrial complex
14. Population limitation
15. Conflict resolution by force

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[6]WALTER S. JONES, THE LOGIC OF INTERNATIONAL RELATIONS 379 (7th ed. 1991).

He explains that many causes of war can be found in conspiracies, hidden agendas and motives, and the influences of the elite, but we cannot ignore the nonconspiratorial basis and the rational processes in social life that turn pacifists into warriors, and involve the "real incompatibilities" between the basic moral objectives of all the conflicting sides in a controversy of international proportion. War is the final output of the frustration of a nation, albeit aggressive or defensive. Usually, the motivational foundation lies somewhere in one or more of the elements found above, but what has really changed the act of war, is not only the "why" we fight but, the "how" we fight.

In our day, war is a vile reality. Due to our modern technological advancement, we can conduct war from anywhere in the globe in an instant. Our methods have become far too destructive. They are impersonal and even comfortable. We do not have to know or see who we kill. It is simply quite automatic and effortless. With a button we can lay to waste vast lands and slay millions of people. This is not science fiction, but scientific and social reality. It has already occurred, and it can happen again, anywhere in our world today. The horror of war is our persistent specter, always lurking about our most primitive social instincts, awaiting to reappear most impetuously. Perhaps, the reality of the modern day slaughter and devastation that war can cause should be the best of all reasons to attempt to prevent it. We should attempt all other methods of conflict resolution before resorting to war. We must replace war with more constructive and less costly schemes of resolving our differences and facing our crises. The art of diplomacy

becomes a useful tool to engage friendly relations among nations to prevent armed conflicts.

Since humanity first resorted to war, a part of us has been resolved to stopping it, while another part seeks to promote it. Diplomacy is the art of the pacific settlement of conflicts and disputes. It is the practice of conducting relations between states through official representatives and liaisons, as a state pursues its own means and interests beyond its jurisdiction.[7] Diplomacy has been around for hundred of years, but it was not until the seventeenth century that it became an organized method of conducting foreign relations, and an orderly fashion of a country to express its foreign policy. France, under Cardinal Richelieu, first introduced the modern approach used today in international relations, with its motivational basis. In the eighteenth century, Britain introduced the concept of a "balance of power" in the world. This concept would be the center of the diplomatic environment of Europe for over 200 years. The nineteenth century brought the diplomatic efforts of the Austrian Hapsburg Prince, Von Metternich, and the reconstruction of the Council of Europe after the defeat of Napoleon. This was an age which remolded European diplomacy into a power struggle and the politics of force and aggression, "and a cold-blooded game of politics."[8] In the twentieth century, industrialization and technology, with its intensive mass destruction, as evidenced by two

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[7] PLANO AND OLTON, s.v. "Diplomacy."

[8] HENRY KISSINGER, DIPLOMACY 17 (1994).

World Wars and countless of other skirmishes, brought us, by necessity, to realize the need for an international legal order.

Although many great civilizations employed the use of diplomacy intensively, it was the Roman civilization which truly improved diplomacy in that age and made it into an organized system of foreign service. It is true that they embraced violence and aggression in their conquests, but nonetheless, they understood quite well the principles and significance of diplomacy. This is reflected by the Roman law of the day in the periods of Republican Rome and Imperial Rome. In fact, the law of diplomacy was developed into the legal *codex* of Rome. The classical legal phrase in Roman law was *Jus Feciale*, or the law of diplomacy and negotiation, which related to the *Jus Gentium*, or the law of nations expressly. Again, it is the concept which can be found in the core foundation of the modern idea of an organized body of diplomatic law and principles, based upon natural law and equity, or *Jus Naturale.*[9] The Romans, as well as the Greeks, Egyptians, Chinese, and Vedic civilizations of India all had an elaborate system of diplomatic representatives and a well-developed standing diplomatic corp.

Today, when nations feud with one another, the first line of crisis containment is diplomacy. In our era, we place more emphasis upon world organizations or parliamentary diplomacy than ever before, but, in this age of power asymmetries and competing interests, diplomacy may not be a satisfactory ideal. Since there is little stability in the world today, and an equilibrium of social, political, and economic

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[9]HENRY S. MAINE, ANCIENT LAW 50–51 (1963).

resources is lacking, we have to exercise caution with the methods of intervention that we use as coercive sanctions and measures. We have not yet defined the goals and objectives of global foreign policy, our international relations, or the structure of equitable resource distribution, opportunity, and dispute resolution. Much mistrust exists in our diplomatic corp worldwide. Although we speak of a "new world order,"[10] it is not yet; it is only in its infancy. There is much room for improvement and continued reforms in global relations.

We cling to antiquated, but familiar, beliefs of military might, economic supremacy, and political spheres of influences. These beliefs foster coercive, one-sided alliances and produce measures and sanctions by voting rather than by an objective, undetached international tribunal that interprets positivist notions of international law and policy. Parliamentary diplomacy, as a policy-making body to oversee treaties and conventions and the making of positive rules, is constructive. However, parliamentary diplomacy, which acts without balance of power or separation of power as a quasi-judicial executive and legislative body, is not constructive. The United Nations is still acting in many respects like a League of Nations. It finds itself in a post-war mentality which is quickly being replaced with the ideal of a new international order, complete with international legal norms, methods of enforcement, and a community of nations with an equal share of power, obligations, duties and socio-political, and economic liabilities.

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[10]KISSINGER, *supra* note 8, at 17-28 . In the past few years, since the administration of President Ronald Reagan, all presidents, most prime ministers, secretaries of state, foreign ministers, ambassadors, and the last two UN Secretary Generals have repeated the same phrase many times describing a new approach of international collectivity and cooperation among nations.

We have made improvements since the last World War, but alliances of nations still control too much of the world's industrial, technological, and economic resources, resulting in raw and unrestrained power at the hands of a few nations. This is not equitable. It creates instability, an imbalance of power, and competing interests, which can only result in more disorder, turmoil, and confusion around the world, bringing the potential for more conflict and dispute.

For as long as the United Nations continues to be segmented into regional alliances, we will have discontentment and mistrust by the least developed nations. A good glance at the arrangement of the Security Council reveals the controlling interests. Minor concessions are granted from time to time, to lesser entities, voices almost silenced in the midst of overpowering influences around them.

