



**General Principles in EU External Relations Law
and the EU as a Global Actor**

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**Equity as a General Principle
in EU External Relations Law**

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ABSTRACT: Equity has become omnipresent in international law. The same is true in EU law where equity has become a growing concern in EU secondary law and the CJEU's case law, especially in EU migration, environment, health, finances, infrastructure/energy and AI law. Despite its relevance, equity remains poorly understood by international law and EU law practitioners alike. Worse, its theoretical treatment in international law has remained largely doctrinal and mostly focuses on specific and codified equitable principles or solely on specific international law regimes. In EU law, the doctrinal treatment of equity is actually very recent and much sparser. This article is the first attempt to provide a discussion of equity in the contemporary philosophy of EU law. Its argument unfolds in three steps: first, it explains that equity in international and EU law is at a crossroads: revived in its practice, it is hampered in its theoretical treatment by a sterile opposition between legality and equity and, conversely, by a sterile identification of legality and equality; secondly, it explores what the relationship between justice, equity and law should be at the international and EU level, drawing on the specific circumstances of international and EU law to explain why equity's place and role therein are even more important than domestically; thirdly, it argues that equity should act as a greater counterweight in the balance with the international and EU rule of law than it does domestically, and it reflects on how equity reasoning could best be organised in the future.

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1. Introduction

Equity, understood for now as the principle of legal interpretation that both ‘adjusts justice’ and ‘differentiates equality’ in context, has become omnipresent in contemporary international law. Of course, it has always been an integral part of international legal reasoning. Recently, however, there has been a surge in the invocation and sometimes codification of principles of equity in all regimes of international law. The most prominent examples that spring to mind are the principles of ‘intergenerational equity’ (IGE) and of ‘common but differentiated responsibilities’ (CBDR).

The same is true in European Union (EU) law where equity is a growing concern and principle in all regimes, but especially in EU migration, environment, health, finances, infrastructure/energy and AI law. This is the case both in the law applicable to internal relations between EU Member States or between private persons in those States, on the one hand, and in the law applicable to the external relations of the EU, its Member States and/or private persons with third States, other IOs and/or private persons in those third States and/or IOs, on the other.

For reasons of convenience and to avoid the controversy of having to defend a more nuanced position in this article,¹ both EU internal and external relations law are considered here as special forms of international law. Of course, the former, i.e. the internal relations law of the EU *qua* international organisation (IO), is even more specialised than EU external relations law. Given the focus of this Special Section, the present article focuses on equity in EU external relations law so understood and this is also what is meant when it refers to ‘EU law’ tout court.

It is important to emphasise, however, that the regimes of EU law just mentioned are all both internal and external in scope. As a result, the equity concerns they raise cannot be considered exclusively a matter of EU external relations law. This is important to stress given the EU’s and its Member States’ efforts at externalizing some of those issues, such as migration or environmental matters, by making them, unilaterally or multilaterally, a matter for other States. In fact, this continuity in scope of general principles and, I will argue, of the principle of equity across EU internal and external relations law can actually be grounded in the ‘consistency’ requirement of Article 21(1) and (3) of the Treaty on European Union (TEU).² It may also be based on Article 23 TEU and 205 of the Treaty on the Functioning of the European Union (TFEU) more generally.

¹ For a recent discussion of the issue, P d’Argent, ‘The European Union: Using International Law to Replace it’ in A van Aaken, P d’Argent, L Mälksoo and JJ Vasel (eds), *The Oxford Handbook of International Law in Europe* (Oxford University Press 2024) 207.

² A Thies, ‘EU general principles in external relations: shaping the EU as a global actor and dealing with its accountability’ in KS Ziegler, PJ Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar Publishing 2022) 576.

Despite its renewed contemporary relevance, equity remains poorly understood by international and EU lawyers alike. Worse still, its treatment in international law has remained largely doctrinal. Also, it mostly focuses on specific and codified equitable principles only or on specific international regimes only. In EU law, the doctrinal treatment of equity is actually very recent and much sparser than in international law.³ This is particularly striking when compared to EU law scholarship on either equality or solidarity: that literature is much more abundant, but never covers equity despite the necessary ties between the three principles. Interestingly, equity is usually conflated with either of those two principles, thereby losing its specific role as a bridge between law and justice or equality, as we will see.

Sadly, philosophers of international and EU law do not fare any better. They have shown little interest in equity to date and, when they have, have usually approached questions of justice and equity as matters external to international legal reasoning and those principles as external principles of reform of international law.⁴ The philosophy of justice in EU law, be it corrective or distributive, fares even worse in this respect as it has largely ignored equity.⁵ Given the close ties that exist between justice, equity and law, and the obvious repercussions of the specificities of international law and EU law on their relations with justice and equity, this neglect of equity by international and EU legal philosophers is regrettable.

This article is the first attempt to provide such a discussion of equity in the contemporary philosophy of EU law.⁶ Its objectives are, first, to assess what the recent proliferation of references to equity in international law and EU law could and should mean, especially for the relationship between international and EU law and justice and for the international and EU rule of law and, second, to reflect on how equity reasoning could best be organised and institutionalised in international law and EU law in the future.

The article builds on an argument I developed elsewhere about equity in international law in general.⁷ There, I did not focus on the (internal and external) law of

³ For two exceptions, L Azoulai, 'Structural Principles in EU Law: Internal and External' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) 31; L Azoulai, 'Editorial comments: A Jurisprudence of distribution for the EU' (2022) 59 *Common Market Law Review* 957; L Azoulai, 'Égalité et équité entre Etats membres de l'Union européenne' in E Dubout (ed), *L'égalité des États membres de l'Union européenne* (Bruylant 2022) 45; and L Díez Sánchez, *A Distributional Analysis of EU Law* (Oxford University Press 2026, forthcoming).

⁴ For two exceptions, TM Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998) 47; E Tourme-Jouannet, *What is a Fair International Society? International Law Between Development and Recognition* (Hart Publishing 2013) 85.

⁵ With one exception albeit focused on 'fairness', P Eleftheriadis, 'Fairness' in P Eleftheriadis (ed), *A Union of Peoples: Europe as a Community of Principle* (Oxford University Press 2020) 194.

⁶ Contributors in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) address the issue of international justice or fairness. However, equity itself is only discussed explicitly in the chapter by J Nickel and D Magraw, 'Philosophical Issues in International Environmental Law', and only as a general moral principle of justice at work in international environmental law.

⁷ S Besson, 'Equity in International Law' in D Lefkowitz and A Follesdal (eds), *Philosophy and International Law: Contestations and Extensions* (Cambridge University Press 2026, forthcoming).

IOs, however. To that extent, addressing the EU's so-called 'global microcosm', and especially its (internal and external) application of international law and its contribution to international law's development when doing so, enables me to complement my argument. Provided they are well organised and institutionalised, indeed, EU institutions', including the Court of Justice of the EU's (CJEU) contribution to equity reasoning could enhance equity reasoning in other IOs, both regional and universal, and in international law in general.

My argument is three-fold. First, I will explain that equity in international and EU law is at a crossroads: revived in its recent practice, it is hampered in its theoretical treatment by a sterile conflation between legality and equality and by the corresponding opposition between legality and equity (section 2); secondly, I will explore what the relationship between justice, equity and law should be at the international and EU level, drawing on the specific circumstances of international and EU law to explain the heightened significance of equity therein (section 3); thirdly, I will argue that equity should act as a greater counterweight in the balance with the international and EU rule of law than it does in the balance with the domestic rule of law (section 4).

The proposed argument is best understood against the background of another argument I developed fifteen years ago according to which general principles are best approached as both a source and a type of international and EU legal norms. To that extent, those principles articulate the continuous relations between law and morality in each specific context.⁸ That very role played by general principles and, I will argue, of equity in legal reasoning is even more relevant in the circumstances of legal and moral pluralism that currently prevail in international and EU external relations law.

2. Equity at a crossroads in international and EU law

Today, equity is at a crossroads in international and EU law. At first sight, it is clearly undergoing a 'renaissance'.⁹ However, this practice and the related theories have quickly become locked into a sterile opposition between legality and equity. This in turn has led to an overlegalisation of equity and, paradoxically, to a limitation of its potential in international and EU legal reasoning and to its 'decadence'.

