3. The contribution of equity to environmental peacebuilding

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1. NATURAL RESOURCES, PEACEBUILDING AND EQUITY: SETTING THE SCENE

Environmental peacebuilding rests on the assumption that natural resources and environmental governance are central to laying the foundations of a sustainable and lasting peace in post-conflict societies. In fact, it has been advanced that natural resources 'underpin or affect practically every peacebuilding activity' as 'most post-conflict economies depend on natural resources to rebuild'.[1] Extractive natural resources such as hydro-carbons, minerals, gem stones or metals can help generate much needed revenue to jump-start economic recovery; land will be key to providing livelihoods to returning populations; access to water will be essential to the provision of basic services such as drinking water or sanitation as well as providing irrigation for agricultural purposes and renewable resources will need to be managed sustainably to ensure livelihoods are sustainable.[2] Hence, environmental peacebuilding plays an instrumental role for the economic recovery of post-conflict societies and prosperity is a foundation for peace.

Peace however is also fostered by cooperation, dialogue, and shared interests. In this context, Jensen and Lonergan note that shared natural resources or common environmental threats can create platforms for dialogue, confidence building, and cooperation between divided groups.[3] Natural resources and environmental governance thereby create peacebuilding opportunities. In fact, according to UNEP, during peace mediation processes, 'wealth-sharing is one of the fundamental issues that can "make or break" a peace agreement',[4] including the sharing of natural resources. The former UN Secretary-General, Ban Ki Moon, has called on states to 'make questions of natural resources allocation, ownership and access an integral part of peacebuilding strategies'.[5]

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[1] Carl Bruch, 'Considerations in Framing the Environmental Dimensions of *Jus Post Bellum*' in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practises* (OUP 2017) 29, 31.

[2] Carl Bruch et al, 'International Law, Natural Resources and Post-Conflict Peacebuilding: From Rio to Rio+20 and Beyond' (2012) 21(1) *RECIEL* 44, 46–47. See also United Nations Environment Programme (UNEP), *From Conflict to Peacebuilding. The Role of Natural Resources and the Environment* (UNEP 2009) (UNEP, Peacebuilding) 19.

[3] David Jensen and Stephen Lonergan, 'Natural Resources and Post-conflict Assessment, Remediation, Restoration and Reconstruction: Lessons and Emerging Issues', in David Jensen and Stephen Lonergan (eds), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Earthscan 2012) 411, 412.

[4] UNEP (n 2) 5.

[5] UNGA, *Progress report of the Secretary-General on peacebuilding in the aftermath of conflict*, UN DOC A/64/866-S/2010/386, 16 July 2010.

Beyond the potential for natural resources and environmental governance to generate sustainable local or regional peace and stability, the international community as a whole will often share an interest in the sustainable management of resources in post-conflict societies. This is because biodiversity hot spots of global importance, world heritage sites and extractive resources of international strategic significance are often located in fragile and conflict prone states.[6] This makes environmental peacebuilding of international and even global significance and of natural interest to the international legal framework.

In this context, considerations of equity appear intuitively relevant to the framing of environmental peacebuilding. UNEP points out that different users of natural resources, at the local level, often have conflicting needs. This naturally raises the question of whose entitlement to natural resources is most important and should be given priority.[7] Equitable considerations here seem particularly fitting. According to Lowe, equity can indeed open the door to 'an elastic framework for the building of a continuing relationship between the parties' rather than a 'once-and-for all allocation of rights' based on a 'strict vindication of legal rights' that would not be suitable in contexts where a solution that can be sustained in the future is needed.[8]

Conversely, inequitable allocation, management and distribution of the proceeds of natural resources may unsurprisingly fuel conflict or lead to renewed violence whilst at the same time undercutting 'reconciliation, political institutionalization, and economic reconstruction'.[9] Tensions naturally arise from competing demands over natural resources, and these are further heightened if specific groups are disadvantaged in the allocation process. Kick-starting economic recovery as a driver for peace, by drawing on the natural resource base, will thus be short lived if careful attention is not paid to the equitable allocation of proceeds from these revenues, and also to the equitable allocation of access and management rights and responsibilities. Jensen and Lonergan identify eight conflict drivers and risks factors which typically contribute to conflict relapse.[10] Interestingly, for at least five of these, the question of whether or not they lead to conflict relapse is arguably highly dependent on how equitably they have been managed. This is the case particularly for the sharing of resource wealth and its attendant benefits; increasing competition over scarce resources; environmental degradation; tensions over land tenure and resource rights; and stakeholder and civil society participation in decision-making. Inequitable wealth sharing will induce tensions amongst communities and so will competition over scarce resources, should access not be devised equitably. Environmental degradation is likely to affect certain communities more than others thereby raising justice concerns. There thus seems to be a strong need for equitable considerations to be fed into peacebuilding legal frameworks, especially as frameworks perceived to be fair are 'not only

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[6] Jensen and Lonergan (n 3) 457.

[7] UNEP, *Governance for Peace over Natural Resources. A review of transitions in environmental governance across Africa as a resource for peacebuilding and environmental management in Sudan* (UNEP 2013) 6.

[8] Vaughan Lowe, 'The Role of Equity in International Law', (1988–1989) 12 *Australian Yearbook of International Law* 54, 73.

[9] Ken Conca and Jennifer Wallace, 'Environment and Peacebuilding in War-torn Societies: Lessons from the UN Environment Programme's Experience with Post-conflict Assessment' in David Jensen and Stephen Lonergan (eds), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Routledge 2012) 63, 63.

[10] See Jensen and Lonergan (n 3) 416.

likely to induce greater participation, but are more likely to be self-enforcing and thus successful over the long term'.[11]

This chapter assesses the ways in which different iterations of the principle of equity in international law may usefully inform environmental peacebuilding frameworks and strategies. Its starts by charting the distinct conceptual meaning and significance that the principle has come to possess in international environmental law (2) before exploring how some of its practical legal translations may assist environmental peacebuilding. In particular, attention is paid to the role equity can play in the management of shared resources and its attendant peacebuilding benefits, both in its substantive dimension, through the principle of equitable and sustainable utilisation (3); as well as through its procedural dimension, through the role of participatory decision-making in resource management (4). The chapter also considers how the principle of Common But Differentiated Responsibilities (CBDR) as an expression of the principle of equity may offer an equitable alternative to the limitations that classic understandings of state responsibility present for effective environmental restoration and reparation in post conflict settings (5) before drawing some general conclusions as to the added value of international legal frameworks of equity for environmental peacebuilding (6).