Diplomacy needs to become more equity-based and must mature to be more objective and goal-minded. Diplomatic negotiations should always observe equitable principles and resolutions and aim for a well-balanced conciliatory outcome, not merely interim results. The foundation, the structure, and objective of complete peaceful settlement of disputes must be implemented thoroughly and incrementally until those purposes are achieved. After all, that is the main aspiration of diplomacy and the chief reason the League of Nations and the United Nations were created, to monitor, manage, and oversee an international legal system based upon the rule of law as interpreted by a world community. That is the role of any kind of functioning legal structure. The UN should now begin conducting itself as a world parliamentary body, or policy-making body, existing collaterally with municipal governments, and under no circumstances

acting contrary to that fundamental and significant directive. The sovereignty of nations should always be revered, and guaranteed, irrevocable rights to self determination preserved. Just as in other gubernatorial systems, the global infrastructure should behave according to a separation-of-powers principle. We are now ready to outlay the separation of the political arm of the UN from the judicial arm, and each must be presented with its own duties and objectives, operating under the same principle and philosophy.

Peace accords, treaties, and international agreements, when arrived at from an equitable perspective, can be enforced in the same manner. Today we use summits, UN resolutions, conventions and treaties to arrive at peace. This procedure is correct when using it as deterrence or prevention, but it may not be sufficient for the purpose of dispute resolution. The doctrine of *pacta sunt servanda* is at the core of all promises embodied in international treaties and agreements reached upon the resolution of disputes, and the subsequent agreements designed to prevent further dispute. This doctrine is based upon natural law principles and almost sanctified in the Preamble to the UN Charter. It is also included in the text of the 1969 Vienna Convention on the Law of Treaties in its own Preamble and in Article 26 and underlies the very foundation of international law and relations today. By its own definition, it embraces the equitable principle of *good faith.*

Article 26 states that ". . . [e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." [11] The duty to observe treaties in good faith has been well recognized in practice by jurists and scholars for centuries. In fact, the

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[11]Vienna Convention on The Law of Treaties (1969), Article 26. U.N. Doc. 1970.

international legal system depends upon this doctrine to maintain peace between nations before and after accords have been arrived at and agreements have been signed. This is the backbone of international relations; when nations reach settlements and resolutions after conflicts and disputes, they must honor their commitments to that resolution. Should a nation default upon its obligations under the terms of a treaty, the international community would loose trust in that nation-state. The international community would begin to isolate it as a state that cannot be trusted to maintain peace and adhere to international legal processes. This, of course, may have economic, political and social repercussions. That nation may even face sanctions against it, imposed by the world community. *The International Law Dictionary* states that:

> To work successfully, the principle of pacta sunt servanda must be complemented by appropriate procedures for peaceful change, allowing for revision of burdensome treaty provisions by peaceful means and by admitting the possibility of terminating treaty obligations in exceptional cases of fundamental change of circumstances. [12]

Although stern adherence to this principle is required, it must be equitable. It must be reasonably and liberally interpreted so as not to place an unreasonable burden upon parties to an international agreement or treaty. This duty to observe all treaties and agreements in good faith is not only a time-honored tradition in international law and diplomacy, but an essential part of both traditional and alternative methods of international dispute settlement. Little could be accomplished in the realm of international relations without it. In 1871, the doctrine or principle of *pacta sunt*

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[12]ROBERT L. BLEDSOE AND BOLESLAW A. BOCSEK, THE INTERNATIONAL LAW DICTIONARY 258 (1987).

servanda, was recognized in the ***Declaration of London*** by the European powers as one of the most essential principles in international law when in it was declared that:

> . . . it was an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by enas of an amicable understanding. [13]

When a state breaches or violates an international agreement or treaty, it will usually attempt to justify its breach by bringing about the defense found in the principle of *rebus sic stantibus,* which means that any substantive or essential change in the conditions under which a treaty was reached will clear a state from its duties and obligations under that treaty or agreement, and release its from operation under the agreement.[14] Most of the time, this is brought forth by an unjustified renunciation of a treaty commitment by one of the parties in an attempt to rationalize its action upon an implied legal principle that provides that any unilateral change on behalf of a party nullifies or voids the agreement or treaty, since it alters the original conditions recited in the text of the agreement, and thus, alters the obligations under the treaty. Indirectly, this serves as a verification and recognition of the legitimacy of *pacta sunt servanda* as an quintessential substantive principle in general international law and policy. In order to negotiate solutions and settlements successfully, where all involved feel as if they have gained peace and won, there needs to be a moral and legal presumption that negotiations

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[13] *Id.,* at 258.

[14] PLANO AND OLTON, s.v. "Rebus sic Stantibus."

will be carried out in good faith. This promotes reliance and trust among the parties, and enables them to work interdependently.

2. NeoAequitas: An Alternative Process to International Dispute Settlement

Traditionally, courts are the governmental bodies charged with the responsibility of the administration of justice. Why should it be any different in an international system of quasi-government? Legislative bodies are charged with the task of policy and rule-making, and not with the interpretation of legal rules and norms. It was useful at one time to amalgamate the two, as in a post world war period, but this is no longer necessary. International legal reform is now imperative, and a *sine qua non* to the administration of an ascending international legal system which ought to reflect our modern day world, detached inasmuch as possible from the political and economic forces and influences included in a parliamentary framework. We already have a number of international courts in use; we now need to delegate the authority and jurisdiction regionally, and for this we need to reform the international legal system, both substantively and procedurally.

Historical examples and constitutional studies show that governments work more efficiently and responsibly when governments are divided into separate branches to curtail power and discretionary authority. Each branch is delegated specific authority and jurisdiction over particular duties and areas of government. If the world is to come together as a sort of government, perhaps the best form of blocking discretionary power is to do the same. This means that maybe it is time that a new global structure and policy emerge, giving specific authority to each branch in the world system of administration, complete with checks and balances, each with specific jurisdiction over its affairs. The legislative assembly ought to concern itself with its policy-making endeavors, while

enjoying a certain amount of parliamentary supremacy, very much like the British style of parliamentary sovereignty, but allowing for independent and detached judiciary, designed to administrate justice, the courts, tribunals, and the legal system. Also, this world judicial branch ought to have circuits around the globe, at least one per continent, charged solely with the resolution of disputes among nations, after all diplomatic efforts have been exhausted. Such courts are never to interfere with national or domestic affairs under any circumstance, unless called to do so by agreement in the UN General Assembly, or by request of individual government. The supranational legal system of the European Union might be a good model; they have cooperation between municipal courts and the European Court of Justice (ECJ). The authority to develop a more organized and separate legal administration and structure already exists and is provided for by the UN Charter. The abolition of the current system is not entirely necessary; it has served the world quite well for its era.