To remedy the situation, I will argue, first, for a relocation of equity along the long arc of international and EU legality in practice: it should indeed be situated neither solely outside nor exclusively within international and EU law (2.1). To that

⁸ S Besson, 'General Principles in International Law: Whose Principles?' in S Besson and P Pichonnaz (eds), *Principles in European Law* (Schulthess 2011) 19; S Besson, 'General Principles and Customary Law in the EU Legal Order' in S Vogenauer and S Weatherill (eds), *General Principles of EU Law* (Hart Publishing 2017) 105.

⁹ On this term, see T Cottier, 'Equity in International Law' in T Cottier, S Lalani and C Siziba (eds), *Intergenerational Equity: Environmental and Cultural Concerns* (Brill, Nijhoff 2019) 24; M Chemillier-Gendreau, 'La signification des principes équitables dans le droit international contemporain' (1981–82) 2 *Revue belge de droit international* 509.

end, second, contemporary scholarly approaches to equity that keep legal reasoning based on equity apart from moral reasoning based on justice should be revisited (2.2).

2.1. Equity in the practice of international and EU law: the long arc of legality

Equity has a long history in international law, probably dating back to its origins in the 17th Century.¹⁰ This can be explained in particular by the joint influence of Roman law's *aequitas* and Aristotle's conception of equity (*epieikeia*) on the modern thinkers of international law, such as Hugo Grotius.¹¹

Equity takes at least three forms in contemporary international and EU law. The first and most spectacular role assumed by equity in international law lies in the power of international judges, in particular the International Court of Justice (ICJ), to judge *ex aequo et bono*.¹² This is the power of judges to depart from the law and to resort to principles of justice, provided the parties authorise them to do so. This power to judge in equity has rarely been used in practice, but this possibility bears witness to the close conceptual ties between judicial reasoning and equity in international law.¹³

Given the compulsory jurisdiction of the CJEU, this first form of judicial reasoning in equity does not exist in EU law. Of course, the *non liquet* principle also applies to the CJEU. However, to abide by it, the Court usually resorts to general principles which it identifies anyway as belonging directly to the sources of EU law.

A second, more common role attributed to equity in international law is precisely that of a principle of interpretation aimed at ensuring individual, concrete justice, and thus at correcting the consequences of general, abstract international law in an individual, concrete case. Equitable interpretation of this kind is now practised by all institutions and in all regimes of international law. The ICJ's use of such 'equitable principles' in maritime delimitations is a famous example thereof.¹⁴

¹⁰ Cottier (n 9) 15; C Titi, *The Function of Equity in International Law* (Oxford University Press 2021) 17.

¹¹ H Grotius, *On the Law of War and Peace* (Book II, ch. 16, para. XXVI, translated by A. Campbell, Verlag Jürgen Beck 2016).

¹² Statute of the International Court of Justice [1945], Art 38(2).

¹³ Rapporteur E Borel, 'Compétence du juge international en équité' in Institut de droit international (ed), *Annuaire de l'Institut de droit international* (Volume 40, Schmidt Periodicals, 1937) 140.

¹⁴ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)* (Judgment) (ICJ, 24 February 1982), para. 71; but also before and after that: *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (Judgment) (ICJ, 20 February 1969) paras 88-94; *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Jurisdiction of the Court and Judgment) (ICJ, 2 February 1973); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* (Judgment) (ICJ, 12 October 1984); *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* (Judgment) (ICJ, 3 June 1985); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Norway v. Denmark)* (Judgment) (ICJ, 4 June 1993). See also Dissenting Opinion of judge Anzilotti and Individual Opinion of judge Hudson in *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Judgment) (PCIJ, 28 June 1937).

This could also be the case of the CJEU's case law, as I mentioned earlier. Importantly, however, equity is not usually referred to as a general interpretation principle to the extent that the Court resorts directly to specific equitable principles already codified in EU secondary law.¹⁵ As a matter of fact, and I will revert to this issue later, the CJEU usually applies other general principles, such as material equality or proportionality, instead of equity when dealing with matters of distributive justice.¹⁶

At first sight, this situation is surprising as general principles of international law such as equity have been accepted as an integral part of the general principles of EU (external relations) law by the CJEU. Since then, and as mentioned earlier, they have also been explicitly recognised as such by Articles 21(1) and 21(2)(b) TEU. Moreover, Article 23 TEU and 205 TFEU require consistency and continuity between the general principles applicable across EU internal and external relations law. At the same time, however, it is telling that Article 21(1) TEU that reiterates some of the general principles of international and EU law as principles of EU external relations does not mention 'equity' specifically, but only equality, solidarity, the rule of law and fundamental rights.

A third form taken by equity is precisely the set of specific equitable principles that have gradually been specified and codified in international law. Sometimes, these principles no longer even bear the name of 'equity'. Think of the principle of 'fair trial', 'proportionality', 'good faith' or 'abuse of right'. While these principles of equity have long been part of international legal practice, there has recently been an upsurge in their codification - including, and this is new, in nominal terms. I have already mentioned two of them: the principle of 'intergenerational equity'¹⁷ and the principle of 'common but differentiated responsibilities'.¹⁸

These newly codified equitable principles apply to all *regimes* of international, and by extension of EU law. They apply to a wide variety of *objects*: rights, duties or responsibilities, resources, costs and benefits, reparations; and to many different *subjects* of international and EU law: natural and legal persons, within the same generation and from one generation to the next, non-human living beings and peoples, States and international organisations. The *scope of application* of these principles of equity is also

¹⁵ Opinion of AG Trstenjak in Case C-137/05 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* EU:C:2007:419; Case C-128/17 *Republic of Poland v. European Parliament and Council of the European Union* EU:C:2019:194.

¹⁶ Case C-203/86 *Kingdom of Spain v. Council of the European Communities* EU:C:1988:420; Case C-310/04 *Kingdom of Spain v. Council of the European Union* EU:C:2006:521.

¹⁷ Rio Declaration on Environment and Development, 12 August 1992, UN Doc. A/CONF.151/26 (Vol. I), (Rio Declaration) Principle 3; UN Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, (UNFCCC) Preamble and Art 3.1; Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, (cbd) Preamble and Art 2; Paris Agreement, 12 December 2015, 3156 UNTS 79, (CBD) Preamble.

¹⁸ UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, (UNCLOS) Arts 61(3) and 62; Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14 ch. 1, (Stockholm Declaration) Principle 12; Rio Declaration (n 17) Principles 6 and 7; UNFCCC (n 17) Art 3; Paris Agreement (n 17) Preamble and Arts 2 and 4.

extremely varied: they apply both within national jurisdictions and between jurisdictions, or even beyond the jurisdiction of a State or the EU in common spaces.

Last but not least, these specific principles of equity are present in all *sources* of international law. This is also the case of the sources of EU law, whether in EU treaties, EU secondary law or customary law, but also and above all, in general principles. The latter may be general principles of international law applicable in EU law or general principles of EU law itself.

Interestingly, however, there have only been two mentions of equitable principles in EU primary law so far,¹⁹ one not even nominally.²⁰ This is surprising when compared to the many references to equality and solidarity one encounters in EU treaties and EU secondary law. Equity is also absent from the values and objectives of the EU under Articles 2 and 3 TEU, including from those applicable to EU external relations (Article 3(5) TEU). Last but not least, EU secondary law guarantees of specific equitable principles, such as the principles of CBDR or IGE in EU climate change law²¹ or the principle of ‘fair sharing of responsibilities and burdens’ in EU migration law,²² are in fact much scarcer than in general and special international law.

Of course, these three forms or roles assumed by equity in international and EU law are not easy to distinguish in practice. In fact, it is far more appropriate, I suggest, to situate them along the same continuum of international and EU legal reasoning. This continuum may be interpreted along the lines of what David Dyzenhaus has called the ‘long arc’²³ of legality, an arc that runs from moral to legal reasoning and, in the same vein, from uncoded to codified legal principles. Equity may be situated at different points on this arc, depending on a variety of factors, such as: first, the conception held by the relevant officials of the relationship between international and EU law and morality; second, their conception of legal and especially judicial interpretation, and of the discretionary power of international and EU judges; and, third, the role recognised to general principles of international or EU law in judicial interpretations and, consequently, the role of equity as a source of international or EU law in its own right.²⁴

¹⁹ On ‘equitable representation’ in EU institutions, see Protocol No. 5 on the Statute of the European Investment Bank, 7 June 2016, Art 11(7).