2. EVOLUTION OF THE PRINCIPLE OF EQUITY IN INTERNATIONAL LAW IN RELATION TO THE ENVIRONMENT AND NATURAL RESOURCES

Equity has long been part of the fabric of the international legal order which sees in it a direct emanation of justice.[12] Conceptually, equity is thus closely associated, in international law as much as in common language, to notions of fairness and justice. Yet, historically equity has been used primarily as a judicial tool to correct the unduly harsh effects of the law. It is indeed in the context of the resolution of disputes that equity would traditionally come into play. As a judicial technique of dispute resolution, equity could, and still can, take various forms. Equity *infra legem* allows for considerations of justice to bear on the interpretation of an applicable legal rule; equity *praeter legem* is used to fill a gap in the law; equity *contra legem* allows for displacing the applicable legal rule and remedying the deficiencies of the law; and a decision made *ex aequo et bono* can depart from judicial considerations altogether. This narrow application of equity however has led the principle to be coined a form of individualised justice.[13] Indeed, equity in such scenarios only comes to bear on the law *ex post*, at the level of legal application and legal adjudication, rather than *ex ante*, at the level of legal design. Equity is thus not built into the rule but operates as an extraneous principle that comes to bear on the application of the rule in the case of a legal dispute brought before the international judge. From this point of view, notions of fairness and justice would only weigh on the law in very limited and narrowly circumscribed situations. Such judicial equity has been criticised for its 'inability to take into account structural inequalities' since a 'solution limited to individual

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[11] Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (OUP 2003).

[12] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment)[1982] ICJ Rep, 18, para. 71.

[13] Charles De Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public* (Pedone 1972) 3.

cases does not provide a sufficient basis for the legal system to offer just outcomes if the result of the application of norms is mostly unfair'.[14]

The second part of the 20th century however saw an evolution, or more precisely an expansion, of the meaning of equity in international law following demands by newly independent states for a new international economic order. Equity started to take on significance in relation to the distribution of wealth and natural resources as the states from the Non-Aligned Movement[15] started campaigning for fairness in the allocation and sharing of resources and benefits and the redistribution of wealth. In this sense, the movement for the establishment of a New International Economic Order (NIEO) was effectively purporting to redesign the international legal system on the basis of equity.[16] New rules were to be developed which 'shall correct inequalities and redress existing injustices' and 'make it possible to eliminate the widening gap between the developed and the developing countries'.[17] Equally, the NIEO was to be founded on 'The broadest co-operation of all the States members of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all.'[18] Hence, according to Article 6 of the Charter of Economic Rights and Duties of States, 'All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account, in particular, the interests of developing countries.'[19] The meaning of equity thus expanded from a narrow technique for individualised justice to a principle meant to be inbuilt within the law and impinge on law at design.

It is this broader understanding of equity that has taken hold in the international environmental sphere. Shelton notes that while the 'New International Economic Order ultimately failed as a set of unilateral demands (…) The aim of realizing economic justice (…) resurfaced in altered form with the emergence of international environmental issues.'[20] For this author, developing countries were able to press the issue of the equitable allocation of resources and burden sharing since they hold the major part of the Earth's biological resources that need to be managed sustainably to maintain essential ecological processes, but also because they could point to the predominant responsibility of wealthier states for pollution and at the same time plead their inability to participate in environmental protection due to lack of means.[21]

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[14] Philippe Cullet, 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps, (2016) 5 *Transnational Environmental Law* 305, 308.

[15] The Non-Aligned Movement (NAM), established in 1961, was formed by developing states who did not wish to formally align with any major bloc.

[16] This is evident in the adoption of a number of United Nations General Assembly resolutions at the instigation of the NAM and China, and newly independent states more generally. See e.g.: Permanent Sovereignty over Natural Resources (adopted on 14 December 1962) UNGA Res 1803 (XVII); Declaration on the Establishment of a New International Economic Order (adopted on 1 May 1974) UNGA Res 3201; Charter of Economic Rights and Duties of States (adopted on 12 December 1974) UNGA Res 3281 (XXIX).

[17] Declaration on the Establishment of a New International Economic Order (n 16) Recital 3.

[18] Ibid., Art. 4.b).

[19] Declaration on the Establishment of a New International Economic Order (n 16).

[20] Dinah Shelton, 'Describing the Elephant: International Justice and Environmental Law' in Ebbesson and Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 55, 62.

[21] Ibid.

From its inception, international environmental law has thus been designed with equitable considerations in mind, and principles of corrective justice, distributive justice and participatory processes (demanded by procedural equity) have been integrated within the development of legal regimes. No longer a reflection of individualised justice, equity is, in international environmental law, built into the law. In fact, according to Shelton, 'it may be argued that equity plays a more important role in international environmental law than in any other area of international law' as 'since the 1972 Stockholm Conference on the Human Environment, international environmental law has sought to fairly allocate the benefits and burdens involved in natural resources and their protection, based on historic responsibility, capacity, and need'.[22] For this same author, equity in international environmental law means 'a rational sharing of the burdens and costs of environmental protection, discharged through the procedural and substantive adjustment of rights and duties'.[23]

If equity runs through the fabric of international environmental law, the inherent characteristics of this area of law, including the concept of sustainable development, have fashioned the development of new or renewed equitable principles: those of intragenerational and intergenerational equity. Intragenerational equity can be seen as prolonging the demands for distributive justice and the integration of socioeconomic considerations in legal design by developing countries following decolonisation. Often considered an inherent requirement of sustainable development and crucial to its achievement,[24] it requires equity in the distribution of the outcomes of development within one generation as much internally (within one national society) as well as internationally (between developed and developing states). By purporting to distribute the costs of environmental protection and the benefits of development equitably, intragenerational equity also aims to ensure the participation of states that would not otherwise participate in environmental protection regimes. Important legal standards inspired by intragenerational equity include the principle of common but differentiated responsibilities (CBDR) according to which, in view of both their particular contribution to the degradation of the environment and their enhanced capacities, developed countries have a shared but heavier responsibility in working towards sustainable development than developing countries.[25] CBDR can concretely translate into differential treatments and differentiated legal commitments, with developed countries endorsing heavier commitments than developing countries.

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[22] Dinah Shelton, 'Equity' in Bodansky, Brunnée and Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 639, 651.

[23] Ibid., 661.

[24] *Searching for the Contours of International Law in the Field of Sustainable Development*, International Law Association, 5th Report, New Delhi Conference: Legal Aspects of Sustainable Development (2002) 9.

[25] On CBDR see Yoshiro Matsui, 'Some Aspects of the Principle of "Common but Differentiated Responsibilities"' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 151; Chirstopher Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 *American Journal of International* Law 276; Philippe Cullet, 'Common But Differentiated Responsibilities' in Malgosia Fitzmaurice et al (eds), *Research Handbook on International Environmental Law* (2nd ed. Edward Elgar 2021) 209; Virginie Barral, 'Common but Differentiated Responsibilities and Justice: Broadening the Notion of Responsibility in International Law' in Hannes Hansen-Magnusson and Antje Vetterlein (eds), *The Rise of Responsibility in World Politics* (CUP 2020) 125.