Perhaps it is time to enact reforms and renovate the international legal system and the administration of international justice for our modern world. If anything ails modern diplomacy today, it is the inability to deal with change, and the inability to redefine itself, and rewrite its own neoteric chapter onto the modern era. This has to come with a change of attitudes, and a reinterpretation of our values and beliefs about who we are as races of people occupying the same world. We have to decide if we are truly committed to world peace, or at least tranquillity, and the elimination of violence and aggression. With commitment, should come action. If we really want to improve our system of

global relations, we ought to discuss more deeply the structure and the programs available to us for solving world crises and disputes among ourselves.

Although we have a responsibility to our nationality, we are also responsible for the welfare, survival, and security of all of humanity. This responsibility was not met during the last world war as the world stood by while an entire race of people were almost eliminated. In many ways, we all share a responsibility for this trepidation. Similar incidents have happened before; it occurred during the Inquisition, during the Great Purge in Russia under Stalin, during the expulsion of the Saphardic Jews from Spain, and other places in Christendom; and it is happening today in Serbia, Bosnia, Rwanda, and many other places.

The United Nations Charter established certain procedures designed to prevent disputes from developing into full-blown use of force. Among them, Article 33(1), was created specifically to be applied to the resolution of international conflicts and the settlements of disputes, and it provides that:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a resolution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[15]

What follows is a proposal to reform the current system of the international administration of justice and redesign the process and procedure of conflict settlement and dispute resolution in international law.

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[15]U. N. CHARTER, ART. 33, CH. 6, ¶ 4., as cited in BURGENTHAL & MAIER, *supra* note 3, at 64.

Proposal for Structural and Process Reforms in International Justice Administration

A. New Alternative in the Dispute Resolution Process

In order to reform the international dispute settlement process, both the substance and the procedure of the legal system must be renovated. The substantive legal principles are well developed, but the substantial use of equity in international law must be augmented. To do this, a complete system of dispute resolution must be defined and implemented to obtain maximum benefits and optimize performance. *NeoAequitas* employs the principles found in equity jurisprudence, while also utilizing the modern scientific approach to conflict resolution. This includes the use of alternative dispute resolution methods in designing a specific interactive and multifactored system of inquiry, and subsequent equitable conflict management. At each new step of the process, parties are required to commit, inasmuch as possible, to earnest efforts in good faith to solve the conflict. The function of any legal system, including the international legal system, is to install a system of fundamental fairness when adjudicating parties who seek solutions to societal disputes through due process while striving to maintain the peace. Berman explains that:

> The peace-making function of law emphasizes the elements of fair hearing, publicity, community participation, and equitableness in the administration of legal justice; the function of law in making calculable the consequences of one's act emphasizes the elements of precision, definiteness, speed, and logical consistency in the legal rules and legal procedures. [16]

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[16] HAROLD J. BERMAN AND WILLIAM R. GREINER, THE NATURE AND FUNCTIONS OF LAW 33 (4th ed. 1980).

We begin with the non-judicial, alternative dispute resolution methods. These resemble current methods but with modifications that include the rules of equity, not law or policy or political perspectives, etc.

Inquiry. When a conflict arises between nations, intervention should immediately follow by agreement of the Security Council, which is charged under the UN Charter with the responsibility of maintaining international peace. First, issue a call to cease and desist all hostilities. This avoids further aggression, retaliation, and escalation of the conflict. A selected multinational panel of experts from various fields should be dispatched to conduct a formal investigation of the controversy and set up *dialogue* rounds with the feuding parties. At this time the formal diplomatic process may begin and equitable conflict management may follow.

Negotiations. After the preliminary investigation, a process for *equitable conflict management* commences. A more thorough investigation should take place and recommendations may be made to the Security Council, the Secretary General, and reports are made to the General Assembly. Negotiations should be supervised under the careful intervention of the Inquiry panel. These rounds should continue until determinations are made or the conflict is settled. Opportunities to settle the conflict are provided at every stage of the process.

Mediation. If the conflict cannot be resolved upon the recommendation of the Inquiry panel, the *mediation* phase may begin. At this stage, the original Inquiry panel is either replaced in whole or in part with more sophisticated technical experts in mediation and conflict management. If mediation is successful, the process moves toward formal

conciliation to seal peaceful resolutions. If not successful, mediation should be continued until all measures of the process are exhausted or a solution is found or, upon the recommendation of the mediators, the parties move to the next stage of the process.

Arbitration. The next phase is formal arbitration by an international panel or board of arbitrators. Parties may elect to keep the previous panel or dissolve it and select their own arbitrators with the consent of all the parties involved. Parties can elect to do this at any stage of the ADR process. Parties to the arbitration process must also agree to abide by the adjudication of the panel. If this stage is fortuitous, then a formal *conciliation* conference is held where the parties will sign a final agreement reflecting the outcome of the adjudication, and the settlement of the conflict. The final adjudication is legally binding upon the parties. This process should continue until either a solution is reached, or one of the parties chooses to end the arbitration process. It is at this point that there is an essential substantive and procedural departure from the current structure in the international legal process. From here the parties can either return to any stage of the ADR system, or leave it and enter the judicial process of conflict settlement upon the consent, recommendation, and leave of the new court of chancery for international disputes.

B. New Judicial Procedures: The New Tribunals

The International Court of First Instance

A new court of chancery for international disputes should be established to provide for the equitable settlements of conflicts and resolution of disputes under the strict use of equitable principles, rules and procedure. This court, called the International Court of First Instance *(ICFI),* is strictly a court of equity, and it will become the entry level for any party for the entire international legal court system, and will handle all initiatory international disputes submitted to it. That means that there will be an initial, compulsory and unvoidable application of equitable rules and remedies at the first level of the international legal system. In this court, where all elements are considered and multidisciplinary perspectives are kept in the court's conscience, there cannot be any mechanical application of strict legal rules. Equity here will be adapted to a universal definition of fairness and substantive justice, and applied from a domestic, jurisprudential, and cultural interpretation of equity in accordance with the parties in controversy. Hence, elements of Roman-Civilian equity jurisprudence may be incorporated into its rules, as well as notions and principles of Anglo-Romano equity jurisprudence, with Islamic, Hebraic, and Asian-Confucian aspects of equitable remedies included.