²⁰ On the ‘fair sharing of responsibility’ in migration that is, however, not usually associated with equity and is identified with fairness, see Art 80 TFEU.

²¹ L Collins, ‘Environmental Rights for the Future? Intergenerational Equity in the EU’ (2007) 16 *Review of European Community & International Environmental Law* 321.

²² A Betts, C Costello and N Zaun, *A Fair Share. Refugees and Responsibility-Sharing* (Delmi 2017); P Hilpold, ‘Quotas as an instrument of burden-sharing in international refugee law: The many facets of an instrument still in the making’ (2017) 15 *International Journal of Constitutional Law* 1188; I Goldner Lang, ‘Art 80 [Solidarity and Responsibility]’ in HJ Blanke and S Mangiameli (eds), *Treaty on the Functioning of the European Union – A Commentary: Volume I: Preamble, Arts 1–89* (Springer 2022) 1517.

²³ D Dyzenhaus, *The Long Arc of Legality* (Cambridge University Press 2022).

²⁴ For those tensions, see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 14), insisting on the difference between judging *ex aequo et bono* or using judicial discretion to refer to corrective or

As explained earlier, the most common approach is to position equity in the third category or form of equity in the law, and hence on the right-hand side of the arc of international legality, and especially of EU legality. This actually corresponds to a trend and a constant quest for the legality of equity in international law, and especially in EU law.

Interestingly, this quest for the legality of equity echoes an evolution that took place relative to the place of equity in domestic law in the past. This was notably the case following the codifications of equity in 19th Century European legal orders,²⁵ but also in the simultaneous projects to merge the Law of Equity with Common Law in English law.²⁶ Given the influence of 19th Century legal theory on the formation of contemporary international law and its sources, attempts to legalise equity in international law should come as no surprise. This is even more the case in EU law that has long been torn between its respective international law and constitutional (internal) law dimensions. This is actually patent in EU external relations law that is often considered as having to be further ‘constitutionalised’ and, for that purpose, codified as much as possible in EU primary and secondary law.²⁷

While this tendency to legalise equity may be understandable in both historical and strategical terms, it is not justified philosophically. The question is not whether equity should be situated inside international and EU law (drawing its sources solely from international and EU law) or outside international and EU law (drawing its sources solely from international and European morality). Reasoning on equity cannot but be situated both inside and outside international and EU law.²⁸ Indeed, legal reasoning, including legal reasoning with equity, is intrinsically normative, and therefore always both moral and legal at the same time.²⁹ Interpretation in equity is therefore best approached as a form of non-legislative decision-making: the moral judgment correcting existing law does not itself become new law, adding to or modifying existing positive law, which alone is the applicable law, but it is nonetheless

distributive justice, on the one hand, and judicial reasoning based on equitable principles that are principles of international law, on the other. See also, more recently, ICJ, *Obligations of States in Respect of Climate Change* (Advisory Opinion) 23 July 2025, ICJ Reports (2025), unpublished, paras 151-153.

²⁵ Cottier (n 9) 15.

²⁶ I Samet, *Equity: Conscience goes to Market* (Oxford University Press 2018) 2 and 76; D Klimchuk, I Samet and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020).

²⁷ M Cremona, ‘The position of the CFSP/CSDP in the EU’s Constitutional Architecture’ in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 5; I Govaere, ‘Promoting the Rule of Law in EU External Relations: A Conceptual Framework’ in A Rosas, J Raitio and P Pohjankoski (eds), *The Rule of Law’s Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 189.

²⁸ D Mantovani, ‘Introduction. De l’aequitas à l’équité’ in D Mantovani (ed), *L’équité hors du droit* (Éditions du Collège de France 2023) 18 on the Roman *aequitas*.

²⁹ See J Raz, ‘The Rule of Law and its Virtue’ in J Raz (ed), *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 210. In international law, see R Dworkin, ‘A New Philosophy for International Law’ (2013) *Philosophy and Public Affairs* 2.

an inherent part of judicial reasoning and, more generally, of legal reasoning in a specific case.

So, contrary to what many international equity scholars have written, there is nothing ‘mysterious’ about equity being situated both outside and inside international law at the same time.³⁰ In fact, as mentioned earlier, it is the role of general principles to bridge moral and legal reasoning.³¹ To that extent, it is no wonder that equity or, more precisely, the specific equitable principles constitutive of equitable reasoning in contemporary international and EU law are generally also regarded as general principles of international and EU law *qua* source of international and EU law.

Not only are these attempts to legalise equity as a general principle of law misguided insofar as they misunderstand the nature of legal and especially judicial reasoning, but they also risk overlegalizing equity. To that extent, they threaten to undermine the potential of equity reasoning right at the time it is starting to be revived. In short, they accelerate what Roscoe Pound has called the ‘decadence’ of equity.³²

Of course, this is not to say that the content of a given equitable interpretation cannot be progressively legalised and specified, or even codified, in international and EU law. The point is simply that such codifications cannot aim to absorb equity once and for all and hence to exhaust its potential in a given field or regime. Its role as a principle of interpretation survives these codifications. It may even be called upon to correct, in the future, the inequitable implications of the legal generalisation of past equitable solutions, thereby showing how non-final that past legalisation of equity was.³³ This is something we have come to realize about other general principles of international and EU law, and equity should be regarded as no exception in this respect. On the contrary, one may even argue that equity reasoning epitomises this constant to-ing and fro-ing along the arc of legality.

2.2. Equity in international and EU law scholarship: never the twain shall meet

International and EU law scholarship is partly to blame for the decadence of equity so shortly after its renaissance.

Starting with international law scholarship, it is possible to identify four phases in the scholarly treatment of equity to date.³⁴ The first phase in the treatment of equity

³⁰ *Contra*: P Reuter, ‘Quelques réflexions sur l’équité en droit international’ (1980) 1 *Revue belge de droit international* 165, 176; P Weil, ‘L’équité dans la jurisprudence de la Cour internationale de Justice : un mystère en voie de dissipation ?’ in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 121; J-L Halpérin, ‘L’équité à l’épreuve du comparatisme’ in D Mantovani (ed), *L’équité hors du droit* (n 28) 219.

³¹ Besson, ‘General Principles in International Law’ (n 8) 29.

³² R Pound, ‘The Decadence of Equity’ (1905) 5 *Columbia Law Review* 20, 25; J Tasioulas, ‘The Paradox of Equity’ (1996) 55 *Cambridge Law Journal* 456, 465.

³³ Samet (n 26) 40–42; Chemillier-Gendreau (n 9) 535.

³⁴ For an overview, Cottier (n 9) 21.

dates back to the interwar period. In retrospect, it can be read as a reaction to the development of international tribunals and as a tribute to their equity-based interpretations of international law and to the individualised and corrective exercise of justice mentioned earlier.³⁵ The second and most prolific phase in the treatment of equity in international law, however, dates back to the 1970s and runs until 1990.³⁶ The concern then was still equitable judgments by international tribunals, but with a focus this time on the constraints on judicial discretion. During that period, authors spent a lot of time devising different typologies of the functions of equity in international law, but also different accounts of its sources for the reasons discussed in the previous section.