Intragenerational equity will also command financial assistance towards developing countries and the transfer of environmentally sound technologies.[26]

The inherently temporal dimension of the notion of sustainability has given rise to the other equitable environmental principle, that of intergenerational equity. Intergenerational equity posits that in its development choices, the current generation must preserve the environmental capital it holds in trust for future generations and ensure it is transmitted in conditions equivalent to those in which it was received.[27] The present generation may use and benefit from this environmental capital, but it may not irreversibly alter its condition. In other words, environmental preservation is necessary to ensure equity between generations as without it, the 'sustainability' of development cannot be ensured. Intergenerational equity is generally thought to imply three further elements: that each generation has a duty to conserve the diversity of the natural and cultural resource base, so that the options of future generations are maintained; that each generation must maintain the quality of the planet and pass it on in no worse condition than it was received; and that each generation should provide equitable access to the natural resource base to its members.[28] A particularly compelling dimension of intergenerational equity is its grounding in the notion of trust. The principle is indeed founded on the premise that each generation is both a trustee with duties of care for the natural resource base, and a beneficiary with rights to use these resources. This grounding of intergenerational equity in the notion of trust and duties of sustainable use of natural resources that flow from it also found the relevance of these principles not only in times of peace, but also in the context of armed conflicts. It has, indeed, been convincingly argued that this reading of intergenerational equity impinges on the duties of an occupant in post-conflict settings. In particular the right of usufruct of an occupant under Article 55 of the 1907 Hague Regulations may well be circumscribed by intergenerational equity. Thus, the duty of the occupant to safeguard the capital of the properties should be read as requiring the wise and sustainable use of natural resources to ensure the rights of future generations to make use of such resources according to their own needs and values.[29]

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[26] See e.g., Montreal Protocol on Substances that Deplete the Ozone Layer (adopted on 16 September 1987) 1522 UNTS 29 (Montreal Protocol) Art. 10, Art. 10A; the United Nations Framework Convention on Climate Change (adopted on 9 May 1992) 1771 UNTS 107, Art. 4(3)–(10); The Convention on Biological Diversity (adopted on 5 June 1992) 1760 UNTS 79 (CBD) Arts 16, 20 and 21.

[27] See generally Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University 1989).

[28] See Edith Brown-Weiss, 'Intergenerational Equity in International Law', (1987) 81 *ASIL* 126, 129–31. The principle of sustainable use of natural resources, a core aspect of the Convention on Biological Diversity, is arguably a translation of the principle of intergenerational equity in that intergenerational equity embodies the 'environmental protection' dimension of sustainable development. In this sense, protection and preservation of the environment (of which sustainable use is one among other expressions) is necessary to ensure equity among generations. Equally, intergenerational equity has recently inspired the development of intergenerational rights within human rights discourse with a rise of cases initiated by children and young people in the context of climate change in particular, see e.g.: Corte Suprema de Justicia, *25 Youth v. Colombia*, STC4360-2018, ruling of 4 April 2018. See also a recent communication submitted to the ECtHR: *Duarte Agostinho and Others v. Portugal and Others*, 39371/20.

[29] See ILC, 'First report on protection of the environment in relation to armed conflict by Marja Lehto, Special Rapporteur' (30 April 2018) UN Doc A/CN.4/720, at 44–46 and Daniëlla Dam-de Jong, 'International Law and Resource Plunder: The Protection of Natural Resources during Armed Conflict' (2009) 19 *Yearbook of International Environmental Law* 27, 56.

Beyond the context of the law of occupation, it is argued that the various manifestations of the principle of equity derived from international environmental law may usefully inform environmental peacebuilding at both the international and the domestic level, or in other words, whether the conflict was an international armed conflict or a non-international armed conflict. It has already been noted that the international community often has an interest in the sustainable management of resources in conflict-torn states where these conflicts are located in areas with resources of international significance. In those circumstances it is irrelevant whether the conflict was an international or a non-international one.[30] It may well be that resources of international significance are located within the territory of a state torn by a domestic conflict. In such circumstances, the international community may still have a shared interest in the preservation of the resources located therein, even though the conflict is non-international. Conversely, environmental peacebuilding 'extends beyond international law to include national law, institutional arrangements, private sector policies, and a wide range of practices'.[31] If equitable considerations grounded in international law are thus relevant for environmental peacebuilding, they will be equally relevant beyond inter-state arrangements to inform domestic or local arrangements in the context of both post-international and non-international conflict peacebuilding. In fact, according to UNEP, 'Environmental governance at the global level has much to inform environmental governance at the national and local levels, both in its contents and in the process of establishing principles and binding agreements.'[32]

Conceptually, equity may take on both a substantive and procedural dimension. In its substantive dimension, equity fulfils the twin aims of corrective and distributive justice. This implies a distribution of resources, benefits and burdens according to needs and capacities (distributive) or historic responsibility (corrective). Substantive equity is however intimately linked to procedural equity too, since it is assumed that fairer proceedings should lead to fairer outcomes. Procedural equity thus demands participatory and transparent decision-making processes as well as access to justice. The remainder of the chapter explores some of the ways in which both substantive and procedural equity could be used as reference frameworks for the development of peacebuilding strategies. It looks in particular at the role of substantive equity in resource allocation through the prism of international principles applicable to shared resources. It also considers the relevance of procedural equity from the specific angle of participatory decision-making. And it evaluates the role the principle of CBDR may play in environmental peacebuilding from the point of view, this time, of the equitable allocation of burdens.

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[30] Common Art. 2 to the Geneva Conventions of 1949 refers to international armed conflict as: '… all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them', whereas Common Art. 3 refers to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'. According to the ICTY, such non-international armed conflicts exist wherever there is: 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' (*Prosecutor v. Dusko Tadic*, IT-94-1-AR72, 2 October 1995, para 70). Hence, according to the International Committee of the Red Cross, 'while an IAC presupposes the use of armed force between two or more states, a NIAC involves hostilities between a state and an organized non-state armed group (the non-state party), or between such groups themselves.' (*International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31st International Conference of the Red Cross and Red Crescent, 2011, 8).

[31] Bruch (n 1) 30.

[32] UNEP (n7) 2.