Composition of the Court

This court will be a permanent tribunal comprised of seven sitting chancellors, including an alternating President of Chambers, and a number of auxiliary alternate justices comprised of judges, jurists, lawyers and international legal scholars and publicists from all nations called to duty *ad hoc* upon request of the court's clerk. During sessions, in accordance with the parties in controversy, two or three out of the seven judges, shall be nationals of the parties to the controversy. The remaining Chancellors are to be selected from among the several nations. All justices must have been engaged as a judge or magistrate in her or his own country for no less than five years, or engaged in the practice of international law or policy for no less than ten years. Active seated Chancellors can serve in this court for a period of no more than ten years and they cannot serve in any other judicial capacity, domestically or internationally, during their tenure with the ICFI.

The President of the Chamber cannot preside over a case if the controversy involves his/her own country, or if she or he is connected in any way to the conflict at hand. An alternate President shall be appointed in his/her stead. In all major controversies, the court shall seat *en banc* and no decision or adjudication shall be handed down without full approval and opinions from *all* seated Chancellors. The decision of the court is legally binding upon the parties and appeal shall be as a matter of right, but with leave of the ICJ upon error. The court may issue preliminary and advisory opinions to an authorized high court from any nation in a case in controversy that makes an inquiry, including any international panels and boards involved in the stages of ADR, and to

branches, and agencies of the UN that may also inquire for advisory opinions upon leave from the ICJ or the General Assembly of the United Nations. Individual citizens shall have no standing in this court, and the court, as a equity court, shall have no criminal jurisdiction.

Jurisdiction and Procedure

This court shall have competence and jurisdiction in all international cases and controversies arising from United Nations member-states who have exhausted all other remedies at the lower levels of ADR. Actions at law are not to be permitted at in this court, and the cause of action filed shall be in the form of a Bill in Equity in regards to a conflict and/or dispute among two or more nation-states. Strict action of law shall be filed with the ICJ directly, and removal from the lower levels of non-judicial process of ADR can be accomplished in only three ways: (a) by exhausting *all* the ADR procedures, and by leave of court appeal to enter the judicial system, (b) in an emergency situation, a party can petition the court for leave to a "leapfrog" appeal and bypass the ADR process in its entirety, or at *any* stage of the process, and (c) by direct request of either the ICJ, or by the Security Council of the United Nations. The court would have the jurisdiction and the right of review of lower level cases coming from the ADR stages, and it could intervene in *pro bono mores publico*, or for moral public good, that is, to do the right thing when it is not being attained. This court could remand cases to the lower ADR levels in certain circumstances or by consent of all the parties involved, and by leave of the court.

The court will maintain a body of experts in diverse academic disciplines, including law, to act as *consultants* upon request of the court in an advisory capacity. This court shall not render decisions that are damaging or contrary to the interests of any of the parties, or act repugnantly to the spirit, Charter of the United Nations, or the Constitution of any member-State. The General Assembly of the United Nations shall reserve the authority to remove a case from the ICFI, by majority vote, and place it at the hands of either the ICJ, or the Security Council respectively. The court shall exercise judicial restraint in matters of politics, and controversies of strict legal principles, and it shall not compete for such jurisdiction with the ICJ, which is assigned by the UN Charter as the highest court for international controversies and disputes, seating with the capacity of rendering decisions at law or at equity. This court in time, may develop its own rules of court and chancery procedure, and it may publish its own reports to the international legal community for the purpose of advancing the international legal system and process, and for the study of international substantive equitable and legal application.

Appeals

Appeals from the decisions of this court will go straight to the highest court in the world on matters of international law and policy, the International Court of Justice (ICJ) at the Hague. In certain instances, a case may be removed collaterally to another intermediate specialty court within the international legal system, such as the Inter-American Court of Human Rights, the ECJ, or the Benelux Court of Justice. Appeals to the ICJ, are to be by a matter of right of petition, and not by leave of the ICFI, but parties

would have to file a petition or brief to the ICJ for leave to be heard, that is, for a case review by grant of *Certiorari.* The ICJ will of course, make the final case determination, and retain the right to remand a case back to ICFI, or to the ADR level. From the ICJ, and only in very special circumstances, states may appeal a decision of the ICJ to a newly formed body of the United Nations General Assembly called, the *Judicial Council.*

The Judicial Council of the General Assembly of the United Nations

This final judicial body is a committee comprised of nine members, each called *legatus.* Of the nine members of this council, four shall be also members of the Security Council of the United Nations, and five from the ranks of member-nations of the General Assembly of the United Nations. Appeals to this body are by leave of the Judicial Council only, once they have granted a petition for review by motion of both the parties and the ICJ, or by recommendation of the ICJ to the council, or both. However, the parties cannot, on their own initiative, appeal directly to the Judicial Council, thus bypassing the ICJ. The council cannot remove on their own, any cases from the ICJ or from the ICFI. Review of a case submitted to it must be exclusively by unanimous vote of the council, and decisions to either remand the case back to the ICJ, or the ICFI, not to ADR, or a straight decision from the council would require a majority vote of the council. This would be the final stage in the international dispute resolution process.

This new process would ensure fundamental fairness and substantive justice within the international legal systems. It would also ensure the complete review of cases in controversy by an equitable tribunal at the first instance (or at *nisi prius),* allowing

sufficient time and procedural steps for all the conflicting parties to approach problems from a legal, peaceful perspective, without resorting to armed conflict. The other international courts and tribunals already in place shall retain their present *in rem* jurisdiction, or subject matter jurisdiction, on their particular areas of specialty. The ICFI will only act as the initial court of record, and from there a petitioner/nation may move to other collateral courts, or petition for an appeal to the ICJ.

Figure 5.1 The Improved Model of the International Legal Process with New Courts and Tribunals Added