The third phase in the research into equity in international law, partly overlapping with the second from the 1970s onwards, was triggered by decolonisation and the recognition of the inequality of the international economic order.³⁷ The main concern for the relevant authors was to identify the best ways for international law to secure more distributive justice between unequally situated States, peoples and individual persons. The point of equity was indeed perceived to amount to the correction, where necessary, of the consequences of the formal equality of States guaranteed by international law, and to do so by differentiating between materially unequal situations. The scarcity of natural resources and the protection of the environment, most recently against climate change, have reinforced scholars' interest in equitable distribution and correction in individual cases. Since the turn of the millennium, however, these discussions on equity have become more specialised, which can be described as a fourth phase of equity research in international law.³⁸ Gradually, indeed, researchers have focused on certain specific principles of equity and in specific regimes of international law, often losing sight of the generality of equity reasoning in international law.³⁹

³⁵ LB Orfield, 'Equity as a Concept of International Law' (1929) 18 *Kentucky Law Journal* 31; K Strupp, 'Le droit du juge international de statuer selon l'équité' in *Collected Courses of the Hague Academy of International Law* (Volume 33, Nijhoff 1930) 351; W Jenks, 'Equity as a part of the law applied by the Permanent Court of International Justice' (1937) 53 *Law Quarterly Review* 519.

³⁶ VD Degan, *L'équité et le droit international* (Nijhoff 1970); C de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public* (Pedone 1972); RY Jennings, 'Equity and Equitable Principles' in Société Suisse de Droit International (ed), *Annuaire suisse de droit international* (Polygraphischer 1986) 27; V Lowe, 'The Role of Equity in International Law' in DW Greig and P Alston (eds), *Australian Yearbook of International Law* (Volume 12, Australian National University 1988-1989) 54; M Virally, 'L'équité dans le droit. A propos de problèmes de délimitation maritime' in M Virally (ed), *Le droit international en devenir: Essais écrits au fil des ans* (Presses universitaires de France 1990) 405.

³⁷ SK Chattopadhyay, 'Equity in International Law: Its Growth and Development' (1975) 5 *Georgia Journal of International and Comparative Law* 381; M Bedjaoui, *Towards a New International Economic Order* (Holmes and Meier 1979).

³⁸ E Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989); M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013).

³⁹ There have been two important exceptions in this respect: Cottier (n 9); Titi (n 10).

On the whole, one may divide those doctrinal accounts of equity in two groups.⁴⁰ Authors active in the first two phases of the treatment of equity in international law have worked hard to establish that equity is a general principle of international law and that, consequently, reasoning about equity should be considered internal to international law rather than external to it.⁴¹ The relationship between equity and justice, whether corrective or distributive, has not been their concern. By contrast, authors writing in the third and fourth phases of the equity scholarship, have generally addressed equity as a matter of justice, distinct from the question of international legal reasoning.⁴² For these authors, justice and equity are related, of course, but both are requirements external to international law even if they should weigh on its reform from the outside.

In EU law scholarship, the contrast between those two approaches is even sharper. Indeed, the scholarly treatment of equity as such is not only recent, but sparse. It is mostly specialised and focuses on specific EU law regimes or on specific equitable principles such as the CBDR or IGE, without reference to a general principle of equity in EU law and legal reasoning. In fact, most authors have focused on other general principles of EU law, such as equality and solidarity, without mentioning equity. To that extent, they do not see the bridge that equity reasoning could build between moral considerations of either justice or equality, on the one hand, and EU law, on the other. The few authors who have started addressing what they call the distributive concern in EU law, such as Díez and Azoulai,⁴³ have focused on the distribution of burdens and benefits only, rather than also on the distribution of rights, duties or responsibilities. And even when authors do, it has only rarely been by referring specifically to equity. Indeed, those authors have also approached this distributive exercise as an economic or quantitative one pertaining to resources rather than as a normative matter, internal to EU legal reasoning.

In sum, these two approaches in the treatment of equity in the literature have hardly ever met, thereby widening the divide between international or EU law and considerations of justice or equality.⁴⁴

This is regrettable, but not entirely surprising. Indeed, this divide reflects the common, albeit erroneous, opposition in international and EU law between a primarily voluntarist conception of legal positivism and a justice-oriented conception of jusnaturalism.⁴⁵ As explained above, however, taking seriously the place and role of equity reasoning in international and EU law does not necessarily lead either to a rejection of legal positivism (the latter can be normative and recognise the moral

⁴⁰ For a restatement, Titi (n 10) 84.

⁴¹ For the most recent example, *ibid.* 199.

⁴² O Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (Cambridge University Press 2017) 205.

⁴³ Azoulai, 'Editorial comments: A Jurisprudence of distribution for the EU' (n 3); Díez Sánchez (n 3).

⁴⁴ For exceptions, however, see MW Janis, 'The Ambiguity of Equity in International Law' (1983) 9 *Brooklyn Journal of International Law* 7; Cottier (n 9).

⁴⁵ Chemillier-Gendreau (n 9).

nature of legal reasoning) or to an endorsement of a jusnaturalistic conception of its validity (the role of moral considerations in the interpretation of the law does not call into question the positive character of the latter).⁴⁶

What is even more interesting is that the relationship between law, justice and equity, which generally preoccupies philosophers of law at the domestic level,⁴⁷ has not yet been addressed as such by philosophers of international and EU law.⁴⁸

Except for Franck and Tourme-Jouannet in international law,⁴⁹ authors have mostly reduced equity to a form of global justice, external to international law and distinct from international legal reasoning.⁵⁰ Accordingly, they have usually been interested in the alignment of international law with external requirements of justice.⁵¹ They have not paid much attention to the role of equity in international and EU legal reasoning itself and as a bridge between justice and international and EU law.⁵² The time has come to address this gap.

3. The internationalised triangle: international justice, equity and law

Since ancient times, justice, equity and law have been presented together. This was particularly the case in Roman law, where this triangular or three-way relationship was captured, very aptly, in Justinian's Digest by the formula *ius est ars aequi et boni*.⁵³

In this second part of the argument, I will unpack the 'triangle' between justice, equity and law and explain how it also applies within international and EU law. Of course, the specificities of the international and EU legal orders affect each side or pair of relationships in the triangle, and it is important to explain how (sections 3.1, 3.2 and 3.3).

⁴⁶ *Contra*: Halpérin (n 30) 234.

⁴⁷ Tasioulas (n 32); J Tasioulas, 'The Rule of Law' in J Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020) 117; Samet (n 26).

⁴⁸ Tasioulas (n 47), where the international rule of law and the relations between the rule of law and equity are discussed separately.

⁴⁹ Franck (n 4), who does not distinguish, however, between 'justice', 'fairness', 'equity' and 'legitimacy'; Tourme-Jouannet (n 4).

⁵⁰ An unease with this may be sensed in F Mégret, 'Justice' in J d'Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2019) 585, but is left unresolved.

⁵¹ S Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press 2015); F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015); D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015). For a general discussion, see J von Bernstorff and I Venzke, 'International Law and Justice' in A Peters (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2023) 54 and 58.

⁵² Franck (n 4) 47; Tourme-Jouannet (n 4) 85; Cottier (n 9) 13 and 30 fare better on this count.

⁵³ D Ulpianus, 'Institutes' in A Watson (ed), *The Digest of Justinian* (Volume 1, Book 1, University of Pennsylvania Press 1985) 1.1.1.

3.1. International law and justice

Even if the law's moral content and especially its just content does not determine its validity according to the approach endorsed earlier in this article, justice and law are generally considered to be related.

This is either because our conception of justice requires a normative social practice such as law for its proper realisation, or because, as I argued earlier, our conception of law recognises the normative proximity between legal and moral reasoning. This normative proximity is important for all jurists who consider that the existence of law has a moral value (and endorse, for instance, the moral ideal of the rule of law) and that, consequently, we have moral reasons to comply with the law.⁵⁴

Moreover, the question of the legitimacy (as legitimate authority or right to rule) of law, like that of its validity, should be kept distinct from its just content. It could even be said that the reason for the existence of different concepts such as legality, legitimacy and justice, is precisely to keep those issues distinct. Moral reasons for complying with the law should therefore be distinct from the moral quality of its content. They are moral reasons all the same, however. To that extent, they should match the reasons we have independently of the law, or at least not be too distant from them. This is also what is meant by the common idea of justice being the 'horizon of law'.

Whether or not one finds this approach to the relationship between justice and law compelling, certain norms of domestic and international law do, as a matter of positive law, establish international justice, including fairness or equality, as an explicit horizon of law. This is the case, for example, when these norms call for 'fair and equitable'⁵⁵ treatment or for an 'equal and equitable'⁵⁶ distribution of benefits. The same may be said in EU primary law where justice is recognised explicitly as a value and objective of EU law (Articles 2, 3(2) and 3(3) TEU), including of EU external relations law (Article 3(5) TEU).