3. EQUITY AND SHARED RESOURCES

Shared resources demand cooperation between stakeholders over their management and cooperation can be an effective tool for peacebuilding as it helps to enhance trust, create shared identities around these resources and establish legal frameworks that are recognised by all parties involved. Characteristically, natural resources do not respect artificial territorial delimitations. International law has thus long devised mechanisms for the cooperation over, and management of, transboundary or shared natural resources such as international lakes or rivers, wetlands, mountain chains of cultural heritage sites.[33] One area of significance for norm development which deserves particular attention is that of international (i.e., shared) lakes or rivers and unsurprisingly, this area of international cooperation is centred around equitable considerations. One such core principle is that of equitable and reasonable utilisation, which, initially developed in the context of shared watercourses, now finds broad application for the apportionment of various shared resources including fish stocks or the continental shelf. It implies an obligation of reasonable use and good-faith negotiations in order to achieve an equitable result while taking into account the need for conservation of the resource as well as the interests of all its exploiters.[34] The fundamental status of the principle for the law of shared resources has been recognised by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case.[35] According to Shelton, the notion of equitable utilisation 'is one of distributive justice, attempting to make a "reasonable" allocation or reach a fair result in distribution of a scarce resource, based on what are deemed to be relevant factors, such as need, prior use or entitlement, and other interests'.[36]

Tensions can however arise as to what factors should prevail in order to lead to an equitable result, and competing contenders can include prior uses, formal equality, proportional use based on population, priority accorded to certain uses or conservation considerations. Arguably these need to be negotiated on a case-by-case basis and according to specific circumstances. Yet, the principle of sustainable development, at least as concerns the principle of equitable utilisation of watercourses, has had the effect of re-shifting the pre-existing balance in favour of better integration of environmental protection considerations to the extent that the principle of equitable utilisation can today be considered a principle of equitable *and sustainable* utilisation. Traditionally, in international watercourses law, environmental considerations, through the duty to not cause significant harm, had been considered as outside and in tension with the principle of equitable utilisation.[37] Modern watercourse law however now integrates notions of sustainability. Article 5 of the UN Watercourses Convention, which spells out the principle of equitable utilisation, for example posits that 'an international watercourse shall be used and developed by Watercourses states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom'. What this means is that sustainability, and environ-

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[33] See Michael Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in Malgosia Fitzmaurice et al (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 494, 498–500.

[34] *Fisheries Jurisdiction cases (UK v. Iceland; FRG v Iceland),* (Merits) [1974] ICJ Rep 3 and 175.

[35] *Gabcikovo-Nagymaros Project (HungarylSlovakia)* (Judgment*)* ICJ Rep 7.

[36] Shelton (n 20) 66.

[37] Malgosia Fitzmaurice and Virginie Barral, 'The Relationship Between the Law of International Watercourses and Sustainable Development' in Malgosia Fitzmaurice et al (eds) (n 25) 413, 416.

mental protection concerns, are not just one factor in the assessment of the equitableness of a particular utilisation but are part and parcel of the principle itself.

This is further confirmed by case law. In the *Pulp Mills on the River Uruguay* case, the International Court of Justice was requested to interpret Article 27 of the 1975 Statute of the River Uruguay which read:

> The right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the regime of the river or the quality of its waters.

Interestingly, for the Court this formulation reflects both the principle of equitable utilisation and that of sustainable development, thus merging them into one single concept. The Court thus sees in Article 27:

> not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development.[38]

In other words, it 'embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'.[39]

Sustainable development thus colours the interpretation of the principle of equitable and reasonable use which now incorporates environmental protection concerns and utilisation of a shared resource will only be equitable and reasonable if it is sustainable.[40] Overall then, the equitable allocation of shared resources must be made effective on the basis of environmental conservation considerations. It has further been argued that the Sustainable Development Goals (SDGs) lend support to an interpretation of the principle of equitable and reasonable utilisation that takes account of future generations and the environment itself beyond inter-state relations, thus interpreting the notion of equity in the principle as also encompassing intergenerational equity.[41] Transposing these readings of equity in international law to natural resources allocation frameworks in post conflict scenarios would thus ensure that conservation and sustainability considerations are at the heart of the allocation process.

In recent years, alongside the principle of equitable utilisation, international law relating to shared resources has also seen the development of integrated resources management frameworks aiming to achieve equity of resources allocation, equity of resource access and resource sustainability through an integrated management approach. In the water sector, this is referred to as integrated water resources management (IWRM). IWRM is a process promoting the coordinated development and management of water, land and related resources in order to maximise economic and social welfare in an equitable manner without compromising the

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[38] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 177.

[39] Ibid.

[40] See Malgosia Fitzmaurice and Virginie Barral, 'The Relationship Between the Law of International Watercourses and Sustainable Development' in Malgosia Fitzmaurice et al (eds), *Research Handbook on International Environmental Law* (2nd edn, Edward Elgar 2021), 413, 422.

[41] Otto Spijkers, 'The Cross-fertilisation between the Sustainable Development Goals and International Water Law (2016) 25(1) *RECIEL* 39, 45–46.

sustainability of vital ecosystems.[42] Rather than focusing on just water it thus adopts a holistic approach to all related resources to the water system that is the object of the regulatory regime. With its focus on an integrated approach, it is a perfect embodiment of sustainable development and it has been said to constitute 'the internationally recognized paradigm for sustainable water management'.[43] Another closely related development to integrated resources management mechanisms is that of the ecosystem approach. The ecosystem approach sets itself as a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.[44] As these frameworks require close cooperation to ensure both sustainability and equity, they lend themselves particularly well to being used as models for the development of natural resource management strategies in post-conflict settings. In addition, one effect of these developments may also be to allow international frameworks to move beyond an interpretation of the no-harm rule from a purely transboundary perspective, to one that applies to the resource itself, irrespective of transboundary effects, in order to prevent harm to future generations.[45] Hence, by focusing on the resources/ecosystem rather than on the inter-state relations, or on the location of the resources at stake, the management solutions have the potential to deflect attention away from traditional sources of tensions and may also easily be transposed to post conflict settings at a domestic or local level.

Whilst the customary principle of equitable utilisation is dependent on effective cooperation between the various states sharing the resource,[46] IWRM and the ecosystem approach, for their part, rely on the effective participation of all stakeholders. Indeed, it has been said of IWRM that:

> The IWRM paradigm promotes cross-sectoral cooperation at all levels to balance different interests and needs of various users in achieving sustainable water resource management. It also facilitates the mainstreaming of water issues in the political economy of a country and, as such, across all sectors. IWRM focuses on better allocation of water to different water groups and, in so doing, stresses the importance of involving all stakeholders in the decision-making process.[47]

And participatory decision-making, as a manifestation of procedural equity, will be instrumental to effective environmental peacebuilding.

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[42] Technical Advisory Committee of the Global Water Partnership, http://www.gwp.org/en/About/why/the-need-for-an-integrated-approach/ accessed 14 March 2023.

[43] Nicole Kranz, Lesha Witmer, and Uschi Eid, 'International Development and Environmental Goals' in Flavia Rocha Loures and Alistar Rieu-Clarke (eds), *The UN Watercourse Convention in Force. Strengthening International Law for Transboundary water Management* (Routledge 2013) 43, 248.