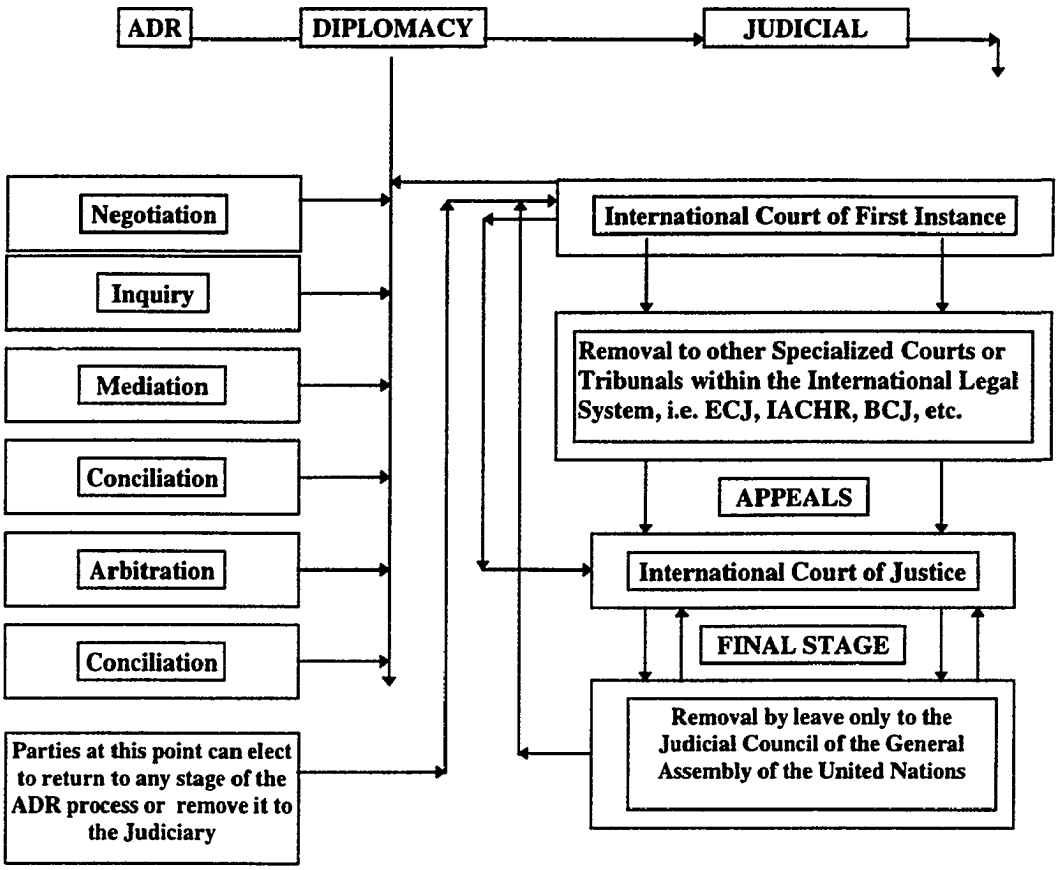
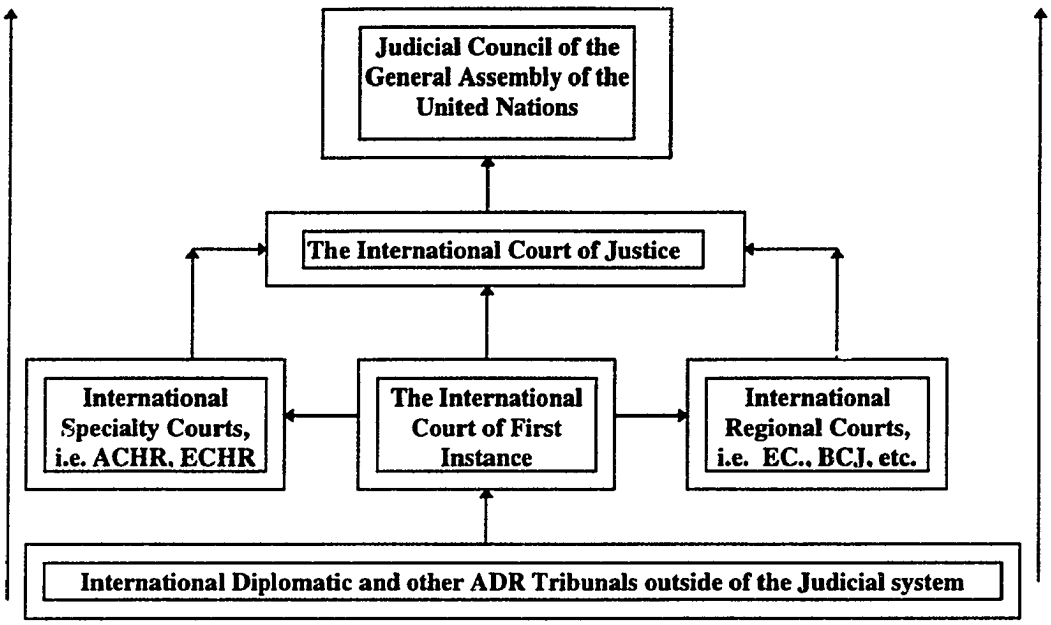


Figure 5.1 above, outlines the new international legal process after all reforms have been made, and it indicates the new processes of ADR, the judicial process, and the appeals process.[17] Figure 5.2 below represents the model of the new international

[17]The creation of a separate court of equity has been proposed before, but with little regard to a separate legal process or procedure or a substantive rationale for its creation. In the past, such a court was only a tribunal aside from the international legal process and not an internal inclusion of the international legal system. *See* GERHARD VON GLAHNS, LAW AMONG NATIONS 451 (2d ed. 1971).

judicial structure and the administration of justice under the United Nations court system integrating the new court of equity and other tribunals. The graph outlines the courts in order of importance in the international system.

Figure 5.2 A model of the new international judicial structure and the administration of justice under the United Nations court system integrating the new court of equity and other tribunals. Graph outlines courts in order of importance in the international system



C. Enforcement of Judgments, Settlements, and Resolutions

Laws become insignificant when judgments and settlements of resolution cannot be enforced. As with any domestic legal system, when the final adjudication of legal tribunals cannot impel the parties to compliance, although they had promised to do so voluntarily and submitted their dispute to the jurisdiction of the courts, nothing is solved. The problem of compliance with the international laws and the legal system has been a historical problem from the onset of early diplomacy, but it is more particular to the nineteenth and twentieth century international organizations. Adjudicated parties should not be allowed to escape compliance, especially if they have exhausted all measures of resolutions, from ADR to judicial means. When judgments and agreements cannot be enforced in international law, as pursuant to the final accord or resolution, this would constitute not only an breach of international laws, but also a rejection by the party in default of the principle of *pacta sunt servanda*, and this cannot be permitted.

It is essential that all parties maintain their national integrity and the soundness of the international legal order and rule of law by complying with the final settlements and adjudication of it tribunals. Only then can an international legal order be properly sustained. However, the reality is that there will always be parties that will break their promises and attempt to evade such judicial determinations, hence measures must be put in place to prevent parties from such avoidance. This has been the condition that afflicts the United Nations. It is a problem at times to get nations to follow resolutions and settlements of the ICJ and the General Assembly, and this cannot continue to be the case.