3.2. International justice and equity

Justice and equity are usually described as a pair. One is indeed implied by the other, even though they remain distinct from each other. This was already the case in Roman law, where justice and equity were generally represented as two sides of the same coin. Justice, as the first more general side of the coin, was considered a virtue

⁵⁴ See L Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge University Press 2014) 4 and 183.

⁵⁵ UNCTAD, 'Fair and Equitable Treatment: A Sequel', February 2012, UN Doc. UNCTAD/DIAE/IA/2011/5; Agreement between the Argentinian Republic and the Swiss Confederation for the Promotion and Protection of Reciprocal Investments, 12 April 1991, Art 3(2).

⁵⁶ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1986, 1363 UNTS 3, Art 11(7); Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 19 June 2023, UN Doc. A/CONF.232/2023/4 (BBNJ Agreement) Preamble, Arts 7, 14 and 15.

in philosophy, while equity, the second and more specific side of the coin, was approached as a criterion of that virtue in rhetoric.⁵⁷

This justice-equity tandem explains why the reference to equity is also often coupled with a reference to justice in legal norms that refer to one or the other. This is also the case in international law, as we can see from the double reference to *ex aequo et bono* arbitration, to ‘fair and equitable’ treatment in international investment law, or to ‘equal and equitable’ participation⁵⁸ in the international legal system. Curiously, it is not (yet) the case in EU law. This is probably due to the scarce mentions of equity in EU primary and secondary law. Equity only appears in this dual fashion with equality⁵⁹ or solidarity⁶⁰ in the CJEU’s case law.

There are two reasons to link justice to equity in this way.

The first, and most common relationship between justice and equity is justified by the need for individualisation and concretisation of necessarily general and abstract considerations of justice. This is what we might call ‘measured’ or ‘adjusted’ justice. This approach to the relation between justice and equity is often attributed to Aristotle,⁶¹ and then became that of Roman law. Although the *aequitas* of Roman law should not be confused with the Greek *epieikeia*,⁶² the Greek influence on Roman law and their subsequent joint reception in the Scholastic tradition have often made them difficult to dissociate. This is even truer in international law, given the influence of both Roman and Greek traditions on its modern founders.

The second, allegedly more Roman relation between justice and equity is justified by reference to the realisation of a more specific form of justice: equality. This is what one may refer to as ‘proportionate’ or ‘differentiated’ equality. Equality and equity share the same etymology, *aequus*, which gives rise to both the concepts of *aequalitas* and *aequitas*. In this context, equity rebalances equality by requiring not only that equal situations be treated equally, but also that different situations be treated differently. The search for identity and symmetry in equality is complemented by a dynamic search for relationship and balance in equity.⁶³ Confirmation for this may be that, in Roman times, equity was actually represented not only as balance, but also as an equalizing counterweight in that balance (*aequipondium*).⁶⁴

⁵⁷ Mantovani (n 28) 16.

⁵⁸ UNGA Res 75/178 (16 December 2020) UN Doc A/RES/75/178.

⁵⁹ Opinion of AG Bobek in joined Cases C-748/19 and C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* EU:C:2021:403.

⁶⁰ Opinion of AG Bot in joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:618; joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:631, paras 252 and 291.

⁶¹ Aristotle, *Nicomachean Ethics* (Vol. 19, translated by H Rackham, Harvard University Press, William Heinemann Ltd. 1934) 1137b 26 and 1138a 15.

⁶² Mantovani (n 28) 19.

⁶³ Ibid. 15.

⁶⁴ Ibid. 17.

Even more importantly for us, however, there is a third and complementary way of linking justice to equity, and that is in their respective relationship to law. It is this third relationship, this time a truly triangular relationship whereby each bilateral relationship implies the other two, that I turn to now.

3.3. International law and equity

The relationship between law and justice presented above could not work without the mediation of a third ideal that is the corrective twin of justice in practice: equity. And the same applies to the relationship between justice and equity: law is the normative social practice whereby justice can be adjusted and equality differentiated. What this means is that equity works as an intermediary in the relationship between law and justice. It enables the constant alignment of law with justice.⁶⁵ It works as a bridge between the philosophy of justice and the practice of law, and therefore as a compass pointing to justice on the legal horizon.⁶⁶

As explained above, equitable reasoning has been present in international law since the origins. As a result, it contributes both to *adjusting the justice* of international and EU law norms and to *differentiating the equality* of treatment or distribution in international and EU law.

At the same time, however, the recent renaissance of equity in international law signals a specificity of international law in its relationship to equity.⁶⁷ There are at least three groups of features of international law that could account for this specificity.⁶⁸ Some of those specific features are shared by EU law, while others are not and, as we will see, EU external relations law also demonstrates specificities of its own with respect to the role of equity.

First of all, one should mention characteristics of international and EU law's relation to equity that are shared by domestic law, but that have emerged more *recently* in international and EU law due to its late development.

A first group of characteristics is inherent in the recent densification of international law. Its gradual codification, to start with, has given rise to the need to re-contextualise codified international law norms through equity. Another development worth highlighting has been the progressive institutionalisation and, above all, the judicialisation of certain international law regimes and of the reasoning therein through equity-based reasoning.⁶⁹

⁶⁵ Ibid. 18. See also Samet (n 26) 192; Tasioulas (n 47).

⁶⁶ Murphy (n 54) 145.

⁶⁷ See Cottier (n 9) 19.

⁶⁸ Franck (n 4) 79; Cottier (n 9) 19; F Francioni, 'Equity in International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2020) 2 and 10.

⁶⁹ FJ Garcia, 'International Adjudication and Global Justice' in H Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2020).

This is particularly the case of EU external relations law due to its post-Lisbon codification and densification. This has included the codification of equitable principles in both primary and secondary law and treaties even if, as explained earlier, those principles are scarcer than in international law. One should also emphasise the gradual extension of judicial review over EU external relations, giving the CJEU a unique position to resort to equity reasoning therein. Its compulsory and general jurisdiction in the field of EU external relations law singles out the CJEU not only from other international courts, but also from domestic constitutional courts given the underjudicialisation of external relations law in most domestic traditions.

A second group of features is related to the emergence of a sense of global justice, social justice but especially distributive justice in international law.⁷⁰ These new concerns call for more international cooperation between States, and therein for an adjusted distribution of obligations and responsibilities and for the correction of formal equalities to address material differences. Without these equity-based adjusted distributions and differentiated corrections, indeed, international law as a system could be said to contribute to the perpetuation and broadening of injustices and material inequalities between individual persons, peoples and States.⁷¹

This second feature is also particularly relevant in EU external relations law where corrective and distributive justice concerns have grown lately. This is the case both internally between Member States⁷² and between individuals inside Member States, on the one hand, and externally in State to State and individual to individual relations, on the other. In fact, as mentioned earlier, these new concerns cannot be considered as a pure matter of external relations law. And this, despite the EU's and its Member States' efforts at externalizing some of those distributive justice issues, especially in the field of migration or environmental law. So-doing, EU law is making them, unilaterally or multilaterally, a matter for other States.

Secondly, other features of international and EU law that explain the recent turn to equity are shared by domestic law, but are *magnified* on the international and EU level due to that law's scope of application.

A first feature in this group is that international law claims to apply universally. As a result, international law is necessarily more general and abstract in content than domestic law. This makes the need for individualisation and contextualisation and hence for equity even more important than it is domestically. A second characteristic relates to the material inequalities between individual persons, peoples and States that are greater on a global scale. These inequalities make it even more important to differentiate the otherwise equal obligations and responsibilities arising under international law.

This characteristic also accounts for the magnified concern about equity both regionally within Europe and in EU external relations law. Inequalities between EU

⁷⁰ Von Bernstorff and Venzke (n 51).

⁷¹ Janis (n 44) 16; Tourme-Jouannet (n 4) 85.

⁷² Joined Cases C-643/15 and C-647/15 (n 60).