[44] Alistar Rieu-Clarke and Christopher Spray, 'Ecosystems Services and International Water Law: Towards a More Effective Determination and Implementation of Equity' (2013) 16(2) *Potchefstroom Electronic Law Journal* 12, 16.

[45] Spijkers (n 41) 41, 44–45.

[46] It thus appears particularly useful in the context of an international armed conflict, although the principle could be easily transposed to non-international armed conflicts and apply in relation to relevant stakeholders rather than relevant states.

[47] Kranz, Witmer and Eid (n 43) 248.

4. PROCEDURAL EQUITY AND PARTICIPATORY DECISION-MAKING[48]

According to Brown and Keating, in trying to identify the natural resources issues that generate conflicts, 'while the ownership may capture attention, what is often at the heart of a dispute is who holds the power to make decisions over the management of the resource'.[49] Decision-making processes perceived to lead to unfair outcomes will also be perceived, in and of themselves, to be unfair, and tensions may rise potentially leading to conflict. It is thus evident that procedural equity and participatory decision-making processes with respect to the allocation, use and management of natural resources will be central to effective environmental peacebuilding. Identifying the benefits of inclusive participatory processes for peacebuilding, Jensen and Lonergan posit that 'Engaging stakeholders in highly participatory processes such as workshops and public meetings demonstrates that their voices are being heard, strengthens their sense of ownership in the process, and increases their acceptance of analytical findings and recommendations.'[50] In addition, UNEP calls for equitable participatory environmental governance to inform peace processes.[51]

In international law, procedural equity can be defined as 'decision-making based on relevant criteria, and with the participation of those affected in order to produce outcomes that treat all affected groups fairly'.[52] Participatory decision-making is today firmly grounded in international environmental law. It first came to prominence with the Rio Declaration which recognised in its Principle 10 that:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[53]

The three elements of Principle 10, access to information, participatory decision-making and access to justice, were later further elaborated in the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters of 1998. Despite the primarily regional reach of this agreement, at the juncture between human rights and the environment, it resonates today far beyond European shores. In fact, as far back as 2004 the ILA advanced that there was little doubt that 'a right to public participation has now become a general rule of international law regarding environmental management' and

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[48] For an example of practical application in the context of environmental peacebuilding, see Chapter 4 by Elisa Morgera in this volume.

[49] Oli Brown and Michael Keating, 'Addressing Natural Resources Conflicts. Working Towards More Effective Resolution of National and Sub-National Resource Disputes' (2015) Chatham House Research Paper, 12.

[50] Jensen and Lonergan (n 3) 420.

[51] UNEP (n 7) 9, 60.

[52] Shelton (n 22) 641.

[53] United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' (adopted on 14 June 1992), UN Doc A/CONF.151/26 (vol. I) Principle 10.

'that a right to information exists is now beyond dispute'.[54] In short, including through the Aarhus Convention Compliance Committee's rich case law, international law has developed a sophisticated regime of participatory decision-making.[55] Participatory-decision making is also not only required under international environmental law, but has acquired human rights status.[56] There is thus much scope for peacebuilding processes to draw inspiration from the fertile regime of participatory decision-making under international law.

Procedural equity and participatory decision-making processes could indeed inform peacebuilding processes in several ways. Procedural equity can manifest itself through an institutionalised management of the resource which integrates inclusive participatory processes. In such a context, effective public participation should lead to the adoption of more rational policies and solutions since decision makers will be aware of, and more likely to understand public concerns when designing policies.[57] Participatory processes could thus be designed to allow for community-based solutions reflecting the community's particular needs.[58] Solutions will be context sensitive as people will have been included in assessing their own needs. And empowering participatory processes are more likely to encourage communities to participate in the construction of appropriate facilities and enhance their willingness to pay for services from which they benefit[59] thus assisting the governmental institutions in fulfilling their own services provision duties while partly alleviating the financial and other constraints generally associated with such duties. Speaking in the context of water, McCaffrey and Neville warned, however, that the development of participatory processes and community-based solutions should not lead to governments divesting themselves of the responsibility of providing access to relevant resources.[60]

Another challenge for the development of meaningful participatory processes is ensuring their inclusive character. Albuquerque pointed out that the privileged should not dominate participatory processes and that states must reach out to the disadvantaged and marginalised to encourage their involvement.[61] Equally, UNEP notes that whereas it is accepted that the local primary user should have the greatest entitlement, in practice they may well be the weakest in terms of power,[62] thus pointing again to the importance of designing inclusive participatory

[54] ILA *Berlin Conference (2004) Water Resources Law*, fourth report, 25.

[55] The Aarhus Convention has also inspired the adoption of the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean on 4 March 2018. In force since 22 April 2021, the adoption of this agreement is testimony to very wide recognition of the importance of procedural environmental law and the firm grounding of participatory decision-making in international law.

[56] See e.g., case law from the European Court of Human Rights: *Hatton v UK* (2003) 37 EHRR 28, para. 104; *Guerra v Italy* (1998) 26 EHRR 357, para. 60; *Taskin v Turkey*, (10 November 2004) App No 46117/99, section 115, ECHR 2004-X paras 118, 119.

[57] See Jona Razzaque, 'Public Participation in Water Governance' in Joseph W. Dellapenna and Joyeeta Gupta (eds) *The Evolution of the Law and Politics of Water* (Springer 2009) 355, 356.

[58] See Stephen C. McCaffrey and Kate J. Neville, 'Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries' (2009) 21 *The Georgetown International Environmental Law Review* 679, 698.

[59] World Water Council Report, *The Right to Water: From Concept to Implementation* (2006) 30.

[60] McCaffrey and Neville (n 58) 699.

[61] *Realising the Human Rights to Water and Sanitation: A Handbook*, UN Special Rapporteur de Albuquerque, Booklet 7, 62 and 64.