The international community must exercise care to not become punitive too early, and only as a last resort. We must try not to isolate nations from the global legal order, although they must be reprimanded and censured for their repressive actions.

To enforce the final resolutions of the United Nations and world courts, the use of sanctions are well recommended, much as we are presently doing. Again care must be taken as to the degree of harshness and punitive measures used, so as not to arouse anger and hostility in nations that would surely cause more conflict and confrontation. Although in difficult and tenacious cases, we must do whatever necessary to compel nations to adhere to the international legal order, but with the consent of all nations, or a plurality of states in the international community, and with the full consent of the Security Council. Walter S. Jones makes an important observation in his book, *The Logic of International Relations*:

> The question of state's compliance with international law, and, therefore the effectiveness and credibility of international law, has been crucial throughout interstate system history . . . Uncontrollably, rapid changes in the current international political system have multiplied the need for a sound world order built on the rule of law . . . If we are to conclude that international law provides effective restraints on states, then we must demonstrate not merely the existence of legal principles but also the willingness of states to comply with them. Compliance is a function of several factors, among them: 1) the subject matter that law seeks to regulate, 2) changes in the motives and the needs of governments, 3) the ability of states to violate the law without serious threat of sanctions, and 4) the importance of the outcome of the event.[18]

Sanctions. International law and resolutions pursuant thereto, are enforced through the international sanctions power. A sanction is a penalty for the violation of

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[18]JONES, *supra* note 6, at 519–520.

social conduct and legal norms. Sanctions are very much like the contempt power exercised by domestic courts and legislative bodies and are used very much in the same manner to compel parties to follow the instructions of the court in particular matters, even against their will. In international law, the use of coercive sanctions are employed to make nations comply with their obligations, duties and promises to the international community. These are essential when all other measures fall short of their intended resolution, and are necessary only when the states default in these obligations and depart from existing norms and customary international behavior. Governments usually regard reciprocal behavior as a very beneficial safeguard, and are often sensitive to international pressures. Coercive sanctions may also include economic sanctions and economic embargoes placed upon nations to create hardships in their respective economies, and thus bring about compliance without armed conflict or intervention. This is more desirable for the international community than sending multinational forces to remote corners of the globe which endangers the lives of soldiers and civilians alike.

The ultimate sanction in international law and relations is war.[19] Hence, states can be threatened with this alternative when all else fails, and they must be placed in the position to either comply with legal norms of the world community or suffer the humiliation of war, destruction, and defeat under a military coalition endorsed by the United Nations and the entire world. This was the case in the Gulf War against Iraq, and now, in the Serbian-Bosnian crisis. This was also the case in both world wars. When a

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[19] *Id.*, at 511.

nation acts aggressively against another, with mass power of destruction and with ruthlessness, the world community must respond to safeguard the lives of peoples and protect the powerless nation. When this occurs, it is considered justified used of force by the United Nations, and it becomes necessary to send the UN peacekeepers to intervene and halt the aggression. At times, armed intervention may be the only alternative available to stop an armed conflict, particularly if there is an asymmetry of military might and industrial capacity. Retaliatory acts of aggression by states and by non-state organizations seeking political recognition or attention to their causes should not be granted recognition until peaceful and civilized methods of interchange are pursued.

Bear in mind that wars are very costly, but no matter how costly we would imagine any peaceful system of dispute settlement to be, it is much less expensive and more desirable than war. Ury of Harvard Law School made a very important statement:

> An effective dispute resolution system offers a way to accomplish the essential functions of violence and war, but at a significantly lower cost. The ultimate challenge is to devise workable dispute resolution systems not only for families and organizations but also for relations among nations. In an increasingly interdependent and insecure world, our survival depends on finding better means of resolving our differences than resorting to the ultimate power contest—nuclear war.[20]

This is perhaps the best rationale for reforming and improving the international legal system, the substantive and procedural methods of international law, and the manner in which we humans solve our differences and settle our disputes. We must promote peace in our time and in our world through the use of substantive justice, equity

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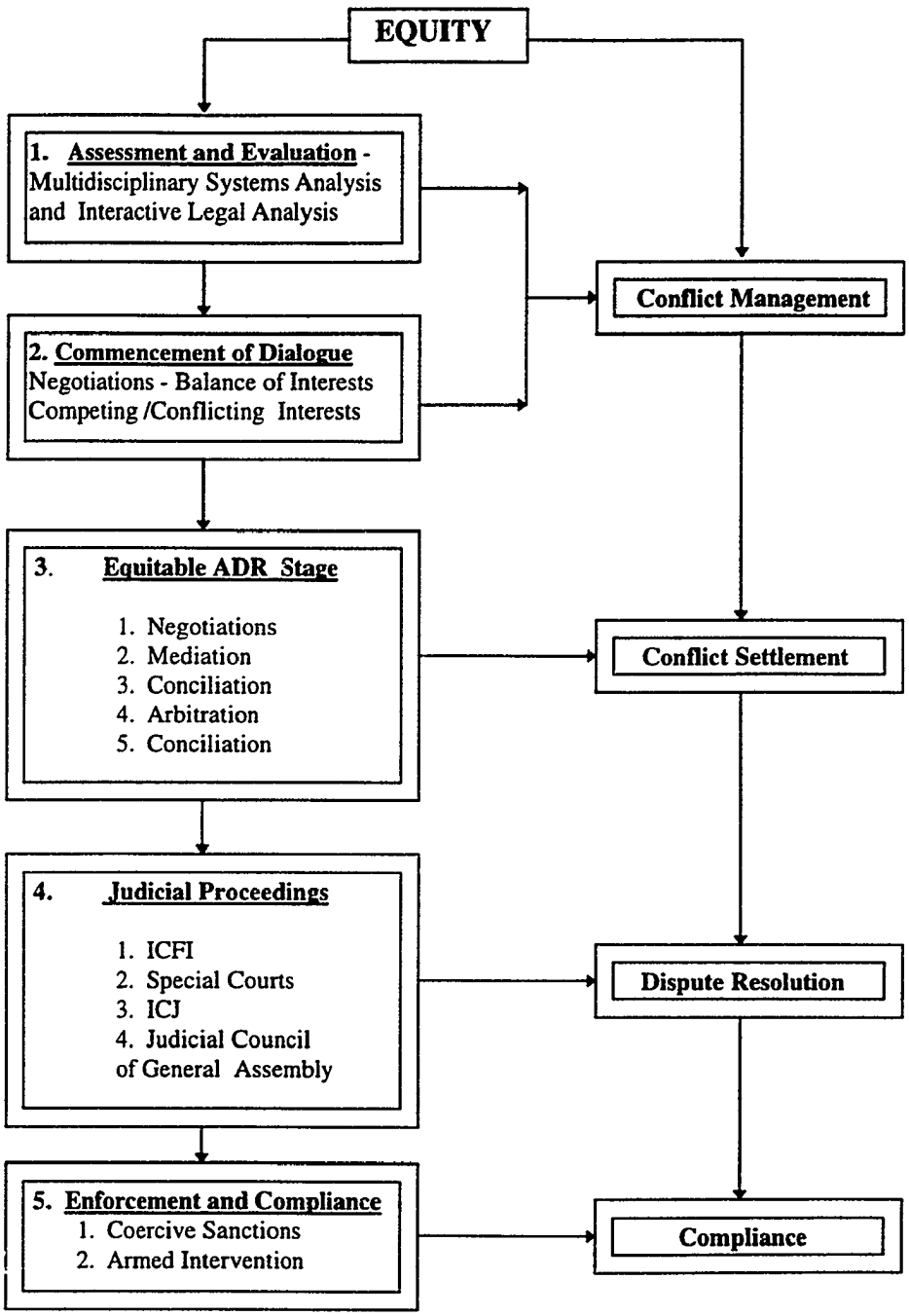
[20]WILLIAM L. URY, ET AL., GETTING DISPUTES RESOLVED 172 (1988).