Member States, but also between EU Member States and other States and between persons inside and outside the EU have become more visible and have deepened recently due to various factors weighing differently on those States and individuals. This is the case in the climate and migration context especially, requiring a differentiation of the otherwise common duties and responsibilities arising under EU law.

Finally, some of the features of international law that explain the recent turn to equity are not shared by domestic law, and are *idiosyncratic*.

The first set of features in this group pertains to its object. The international legal order that is not bounded territorially is often the sole legal order in which current transnational issues of distributive and corrective justice, related especially to health, climate or technology, may be addressed effectively. And the same is true of the protection of future persons, peoples and even non-human living beings. No wonder then international law, and especially regional international law is also the legal order in which equity is now turned to so heavily today. This also applies to EU external relations law due to the specific situation of the EU among regional IOs. The EU and its legal order often constitute the sole fully institutionalised context beyond the State in which it is possible to address some of the complex regional issues of corrective and distributive justice raised by climate change, pandemics or transnational migration.

Precisely, a second set of features of international law that singles it out in its relation to equity is institutional. There is no centralized global State of international law, and hence no global legislature or government responsible for centralizing the equitable distribution of obligations/responsibilities, resources/benefits or costs among individual persons, peoples and States.⁷³ Equity reasoning is therefore called for more frequently to constantly realign, at each institutional level, international law with its horizon of distributive or corrective justice. This is all the more so as many international law regimes have not yet been institutionalised, let alone judicialised. In fact, even when regimes are judicialised, there is usually more than one competent judge at a time, and even the competent judge does not usually have general and compulsory jurisdiction.⁷⁴

This also accounts for the enhanced role of equity in EU external relations law due to the specific situation of the EU among regional IOs. One may think, for instance, of its high emissions now and in the past and hence of its heightened, both corrective and distributive, responsibilities under international climate law. In the absence of international climate institutions, the EU has developed a form of 'environmental unilateralism'⁷⁵ whose self-imposed corrective in the allocation of burdens and responsibilities should be equity.

⁷³ S Besson, *Reconstructing the International Institutional Order* (Editions du Collège de France 2021), at books.openedition.org/cdf/12335.

⁷⁴ S Besson, 'Legal Philosophical Issues of International Adjudication: Getting over the *amour impossible* between international law and adjudication' in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 413.

⁷⁵ J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469.

A third set of specific features of international law pertains to its sources. The quantitative importance of non-written international law, such as customary international law and general principles, explains why equity becomes instrumental in filling gaps, but also in interpreting indeterminate rules. This also applies to EU law, especially in EU external relations law where sources are more international in character and indeterminate, and hence in greater need of equity-based reasoning.

4. Two ideals of international and EU law in the balance: the rule of law and equity

At first glance, the increased role of equity as a horizon of justice in international law this article has argued for so far would seem to contradict another ideal of international law, i.e. the rule of law, and in particular its requirements of generality and predictability. This is a well-known tension in domestic legal theory where equity and the rule of law are often presented as counterbalancing each other.⁷⁶ It is also clearly the case in EU law where the differentiation of rights and obligations that equity would seem to require is usually explicitly contrasted with a strict respect of the rule of law.

Given the difficulties currently facing the international and EU rule of law ideal, however, it is my claim that equity should become an even greater counterweight in international and EU law than it is domestically. To explain why this should be the case, I will begin by briefly explaining what the rule of law (ROL) entails when applied to international and EU law and what difficulties it currently faces (4.1). I will then turn to equity as a specific counterweight to this ideal in international and EU law (4.2). Thirdly, I will explore different ways to organise and institutionalise equitable reasoning in international and EU law in the future (4.3).

4.1. The international and EU rule of law in search of balance

Insofar as international law is considered as law, the ROL ideal also applies to international law.⁷⁷ In EU law, the ideal of the EU rule of law (EUROL) is actually recognised explicitly by EU primary law (Article 2 TEU) and applies to EU external relations as well.

Most philosophers of international law admit, however, that a direct transposition of the national conception of the ROL to the international level may prove inappropriate. This is due to the specific features of the international legal order that pertain to whom should be protected by the ROL, against whom and how. Those three features are: first, the diversity of subjects to international law, ranging from public institutions such as States and IOs to individual persons, and the conflation

⁷⁶ Samet (n 26).

⁷⁷ J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315; S Besson, 'Sovereignty, International Law and Democracy', (2011) 22 *European Journal of International Law* 373.

between some of those subjects and the actual officials of international law such as States and IOs; second, the absence of a single international sovereign and law-maker to be constrained by international law; and, finally, the absence of a single international tribunal with general and compulsory jurisdiction and, more generally, of a centralised mechanism of enforcement of international law.⁷⁸

Even though those difficulties are attenuated in the case of EU law due to its institutionalisation, the critiques still bite in EU external relations law. Indeed, EU law applies not only individual persons, but also to States who then also act as officials of EU law in the implementation of EU law. Moreover, EU external relations law also applies to the EU itself, the EU acting both as a subject and as an official of EU law. Furthermore, EU external relations law is more than the law of the EU and of its Member States. To that extent it also binds other States and IOs, and not as the law of a single EU institution. Finally, while EU external relations law is increasingly subject to the compulsory jurisdiction of the CJEU, some areas are still excluded thereof or, at least, subject to the jurisdiction of other enforcement institutions, including other IOs' or international treaties' such as, after the EU's accession to the European Convention of Human Rights, the European Court of Human Rights.

At least two approaches to the international ROL (IROL) have been distinguished to address those specific features of international law. The conventional approach⁷⁹ treats States as beneficiaries of the IROL, in the same way that individual persons are considered beneficiaries of the ROL at the domestic level. The problem with this conception is that individual persons are the ultimate subjects of both national and international law and should therefore be protected by the IROL as well. This argument has led other authors,⁸⁰ therefore, to propose a new approach to the IROL which would also benefit individual persons. In this conception, sovereign States are conceived not only as subjects of international law, but also as institutions and hence as officials of international law. This implies understanding the IROL together with and in the continuity of the domestic ROL. And the same may be said of the EUROL.⁸¹

Of course, the content of the ROL has long been a topic of controversy in legal philosophy. So-called 'thin' conceptions, which limit its content to certain formal or procedural requirements, are generally opposed to 'thick' conceptions, which include a variety of additional substantive requirements, such as democracy or the protection of human rights.

The thin conception of the ROL is the one favoured here, with its requirements of equality, generality, publicity/publicness, clarity or predictability among others.

⁷⁸ Besson (n 77).

⁷⁹ S Beaulac, 'The Rule of Law in International Law Today' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 197.

⁸⁰ Waldron (n 77); Besson (n 77).

⁸¹ See also the Opinion of AG Ćapeta in joined Cases C-29/22 P and C-44/22 P *KS and KD v. Council of the European Union, European Commission and European External Action Service (EEAS)* EU:C:2023:901, para. 115.

This is due to a double methodological requirement: on the one hand, the pluralist requirement to elaborate the ROL as a legal ideal or value among others, especially as one that is distinct from justice or legitimacy; on the other hand, the requirement that the criteria of the ROL present sufficient coherence or unity to justify bringing them together under a single heading, especially in our current circumstances of persistent and widespread reasonable disagreement about substantive issues of morality.⁸² These two arguments in favour of a thin conception of the ROL, and in particular the last one, are even more convincing when applied to both IROL and EUROL.

All the same, the IROL ideal remains difficult to realise, and the same may be said about the EUROL. To the aforementioned three specificities inherent to international law and that make it more difficult to determine whom should be protected by the IROL and EUROL, against whom and how, one may add two difficulties.

The first concerns the major disparities of power in international relations, starting with the power disparities between States of course. Combined with the plurality of public and private institutional expressions taken by the different other powers besides States, these disparities make it difficult for international legal norms that are general to limit those very different powers in practice. Worse, by applying equally to all of them, international law glosses over these inequalities. This concern also applies to the EU. And this even more so after the explicit guarantee of the equality between Member States in Article 4(2) TEU and its strengthening as a result. As a matter of fact, the CJEU's case law⁸³ has interpreted the guarantee of States' formal equality before the law as nothing less than the expression of the principle of primacy of EU law.