[62] UNEP, *Governance for Peace over Natural Resources: A review of transitions in environmental governance across Africa as a resource for peacebuilding and environmental management in Sudan* (n 7) 21.

processes. Provided that such challenges are effectively managed, participatory processes thus potentially offer significant promise as peacebuilding drivers since these solutions benefit from enhanced legitimacy. Indeed, participatory processes open the system to include the perspectives of those most affected by the decisions, offering them an opportunity to buy into the solution.[63] Ultimately, local participation might also increase compliance with regulations and acceptance of the arrangements in place.[64]

Procedural equity may be taken a step further, beyond institutional management, and manifest itself through co-management or community-based management of the resource. Co-management points to a sharing of the resource management between central authorities, local institutions and local communities, who will share rights and responsibilities through diverse institutional arrangements.[65] Community-based management for its part is defined in terms of the devolution of rights to make management decisions and distribution of benefits in relation to natural resources to the local communities.[66] If designed well, with equity and environmental integrity at their heart, such mechanisms can bring much welcome peace dividends as they allow for cooperation between groups, they are confidence building, and the sense of ownership they bring means that communities are much more likely to buy into the processes and perceive them as fair, thus defusing potential sources of tension. Jensen and Lonergan note that these types of processes can also valuably be extended to environmental and natural resources restoration programmes in post-conflict settings.[67] Whether they be peacebuilding co-management programmes, community-based management programmes or restoration programmes, these local frameworks have much to gain from what the sophisticated framework of procedural equity as developed under international environmental law and international human rights law can offer. Restoration programmes however may also involve questions of responsibilities and in this context another equitable principle may offer useful guidance as to how to apportion responsibility in post-conflict settings for the purposes of peacebuilding.

5. EQUITY AND CBDR

Where, in the process of armed conflict, natural resources and the environment are degraded or damaged, their restoration and reparation will be at the heart of peacebuilding efforts. Yet, compensation, reparation of environmental damage and restoration programmes are costly endeavours raising the question of who should bear the costs and how these should be apportioned. In essence, they raise issues of responsibility. This section argues that effective peacebuilding calls for a wider understanding of the notion of responsibility. It calls for an understanding of responsibility that is firmly grounded in equity and justice, rather than in a classic narrow legal liability sense, and the principle of CBDR may offer, in this context, a useful conceptual framework. In other words, in the apportionment of reparation and restoration burdens, notions of responsibility should be decoupled from those of liability and

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63 McCaffrey and Neville (n 58) 703.

64 Ibid., 704.

65 Dilys Roe et al (eds.) *Community Management of Natural Resources in Africa. Impacts, Experiences and Future Directions* (IIED 2009) vii.

66 Ibid.

67 Jensen and Lonergan (n 3) 423–35.

a shift in focus from liability towards equity and justice would pave the way towards effective peacebuilding solutions. The grounding of the principle of CBDR in equity and justice, and the grounding of the notion of responsibility, as understood in the principle, in morals and ethics, make it a promising model for the forging of constructive peacebuilding solutions as far as the apportionment of reconstruction and reparations burdens are concerned.[68]

The section first assesses the current state of the law relating to environmental reparation and restoration in post-conflict situations. It then highlights the limits of the current law and the need for more equitable frameworks before charting how CBDR could offer useful conceptual inspiration for the design of such frameworks.

5.1 Legal Framework for Allocating Responsibility for Environmental Damage Caused by Conflict – A Very Brief Overview

In international law, responsibility for damage to the environment caused during conflict may stem from the *jus in bello*, the *jus ad bellum*, or from human rights obligations.[69] As far as human rights obligations are concerned, according to the ILC, 'degradation of environmental conditions may violate a number of specific human rights, including the right to life, the right to health and the right to food'.[70] Violation of the law relating to the use of force, or in other words, using force without either authorisation or in self-defence under the UN Charter, may result in responsibility for environmental damage caused during conflict. Whilst under the law of armed conflict, the key relevant provisions are to be found in Articles 35(3) and 55 of additional Protocol I to the Geneva Conventions. Article 35(3) posits that it is prohibited to use methods or means of warfare that may cause 'widespread, long-term and severe damage to the environment'; while Article 55 is phrased in very similar terms but links the environmental damage to the consequences it can have on the population.

5.2 The Limitations of the Current Framework

This framework of responsibility suffers however from a number of limitations which diminish its suitability for effective environmental peacebuilding. One first limitation is that the thresholds of responsibility under Articles 35(3) and 55 are notoriously extremely high and, in reality, almost impossible to reach, one reason being the cumulative nature of the criteria.[71] A second limitation is that the damage to the environment may be the result of lawful activ-

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[68] This is so despite the contested and uncertain legal status of the principle. The section is interested in CBDR as a conceptual engine for the apportionment of reparation burdens in peacebuilding contexts and whether the philosophical considerations behind the concept could be transposed and inspire the design of peacebuilding solutions. From this standpoint, the uncertain legal recognition of the principle bears less relevance to the discussion, as it is its conceptual content that is of particular concern here.

[69] ILC, *Second report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur*, 2019, Doc. A/CN.4/728 at 51.

[70] Ibid.

[71] Phoebe Okowa, 'Environmental Justice in Situations of Armed Conflict' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 231, 240–41. Reflecting on the traditional significance of the concept of 'justice' in the context of the law on use of force, this author also underlines that 'concerns for corrective justice, in the sense of an equitable formula for apportioning who bears responsibility for war-related damage was quite simply not part of the regulatory landscape.' (see at 232).

ities, which do not breach any international obligations. This is often an issue with regard to environmental damage whether during peacetime or during conflict as environmental protection obligations are often framed as obligations of means, or due diligence obligations. This means that if the parties at stake have taken all necessary measures in light of their capacities to prevent the harm but the harm nevertheless occurs, they would have fulfilled their duty of care and not breached any international obligation. In those circumstances, responsibility for the environmental damage cannot be linked to any wrongful act and cannot thus lead to the allocation of responsibility. In fact, Special Rapporteur Marja Lehto notes that much of the environmental harm done in conflict does not violate the law of armed conflict and does not give rise to international responsibility on that ground.[72] This is because prohibitions in the law of armed conflict 'do not address normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance'.[73] A third limitation is that the process of establishing and allocating responsibility *ex post* does not allow for timely restoration and remediation of ongoing harm.[74] A fourth limitation is that the law of state responsibility is not well suited to the allocation of responsibility to a multiplicity of actors although modern armed conflicts are often characterised by the presence of multiple states and non-state actors.[75] And finally the law of state responsibility will be of little help in the allocation of responsibility to non-state actors or in situations of non-international armed conflict such as civil wars.

5.3 The Need for a Shift from Liability Towards Equity, Justice and Capabilities

Arguably however, it is not the international character of the regime of responsibility that is inherently problematic for environmental peacebuilding, but rather the fact that it allocates the burden of restoration, remediation and compensation on the sole basis of liability, or strict legal responsibility. From this viewpoint, domestic liability regimes are likely to suffer from the same weaknesses. Stahn, Iverson and Easterday note that 'there are often conflicting priorities in post-conflict settings that may require deviation from classical peacetime standards' and that 'a balance needs to be struck between strict liability approaches, supportive compliance mechanisms, and punitive approaches'.[76] In particular they point to the fact that burden-sharing is a fundamental element of post-conflict peacebuilding,[77] whereas parties to a conflict, whether governmental or non-governmental, may lack the means and know-how to restore environmental damage. As a result, remediation may have to be spread more widely than on the parties to a conflict.[78] In this context, the ability to rebuild, rather than solely the

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[72] Ibid., 55.