and fairness, with a responsive and progressive legal system concerned for all humanity, not only a few nations.

Figure 5.3 This is a broad scope view of the aggregate and complete NeoAequitas system of conflict settlement and dispute resolution in international law. This graph is an integrated outline of the five stages of the process and it describes each accompanying phase together with the application of equitable principles in ADR and the international judiciary.



CHAPTER 6

CONCLUSION

Equity looks upon that as done which ought to be done.

Conflict is natural to humans. There will always be conflict among societies, and among nations. Since the beginning of history, nations have attempted to maintain peaceful relations and behave toward one another in a more civilized manner. Nations have learned that to keep peace between them, they must change their intolerant attitudes, and posture themselves for peaceful coexistence. Although there has been some improvement in international relations in the latter half of this century, we must learn new ways to work out our differences in civilized productive ways rather than by spilling blood.

Much work remains in areas of international relations and international law and policy, more particularly, in the field of international conflict settlement and dispute resolution. To deviate from or abandon the ancient habit of war is naturally very hard for all nations, for our past, the human past, indicates that we all have been quite barbarous at times. War in our modern day is a horrific reality. The potential for devastation and slaughter from a final conflict must not be forgotten. We must curtail our primordial instincts and remind ourselves of what is possible (and perhaps even probable) should we

fail to learn how to deal with one another in a fashion that we can truly and literally live with.

We should make a considerable effort to acquire any and every possible technology and skill to install a system of transnational, cooperative problem solving that takes us to a higher level of understanding ourselves, our heritage, our culture and who we are as nations and as peoples. In order to make such progress, we must change our attitudes toward ourselves and other nations and races. This is very hard to do. Our values, our beliefs, our customs, and our attitudes make us who we are. However, if who we are will bring more violence, hatred, wars, genocide, and intolerance, then we must change who we are, so that we may live peacefully, or at least tranquilly, and survive. Even our attitudes toward peace, harmony, and conflict resolution and settlement is criticized quite often in the literature as being utopian, idealistic, hopeful, and visionary.

This may explain in part why we find ourselves in a state of global disorder and turmoil. We are appalled when we hear of massacres, murder, genocide, mass rape, and other atrocities. We ask ourselves why these things happen, when—given our human nature—we should ask why they don't happen more often. Perhaps we should be asking not just "why" these things happen, but "how" they can be stopped. We ought to seriously consider our present condition and work from there. Improvement will come with more focus on the problems and by concentrating our efforts in these directions. We must make an intentional and attentional effort to commit ourselves and our resources to benefit all nations socially, economically, politically, and even legally.

To improve the quality of our international relations and to encourage the expansion of serenity among nations, we must develop the proper cultural content of support; we have to devise a system of values and attitudes which would promote these ideals. In German this is called *weltanschauung* or a system of values and beliefs. The law and the international legal system must become an integral part of this system of values. With the application of the right or proper philosophy of law, this can be accomplished on a grand scale, globally. International peace and serenity can be accomplished, although not exclusively, through the law and a well-ordered and properly structured legal system. This system would be designed to support world order, foster cooperation among nations, and encourage the discussion of differences without the constant threat of armed conflict.

This endeavor necessitates an international legal system in which all nations are seen as important, all races and cultures significant, and all customs and traditions tolerated unless repugnant to the essence of humanity itself. Such a legal system must be based upon impartiality and fairness, founded upon substantive justice, and responsive to both the needs and the wants of society. It must be flexible and objective enough to consider all extraordinary elements of human conflict and other nonlegal factors of life. To achieve this, this legal system has to be pliable in substance and procedure and must not be mechanical in principle or application. This legal system must have as its goal, justice and equality for all that stand before it seeking guidance and relief. This system is equity.

The principles of equity are well understood universally. All nations, all cultures and civilizations have the notion of justice and fairness, and comprehend its roots and value. It makes sense to employ a body of legal principles and jurisprudence to correct the wrongs of strict legal principles and their applications. Equity, as known to most ancient civilizations, was—and still is—a corrective measure of justice that fills the gaps left by the erroneous application of law or legal principles incapable of providing remedy. Therefore, equity must, by nature, be flexible and consider all factors and all elements. A body of jurisprudence such as this grants extraordinary relief and remedy in uncommon or special circumstances. The Greek, the Roman, and the Anglo-American legal systems all embrace equity as a special and pure body of jurisprudence. Other Eastern and African societies have also embraced it under similar moral imperatives and concepts such as Taoism, Confucianism, etc., and from a social standpoint. Because civilization is comprised of many cultural, social, economic, and religious perspectives, international law must consider these factors and weigh them in trying to arrive at a settlement. It is, therefore, rational to employ equitable principles in the resolution of complex international disputes.

By designing systems tailored for each situation, we increase the probability of successful conflict resolution. By combining the principles of equity jurisprudence with scientific approaches to qualitative and quantitative evaluation, we can accurately identify the true causes of disputes. This is the objective of *NeoAequitas*, an interactive system which integrates the principles found in equity with the science of conflict resolution, and a multi-disciplinary approach to international crises and problem solving. *NeoAequitas*

involves the substance and procedure of equitable principles and international legal doctrines, blending them with the art and science of diplomacy and human relations.