A second set of difficulties makes things even worse. It pertains to the absence, to date, of a legal status under international law of the many public and private organisations which nevertheless participate in the elaboration of international law and exercise power over its subjects.⁸⁴ This concern also applies to EU external relations law to the extent that its procedures associate not only other IOs, but also private or public organisations whose legal status under EU law is unclear.

Those difficulties with the ideal of IROL and EUROL enhance the need for some form of counterweight. It is in this context that the counterweight of equity in the balance with the IROL and EUROL may be worth exploring.

⁸² Tasioulas (n 47) 117.

⁸³ Case C-430/21 *RS*, EU:C:2022:99; E Dubout, 'L'égalité des États membres: Raison d'être du droit de l'Union européenne ?' in E Dubout (ed), *L'égalité des États membres de l'Union européenne* (Bruylant 2022) 11.

⁸⁴ Besson (n 73). See also J von Bernstorff, 'The Decay of the International Rule of Law Project (1990-2015)' in H Krieger, G Nolte and A Zimmermann (eds), *The International Rule of Law. Rise or Decline?* (Oxford University Press 2019) 33.

4.2. International and EU equity as a counterweight to the rule of law

As indicated earlier, equity often works as a counterweight in the balance of equality, requiring that different situations be treated differently rather than similarly, and hence more justly and equally overall.

This role of equity may be extended to the balance of equality before and in the law. In this balance, indeed, the legal ideal of equity works as a counterweight to the ideal of the ROL itself, and in particular to the requirement of equality before and in the law that derives from the ROL. Equity's role as a counterweight to the generality and equality of the law in general makes it possible to protect legal subjects against the abuse of law by powerful, and hence unequally situated individual persons, organisations or institutions whose material inequalities would only be enhanced were they to be treated equally before and in the law.

In short, the counterweight of equity helps preventing the transformation of the 'rule of law', by too strict an application of the law, into an equality-blind 'rule of rules'. This has been well captured by Irit Samet when she describes equity as the anti-'rule of rules' in those cases.⁸⁵

Importantly, the ROL and equity nevertheless remain two distinct and equally important ideals to be pursued separately. It follows that the balance between them cannot be approached as a form of mutual compensation and hence as a zero-sum game.⁸⁶ Nor does an equity judgment necessarily lead to the negation of all ROL requirements. In fact, equity-based counterbalancing judgments always depend on the circumstances: they are less easily justified in areas of law where the values served by the ROL assume greater weight (e.g. criminal law, by opposition to environmental law).

To that extent, the stark opposition that is made in EU law, and especially in EU climate or migration law, between the EUROL and the CBDR is erroneous.⁸⁷ And so is the claim that applying the CBDR necessarily leads to inequality before and in EU law. By extension, and because solidarity has by and large replaced or subsumed equity in many regimes of EU law⁸⁸ instead of being articulated to it and then giving equity its necessary role in solidary burden sharing,⁸⁹ this erroneous opposition between equity and equality also explains why the principle of solidarity has been wrongly opposed to differentiated responsibilities. Nor should one consider the latter as implying some form of disintegration of the EU and of EU law.

⁸⁵ Samet (n 26) 194.

⁸⁶ Tasioulas (n 32) 462.

⁸⁷ Azoulai, 'Editorial comments: A Jurisprudence of distribution for the EU' (n 3) 967.

⁸⁸ See e.g. AG Ćapeta in Case C-488/21 *GV v Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs and Social Protection, Ireland, Attorney General* EU:C:2023:115, para. 134.

⁸⁹ E Karageorgiou and G Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4 *Jus Cogens* 131; E Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22 *European Law Journal* 448.

The role of equity in counterbalancing the ROL also applies to international and EU law, therefore. In fact, given the current circumstances of international law, I would like to argue that the counterweight of equity may temporarily have to weigh even more heavily in the balance with the IROL and EUROL than it does domestically. The long-term realisation of an international and EU legal order more respectful of the IROL and EUROL may indeed require a transgression of some of its short-term requirements by giving greater weight to equity in some cases.⁹⁰

The greater counterbalancing role of equity is particularly evident when it comes to addressing three difficulties facing the full realisation of the IROL and EUROL. The first difficulty concerns the diffusion of power in international relations and its unequal balance. In certain circumstances, indeed, we might consider that supporting the formal equality of all States before and in international law at all costs would merely entrench an already unequal international order.⁹¹ This is particularly relevant in the internal organisation of IOs such as the EU, where the equal participation rights of States should be differentiated according to equity in the short term (for example, to favour the poorest, most affected by migration or climate change, or otherwise least powerful States) in order to become more equal, and therefore ultimately more democratic, in the long term.⁹²

Of course, unlike other IOs, the EU has already done much to counterbalance formal equality before and in EU law. This is what one can see, for instance, in the way in which EU law differentiates formal equality in political participation and representation rights. More should be done, however, with respect to substantive EU law. In those regimes, such as EU migration or environment law, indeed, the same power imbalances between States require a further differentiation of otherwise equal or common duties and responsibilities.

A second difficulty for the realisation of the IROL and EUROL lies in the current confusion between the subjects of international law and its officials. This applies not only to States, but also to IOs and numerous private organisations such as non-governmental organisations or trade unions.⁹³ This calls for an equitable adjustment of the relevant rights of those subjects depending on whether they are not only acting as subjects, but also as officials in each case. This is particularly relevant again in the internal organisation of IOs like the EU, where the equal participation rights of those private organisations need to be differentiated and adjusted to those of other

⁹⁰ Tasioulas (n 47) 129.

⁹¹ Tourme-Jouannet (n 4) 85.

⁹² S Besson, 'Democratic Representation within International Organizations. From International Good Governance to International Good Government' (2022) 3 *International Organizations Law Review* 489.

⁹³ S Besson, 'Democratic Representation in, through and by International Organizations: An Introduction' in S Besson (ed), *Democratic Representation in and by International Organizations* (Cambridge University Press 2026) 1.

officials such as States in the short term in order to become more equal in the long term, and perhaps then eventually more democratic.⁹⁴

A third difficulty for the realisation of the IROL and EUROL lies in the absence of separation of powers in international law, including in EU law. The multiple public institutions in charge of the implementation of international law should therefore be required to distribute and articulate their participation rights as equitably as possible to make up for a rolling separation of powers as it were. In the EU, the multiple dimensions of the principle of institutional balance, both vertical in the EU and horizontal among Member States, call for specific equitable corrections of otherwise equal participation rights.

4.3. Constraining and institutionalising international and EU equity reasoning

Understanding how equity could and should become a greater counterweight to the IROL and EUROL implies paying more attention to the way equity reasoning is organised and institutionalised in international and EU law.

First, the organisation of equitable reasoning in international and EU law. This could be done by analogy with the constraints developed for equity reasoning in the domestic context.

It is important to emphasize again indeed that equity-based interpretation is not arbitrary or unconstrained by reason.⁹⁵ On the contrary, equitable reasoning is principled and must respect its own constraints as a specific form of moral reasoning.⁹⁶ It must also be institutionalised in such a way as to represent the common conception of equity of the public community whose law is being interpreted, just as we do it for those whose conception of justice is at stake. This institutional question is a particularly sensitive issue in international and EU law,⁹⁷ as discussed earlier.

First of all, then, equity-based reasoning should only be legitimately exercised by formally authorised institutions, whether legislature, administration or judiciary, rather than by individuals acting unilaterally. Secondly, equity-based reasoning must seek to realise the underlying purpose of the legal norm, even if it deviates from its strict terms. Thirdly, equitable interpretations should follow objective moral reasons for departing from the strict letter of the law, rather than reflecting the subjective preferences of the interpreter. Finally, the injustice or inequality corrected by equity

⁹⁴ S Besson, 'We the Peoples of the United Nations: From Single Separate Institutent Powers to Multiple Nested Instituted Publics' in P Niesen, M Patberg and L Rubinelli (eds), *The Oxford Handbook of Constituent Power* (Oxford University Press 2026) 531.

⁹⁵ Mantovani (n 28) 16; Tasioulas (n 32) 466.

⁹⁶ Tasioulas (n 32) 463.