[73] Cymie Payne, 'The Norm of Environmental Integrity in Post-Conflict Legal Regimes' in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds), Jus Post Bellum: *Mapping the Normative Foundations* (OUP 2014) 503, 511.

[74] ILC, *Second report* (n 69) 55.

[75] Ibid., 55–58; Ilias Plakokefalos, 'Reparation of Environmental Damage in *Jus Post Bellum*: The Problem of Shared Responsibility', in Stahn et al (n 73) 257–73.

[76] Stahn, et al, ibid., 5.

[77] Ibid., 25.

[78] Ibid., 10.

legal duty to rebuild, may come to bear on the apportionment of burdens.[79] Some examples of alternatives to strict liability regimes include the compensation of environmental damage resulting from military activity without acknowledgement of responsibility via *ex gratia* payments. According to Special Rapporteur Marja Lehto, these entail 'shifting the focus from the liable party to the party suffering the harm, from the legal violation to the injury suffered by the victim'.[80] This evokes the moral rather than causal dimension of the notion of responsibility. But sometimes morality may require that the party technically strictly liable is spared from carrying the full burden of its responsibility.

Larry May asks 'in what sense is it disproportionate to demand reparations payments from those who are already devastated by the effects of a long war'.[81] For this author, in the context of ensuring sustainable peace, demanding full reparations might pose a greater burden on the losing side than it will benefit the winning side.[82] He reasons that not demanding what one has a right to demand might be a matter of justice referred to as *meionexia*. *Meionexia* 'calls for the people to accept, or demand, less than what they are due if this is necessary for some greater good as well as for achieving justice understood in this wider sense'[83] and is a concept closely linked to equity as a part of justice as fairness.[84] May concludes that 'in order to secure the long-term goal of a just and lasting peace, it may be necessary for the current just and victorious party not to demand all that is his or her due in the short-term'.[85] In short, ensuring sustainable peace may require concessions, compromises and a degree of renouncement. Arguably, like *ex gratia* payments and spreading the burden more widely than on the parties to the conflict, *meionexia* and its focus on equity accord better with environmental peacebuilding than traditional systems of retribution and liability. Such solutions can also address concerns, in the context of international armed conflicts, about wealthy states compelling poor states already crushed by the burdens of wars to be further burdened with the responsibility to pay disproportionate reparations.[86]

5.4 CBDR as a Conceptual Framework for the Design of Equitable Allocation of Reparation and Restoration Burdens and Effective Peacebuilding Solutions[87]

In practice however, the aforementioned alternatives to strict liability regimes remain either overly abstract or incidental in their application. CBDR, as an equitable principle derived from international environmental law, could offer for its part a useful alternative framework for the apportioning of burdens than strict liability regimes and contribute to more effective peacebuilding. CBDR, as an expression of intragenerational equity, hinges indeed upon responsibility not only in its causal, but also in its moral dimension. Initially designed to negotiate the relationship between North and South in the context of environmental protection,

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79 Ibid., 14.
80 ILC (n 65) 73.
81 Larry May, '*Jus Post Bellum*, Grotius, and *Meionexia*', in Stahn et al (n 73) 15, 18.
82 Ibid.
83 Ibid., 20.
84 Ibid., 21.
85 Ibid., 22.
86 Payne (n 73) 515.
87 Virginie Barral, 'Common but Differentiated Responsibilities and Justice, Broadening the Notion of Responsibility in International Law' in Hansen-Magnusson and Vetterlein (n 25) 125.

this principle is founded on the postulate that whereas all states have a common responsibility towards environmental stewardship, this responsibility must be differentiated on the basis of equity. This is because depending on the nature of the environmental threat, not all states would have made the same contribution to the creation of the problem. But equally, not all states will have the same capacity to address the problem depending on wealth and level of development. Developed states are perceived both as the prime contributors to environmental degradation through their heavily industrial mode of development, and as being able to devote more resources towards environmental stewardship through financial advantages and technological advances. As a result, in practice, the application of CBDR involves the elaboration of differentiated legal standards and implementation mechanisms according to both responsibilities and capabilities of states. It further requires, crucially, the transfer of financial resources and relevant technology from those more capable (and responsible) to those less well endowed. Differentiated commitments also work as a condition *sine qua non* for the recognition of a common responsibility towards environmental protection.

The grounding of responsibility, in its wider sense, in the CBDR principle can thus be premised on two rationales: historic responsibility and capability. Whereas the South locates responsibility in the historic contributions of the North towards environmental degradation, and thus favours a causal conception of responsibility, the North firmly rejects that such historic contributions could be the source of any liability. This is because, it is argued, they cannot be held liable for the current consequences of past behaviour that was not illegal at the time it took place. At best, thus, any consensus on a differentiation of responsibilities grounded in historic contributions to environmental degradation is either moral, or turned towards the future and in so far as any liability may be accepted by the North, it would only be liability for current and future behaviour.[88] Beyond historic contributions or causality, CBDR also allows for an allocation of responsibility according to capabilities, and we will see that it is here especially that CBDR may be usefully transposed to restoration and remediation programmes in post-conflict settings. From this perspective, better endowed parties are in a much stronger position to tackle existing issues, adapt to evolving environmental conditions, or prevent future threats, than less well-endowed parties in view of their better financial capabilities and technological advances**.** Equity and justice thus command that responsibilities be differentiated on the basis of varying capabilities. Ultimately, CBDR translates into differing legal burdens imposed on parties, according to both contributions (at least current) and capabilities. The notion of 'differentiated responsibilities' thus primarily gives rise to differentiated duties.

The principle of CBDR is thus intimately connected to the notion of justice both in its corrective[89] and distributive dimensions.[90] In international environmental law, CBDR hinges upon corrective justice by requiring developed states to take the lead in the fight against environmental degradation, in the adoption of mitigation and adaptation measures, and in assisting the developing states in achieving their own commitments, due at least to their current contributions (and possibly historic contributions too) to existing problems and threats. But CBDR also hinges upon distributive justice. The differential treatment that it commands is

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[88] Kristin Bartenstein, 'De Stockholm à Copenhague: genèse et évolution des responsabilités communes mais différenciées dans le droit international de l'environnement' (2010) 56(1) *McGill Law Journal* 177, 187.

[89] Shelton (n 20) 67.