To study the cause and effect of a conflict, we must understand the history of the parties, their cultural perspectives, and the history of the problem itself, and then perform an interests-based analysis to perceive fully what specific interests the parties consider to be at odds. Once these interests are identified, we may comprehend much more appropriately what interests are competing, and hence, conflicting. This conflict of interest is the root of the problem. When this conflict is distinguished, the parties must be made aware of it, and guided to reconciliation by an equitable resolution or settlement. The main objective in this part of the process is first to balance those interests by placing them in priority and perspective, and then, to attempt to reconcile those same interests through negotiation and accommodation through cost/benefit analysis. This proactive method of effecting synergy between the parties is achieved by fostering responsibility for their own, and each others, benefit and by obliging the parties to take each step together, from initial analysis to final resolution. Direct communication between the parties should lead to interdependency and then to open, and frank dialogue and negotiation. The third party, the intervenor, must be carefully aware and supervise and direct the situation sensitively, never taking either side. This process is known as equitable management and takes place throughout the entire alternative dispute resolution stages.

We can learn much by modeling the principles of leadership-based management, which teaches the application of proactivity, responsibility, and synergy in problem solving. By carefully designing each step at the diplomacy phase, ADR phase, the

judicial phase, and at the compliance phase, we can achieve better results and attain better resolutions and settlements. Each stage must have built-in return loops that will keep the parties in dialogue and engaged in constructive negotiations to solve the problem for their mutual benefit and arrive at a resolution in which each feels their concerns have been addressed and that they have won. They should feel that they arrived at the solution by choosing the third or "other alternative" without giving up anything. This is the principle of win/win and its application to modern international dispute settlement. The intensive use of equitable principles is essential at every stage. The *NeoAequitas* approach is an interactive systems perspective, which allows for the use of equity jurisprudence and its application through a process of legal and non-judicial procedures that seek to manage the conflict equitably, and apply those principles fairly in all phases of dispute settlement. It encourages compliance through good relations and well-settled resolutions based upon equitable and international legal principles such as *pacta sunt servanda*, among others.

In order to advance further the application of equity in the international legal system, certain reforms and improvements must be made to the entire process of international diplomacy and the values which are at its core. The creation of an intricate process and an international court system that would function as the administrator of world justice is perhaps one of the most essential tasks in modern history. We realize that the present system is not adequate to sufficiently handle the complexity of economic, political and social upheavals. Legal principles that cannot be applied, and then enforced, have little value to our society. We need sound legal principles that are binding forces in

world policy and we need an international legal structure that enforces those international legal norms.

We must create a separate court of equity at the entry level of the international judicial system for the application of equitable principles at the onset of an international dispute. Therefore, the equity process would not be bypassed and parties would be compelled to approach the matter equitably for adjudication and settlement. With an elaborate court system, nations can now literally "sue" one another in an international court, rather than expending their efforts in aggressive retaliation and armed confrontation. Principles of law can be more simply applied once there is a machinery or procedure installed to apply them. This is the purpose of any legal system, which is to function in a manner that achieves its end, justice. As we know, this is a predicament in which the present system of diplomacy and international law finds itself. To give meaning, purpose, and integrity to an international legal order that nations trust to help solve problems, there must be a structure which operates to settle disputes among states amicably, or at least, peacefully.

Once the matter has been settled by either ADR or by judicial adjudication, compliance must be ensured through the use of collective sanctions. Nations should never engage in sanctioning other nations unilaterally, for this would bring about retaliation and reprisals and even the condemnation of the world community. States must involve themselves more often and more intricately with the formation of a competent and solid international legal order that maintains a standard for nations to follow in dealing and relating with one another. In placing the initial ADR phase and judicial

process under the vigilance of an equitable system, we promote justice and fairness and encourage nations to place confidence in a structure which can assist in reducing global tension. This work underlines the necessary principles to achieve more balance in world affairs. It assumes that the international community is willing to change its stance and attitudes toward global legal and policy management.

The settlement of disputes is by far the most pressing problem in our world. We must develop a functioning legal system, complete with procedural steps that deal with this pending problem. Current international scholars, jurists, and sociologists study the problem of conflict resolution more than ever. In fact, in the last decade the literature of conflict resolution and dispute settlement in the international arena has grown substantially. What is missing is a more progressive and substantial methodology with a modern scientific approach. Growing problems in the international realm suggest that diplomacy, policy-making, and the current world legal order must be revamped. We must study the plurality of our history and the complexity of our cultures, and we must create a standardized code of legal norms and processes. The quality of our international relations lies in the betterment of a solid and more equitable method of peaceful dispute settlement; so, in our modern age it serves us well to endeavor laboriously to achieve transnational serenity. By doing so, we may then concentrate on the more constructive and worthwhile ventures of the human race.

Perhaps, we may be able to focus more on education, the arts, healthcare, and our social, and economic environment. Few legal scholars address the necessity to employ equitable principles in international law. Some do address the need, but they lack the

machinery to apply these principles or they ignore the deep implications of making equity jurisprudence a whole and integrated part of modern international law. Past international jurists and ancient civilizations have delegated to us the responsibility of fully realizing the significance of fairness and fundamental due process in the international rule of law. However, we must not ignore the historians, philosophers, lawyers, and judges of old who have contributed vastly to our knowledge of sound legal principles and international law. When we analyze all the studies, data, and case analogies of the first half of the 20th Century, it becomes obvious that we must improve methods of solving discord among nations.

War is very costly and rarely beneficial to anyone. Dialogue and negotiations cost much less and are beneficial to all the parties involved. Our chief purpose for creating a tighter and more realistic legal system is to prevent destructive conflicts. Although such a scheme may appear to be altruistic and utopian, it is nonetheless a necessity of modern times. The ideal of promoting world peace through law or legal systems is not new. From Grotius to Cicero, and from Gandhi to Churchill, many have suggested that perhaps this may be the only responsible way we can discuss our differences within the confines of order.

A look at our global condition may allow us to ascertain the importance of an equitable system of dispute settlement and resolution. It is easy to see how failed diplomacy and coercive foreign policy on behalf of a few ambitious nations have launched our global society into a series of historical catastrophes and crimes against humanity. When we commit such crimes or allow them to occur, we sin against

ourselves. Finally, Bonar Law once observed a remarkable truth when he stated: *There is no such thing as inevitable war. If war comes it will be from failure of human wisdom.*

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