⁹⁷ See e.g. AG Ćapeta in Case C-488/21 *GV v Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs and Social Protection, Ireland, Attorney General* EU:C:2023:115, para. 134.

must be sufficiently serious in each case in order to justify a departure from the requirement to apply existing law according to its strict terms.

Organising international and EU legal reasoning with equity is even more urgent. Indeed, a double-edged threat is looming large on equity in the current practice of international and EU law.⁹⁸

First, the *overlegalisation* of equity reasoning. This difficulty identified earlier in the article actually echoes the distrust of any form of moral reasoning in the law. It confirms the tendency to legalise equity in order to make it more objective and universal, thereby also accelerating equity's decadence, however.

This threat is particularly patent in EU external relations law. Respect for the EUROL and, by extension, for equality both before and in the law has been increasingly reduced to the respect for the primacy of EU law and hence to legality itself. This has been done, however, at the price of equity reasoning. Think, for instance, of how equity has been approached in EU migration law and inside the EU Migration Pact especially. Regarding the latter, what has allowed the reduction of equity into a mere voluntary mechanism or, at the most, a mechanism of emergency lies in the severing of any ties between the positive legal codification of equity in the Pact and the principle of equity in general, and hence in its separation from legal reasoning. More generally, EU law tends to overlegalise equity to neutralise what may look like its political load-*edness*, thereby reducing equity reasoning, however, to a matter of institutional balance in the EU.⁹⁹

A second, opposite threat hangs over the organisation of equitable reasoning in international and EU law: its *delegalisation*. This is one of the consequences of international and EU lawyers' neglect of equity reasoning or, at least, of the illusion that by outsourcing equity and expelling it outside of the bounds of law, they could make equity reasoning more objective and universal.¹⁰⁰

It occurs, on the one hand, when equity is transformed into a purely technical standard. For instance, equity is increasingly being 'encoded', along with the ROL and other values, norms, ideals or principles such as human rights or democracy, in integrated ethical norms applicable to AI.¹⁰¹ This is clearly the case of the multifarious references to equity in the EU Digital Market Act and their technoscientific interpretation.¹⁰² The delegalisation of equity reasoning is also at play when equity is treated as a purely economic norm, on the other hand. This is particularly the case

⁹⁸ Cottier (n 9) 13.

⁹⁹ Case C-39/72 *Commission of the European Communities v. Italian Republic* EU:C:1973:13.

¹⁰⁰ A Supiot, 'L'équité hors du droit : remarques marginales' in D Mantovani (ed), *L'équité hors du droit*, (n 28) 237.

¹⁰¹ CR Sunstein, 'Governing by Algorithm? No Noise and (Potentially) Less Bias' (2022) 71 *Duke Law Journal* 1175, 1178.

¹⁰² LJ Hoffmann, 'Fairness in the Digital Markets Act' (2023) 8 *European Papers* 17.

in international environmental law where ‘intergenerational equity’ has been reduced to an equal right to economic development for future generations.¹⁰³ Another example is that of the technocratic and political-economic ‘distribution keys’ adopted in the few CJEU’s decisions that have addressed issues of distribution of burdens and benefits in EU law.¹⁰⁴ They have done so by analogy to a mere economic distribution of resources. This has led them, for instance, to treat migrants as pure ‘burdens’ and vaccines as mere ‘benefits’.

Second, the institutionalisation of international and EU equity reasoning. Working on the institutionalisation of international equity reasoning by a public or third-party institution is even more important as equitable distributions are increasingly left to unilateral decisions of States and IOs themselves by international law.

This concern for the institutions of equity may be exemplified by the self-distribution of obligations and responsibilities through ‘self-differentiation’ in international law. This is the case of self-differentiation by reference to ‘nationally determined contributions’ according to the Paris Agreement or in the context of EU ‘climate unilateralism’ mentioned earlier. An illustration of the latter is the EU Carbon Border Adjustment Mechanism which has been criticised for unilaterally imposing EU climate change law onto third States and thereby of externalising internal equity concerns without, however, complying with equity in EU external relations.¹⁰⁵ This inequitable practice may be corrected in the future by abiding more openly and rigorously by the CBDR in EU external relations law. Indeed, the CBDR may be considered a general principle both of international law and of EU external relations.¹⁰⁶ Complying with this equitable principle, however, requires much more than mere financial aid by the EU to third States or than bilateral investment agreements.

A first remark concerns the nature of the institutionalisation of international and EU equity reasoning. As mentioned earlier, equity should not be only a matter of judicial reasoning and, in general, of the enforcement of international and EU law. It should be practised by all institutions in charge of international law-making as well, starting with, but not only, States and IOs like the EU and all their respective organs such as the EU Parliament, Council or Commission besides the CJEU.

¹⁰³ E Brown Weiss, ‘Intergenerational Equity’ in A Peters (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2021) 5 and 17; Cottier (n 9) 25.

¹⁰⁴ Joined Cases C-643/15 and C-647/15 (n 60), paras 290 and 299.

¹⁰⁵ NL Dobson, ‘(Re)framing Responsibility? Assessing the Division of Burdens Under the EU Carbon Border Adjustment Mechanism’ (2022) 18 *Utrecht Law Review* 162; I Venzke and G Vidigal, ‘Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)’ in M den Heijer and H van der Wilt (eds), *Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities* (Volume 51, T.M.C. Asser Press 2022) 187.

¹⁰⁶ G Marín Durán and J Scott, ‘Global EU Climate Action and the Principle of Common but Differentiated Responsibilities and Respective Capabilities’ in K Armstrong, J Scott and A Thies (eds), *EU External Relations and the Power of Law: Liber Amicorum in Honour of Marise Cremona* (Hart Publishing 2024) 161.

A second remark concerns the scope of institutionalisation of international equity. International and EU equity concerns the very individual persons and peoples who are already subject to domestic law. To the extent that those persons and peoples fall within the authority of all their institutions, so does international and EU equity. Equity-based reasoning should therefore develop bottom-up in all institutions as a form of common international reasoning.

This is even more important in light of the ethnocentrism critique to equity.¹⁰⁷ Regional organisations' and courts' equity reasoning, such as the EU's and the CJEU's, could be of particular interest here. They could indeed first help crystallise the commonalities between the various national practices of equity on an intermediate regional level. This could then facilitate, through the use of comparative regional international law, the consolidation of a universalizable conception of equity. This form of comparative law is after all a characteristic of reasoning with general principles in general. Comparative domestic and international equity reasoning should not only be cultivated bottom-up, but also, in an integrated way, across regimes of international and EU law to break the current silos of regime-based equitable principles. Indeed, some of them have come to create an undue path dependency in international equity reasoning. It is especially the case of the equity-based reasoning first developed in international environmental law or in EU unilateral climate change law and which has, since then, been transposed unreflectively into other regimes of international and EU law. This has already had deleterious effects such as the delegatisation of equity in other regimes of EU law such as EU migration law where the CBDR is interpreted by reference to EU climate change law and hence as a technical standard,¹⁰⁸ with all the difficulties flagged earlier when it applies to migrating human beings.

5. Conclusion

By holding its place and playing its role in future international and EU legal reasoning along the lines proposed in this article, equity may be able to counterbalance the weaknesses of the IROL and EUROL. In turn, equity-based reasoning that aims at adjusting justice and differentiating equality could contribute to the legitimacy of the solutions to the difficult issues of distributive and corrective justice that arise in international relations in general and in EU external relations in particular.

Of course, this argument was only a first attempt to accompany the current renaissance of equity in international law and in EU external relations law. New voices

¹⁰⁷ J Tasioulas's critique of TM Franck: J Tasioulas, 'International Law and the Limits of Fairness' (2002) 13 *European Journal of International Law* 993, 1014. See also Janis (n 44) 33.

¹⁰⁸ E Mavropoulou and L Tsourdi, 'Solidarity as Normative Rationale for Differential Treatment: Common but Differentiated Responsibilities from International Environmental to EU Asylum Law?' in M den Heijer and H van der Wilt (eds), *Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities* (Volume 51, T.M.C. Asser Press 2022) 311.

in the philosophy of international and EU law will hopefully join soon and this Special Section certainly leads the way.