[90] Cullet (n 25) 209, 213.

also grounded on states' differing financial resources and capabilities: the better endowed, the heavier the commitment. In that sense, the differentiation of obligations according to present distribution of resources and powers aims to achieve substantive equality through the medium of equity and distributive justice. Ultimately, despite a clear corrective element, when CBDR is premised on historic responsibilities, it does not necessarily imply that the notion of responsibility should be understood as liability since it primarily impacts on the rule at design. When the rationale for differentiation is not based on states' historic or current contributions to an environmental problem but rather on their varying capabilities to tackle it, it is the distributive justice foundation of CBDR that is called into play. The source of responsibility is here not causal anymore but moral. It is the imperative of justice (and necessity) that commands the differentiation of responsibilities and leads to the elaboration of differentiated duties.

Ultimately, the principle of CBDR is an expression of equity through both its corrective and distributive justice dimensions. Crucially, in addition, the meaning of the notion of responsibility in CBDR is much broader than that of liability *stricto sensu*. Responsibility as embodied in the CBDR principle takes on a moral and ethical dimension. Concerned parties (whether states or stakeholders) will undertake commitments to address a certain issue (including potential restoration or reparation commitments), not just on the basis of causality and liability, but also according to their capabilities, and thus on the basis of their moral and ethical responsibility.

As an expression of equity, CBDR may usefully inform peacebuilding processes, and in particular in the apportioning of responsibilities for restoration of depleted natural resources or environmental remediation programmes. The principle can easily be transposed beyond inter-state relations to a range of non-state actors and can thus equally apply to international as well as domestic post-conflict settings.[91] Indeed, what is at the heart of CBDR are the notions of equity and justice and the allocation of burdens not only according to causality but also to capabilities. These same equitable considerations could be transposed to the context of the allocation of reparation and restoration burdens to the parties to a conflict. Whether these parties are different states, different domestic factions, or different stakeholders and local communities, CBDR would equally command an allocation of burdens according to a mix of causal responsibility and capabilities, with justice considerations at its heart.

By distancing itself from the language of liability in favour of notions of ethics and capabilities, CBDR has the potential to positively affect the dynamics amongst the parties. Where responsibilities are apportioned according to capabilities and on moral grounds, parties may feel they are contributing voluntarily in accordance with their capacity and for the collective good, which in turn should lead the way towards more peaceful and less adversarial relations. The focus on capabilities may also allow for the design of restoration programmes irrespective of whether liability for environmental damage may be attributable to one or several parties.

Under a CBDR framework, the inability to allocate responsibility either because the thresholds of liability have not been met or because the damage results from lawful activities should not be an obstacle to the setting of effective environmental remediation programmes. In addition, CBDR allows to move the focus from the responsibility of the actor towards the object of the duty of care, towards the environment. It is no longer solely about who is at fault, but it is rather about how best to restore the degraded environment and who is best placed to

[91] On the applicability of the CBDR principle beyond the state see Paula Castro, 'Common But Differentiated Responsibilities Beyond the Nation State: How is Differential Treatment Addressed in Transnational Climate Governance initiatives?' (2016) 5 *Transnational Environmental Law* 379.

contribute and to what extent. And since it is based on equity and justice, it may channel the need for a certain degree of renouncement in the interest of sustainable peace. CBDR and its focus on capabilities allows indeed to ask for what can be reasonably demanded rather than what is legally owed. In fact, it is arguable that the Eritrea-Ethiopia Claims Commission found inspiration in the principles of equity and CBDR when it decided to limit Eritrea's liability for the losses resulting from its unlawful invasion. Among the factors that the Commission took into consideration to reach this conclusion was notably the economic situation in Eritrea and its limited capacity to pay in view of the need for the country to meet its people's basic needs.[92] And interestingly, the Commission also pointed to the need 'to ensure that programs of compensation or reparation do not themselves undermine efforts to accomplish a stable peace.'[93] Not only has responsibility been allocated on the basis of capacity rather than liability, but traditional frameworks of liability allocating guilt were also perceived as not conducive to a lasting peace, which instead demanded a level of renouncement on the basis of justice and equity.

Arguably however, recognition of guilt and accepting causal responsibility is also part and parcel of effective peacebuilding. With its twin foundation on corrective justice and distributive justice, on historic contributions and capabilities, or in other words on causal and moral responsibility, CBDR appears once again particularly suitable for peacebuilding frameworks. It allows for a mix of responsibility scenarios to feed into the peacebuilding solutions and allows for the apportionment of duties and responsibilities for reconstruction according to multiple sources of responsibilities. In this sense, the apportionment of restoration duties can meet a variety of peacebuilding needs: the need to reflect causal responsibility and for the 'liable' party to take ownership of their responsibility; the need for justice in terms of fairness and the recognition of the varying capacities of the different parties to contribute to restoration and reparation; and the recognition of a common interest of all parties in the restoration of the degraded environment.

6. CONCLUSION

Equity is part of the fabric of international environmental law since international environmental law has been built with equitable considerations at its heart. This regime building founded on equity has translated into a variety of practical legal manifestations of the principle ranging from intergenerational equity, to equitable utilisation, participatory decision-making or CBDR. A unique characteristic of the principle of equity in international environmental law is its broadened meaning which encompasses considerations of environmental conservation and sustainability beyond more traditional equitable considerations. At the same time, given the intimate connection between notions of equity and notions of justice and fairness, it can be intuitively advanced that equity should command resources allocation for the purposes of sowing the seeds of a durable peace in post-conflict settings. Drawing from the understandings of equity in international environmental law would thus naturally work towards ensuring

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[92] *Final Award – Eritrea's Damages Claims between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, Eritrea-Ethiopia Claims Commission, 17 August 2009 *9, UNRIAA vol. XXVI*, pp. 631–770 at paras 313–314. See also ILC, *Second report* (n 69) 53.

[93] Ibid., at para. 315.

that environmental conservation considerations and sustainability are fully integrated within peacebuilding frameworks, which are themselves, as we have seen, part and parcel of building a sustainable peace. The principle of equitable utilisation or integrated resource management frameworks thus have the potential to command an effective and constructive allocation of resources access, resource management and distribution of benefits while ensuring the sustainable use of these resources. The sophisticated legal frameworks of procedural equity and participatory decision-making in international law could feed into the processes leading to the resource management regime and ensure that the various parties and communities fully buy into the solutions proposed. And reliance on CBDR for the apportionment of responsibilities towards environmental restoration and remediation may allow for both retribution and reconciliation as it opens the door to a degree of renouncement and brings in considerations of morality and capabilities into the equation. Another unique benefit stemming from the integration of environmental equity into peacebuilding framework that emerges from the review conducted of the different manifestations of this principle is that environmental equity combines paying attention to the resource users with paying attention to the needs of the resource itself. By integrating the needs of the resource within peacebuilding frameworks, environmental equity can thus positively contribute to deflecting attention away from traditional tensions between the parties towards a focus on preserving the resource, which should itself constitute a common goal of all resource users. Equity thus constitutes a promising vector for the integration of international environmental principles into peacebuilding frameworks.