THE NATURE, ORIGIN AND DEVELOPMENT OF INTERNATIONAL LAW

1.1 THE NATURE OF INTERNATIONAL LAW

1.1.1 Definition

In the most simplified form, international law is defined as a system of law whose main function is to regulate relations among nations. This was a notion developed since the 16th century, and it was more expounded in the Lotus case (case of 1927 court of international justice, series A, No 10/187).

However, it is accepted today that the subject of international law does not only cover relation among states, but extends to rights and duties pertaining to international organizations, international companies, and individuals.

The term international law is sometimes referred to in alternative exforessions as:

- The common law of mankind
- Transnational law
- Global law

1.1.2 The underlining philosophical perspectives behind the theory of International law

There have been developed theories and philosophies to try to explain international law, especially as regards where it comes from and why a state should comply with a rule of international law.

So for, two philosophical perspectives try to explain the nature of international law, namely natural law and legal positivism.

Natural law: Hugo Grotuis and Samuel Pufenderf

Advocates of natural law theory believe that there are principles of natural law that exists independently of the people. The task for the people is to find the law.

The best known of the naturalist writers was Dutchman called HUGO GROTIUS [1583 – 1645] He is often regarded as the founder of modern international law. He wrote a book titled ″ De Jure Belli a c Pacis – 1625.″

In his perception, natural law is the rule of right reason, which teaches us that an act in just in so far as if confirms to natural reason, and morally just or unjust and consequently

for bidden or commended by God himself as the author of nature. This natural law does not change. God himself cannot change the scheme of things,

Applying this to international law, natural law is the ever- present source for supplementing the volunting law of nations, for judging its adequacy. The will of states cannot be the excusive or decisive source of the if nations.

On his part, SAMUEL PUFENDORF (1632 – 1694) suggested firmly that, international law cannot arise from custom or from treaties. The only international law that could exist should be part of natural law.

Positivism: Lasso Oppenheim.

Positivism lies in the simple asceticism that law is made by people or its authorities. Therefore, the people and its authorities make the law, and not that law is derived from some higher authorities.

Thus, in the international legal system, states make the law. Therefore, international law is a law between states, and it concerns states only and exclusively.

Positivists argue that, because states make the law the law derivers its authority from the mill of states. This is what makes international law obligatory. They further argue that, natural law philosophy has the overall problem of justifying international law as obligatory to states.

This statement by the positivists was echoed in the decision of the permanent court of international justice in the Lotus case {supra} as follows:

> ″International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will, as expressed in conventions, or by usages generally accepted as expressing principles of law″

However, neither natural law nor positivism alone can explain international law it is a combination of both.

1.1.3 The function of International law

Firstly international law is expected to facilitate and support the daily business of international relation and politics. It does so by allocating decision making power within the international system.

Secondly, it is supposed to prevent the pursuit of multiple national interests, or private interests from becoming anarchy.

Thirdly, it allows for the co-existence of multiple political units and their interruption

Fourthly, it advances particular values – for examples the regulation of the use of force and the protection individual/human rights.

1.1.4 **Is international law really law?**

Once of the most debated issues by writers is whether international law is real y law. Those who dispute the legal nature of international law point to a number of pieces of evidence to support their case.

Lack of institution

- In the context of the state, there is legislative judiciary and executive. In the international system no legislatures, judiciary, and execution in the real sense

ii) The command theory

- The 19th century positivists (analytical passivity) understood law as the command of the sovereign. This school of though was expended more by John Austin (1790- 1859). But see mighty international law does not meet one Austin understanding of law.

iii) Effectiveness:

- There are julosts/writers who argue that, even if international law came be regarded as law, it is so ineffective to rend it meaning

iv) Lack of grund norm:

- Municipal law can be validated by the presence of a grund norm. International law cannot hence cannot be validated.

1.5 The dual character of international law

International law provides both an operating system – and a normative system for international relations.

Operating system;

As an operating system, international law sets the general procedures and institutions for the conduct of international relations.

- It provides a framework for establishing rules and norms
- Outliners the parameters for interruption
- Provides procedures and forms for dispute resolution among those taking part in the interactions. In this aspect, international law is″ facilitative″

Normative System:

As a normative system, international law takes a legislative character by mandating particular values, and directing specific state behavior.

In this aspect international law is ″directive″as it creates norms. The normative system of international law defines the acceptable standards for behavior in the international system.

1.2 THE HISTORY OF PUBLIC INTERNATIONAL LAW

Public international law cannot be properly understood without some knowledge of its history. The accepted view among scholars is that, the subject of public international law began to emerge in western Europe in the 16th century , and that this emergency is associated with the evolution of the modern nation state.

1.2.1 The period until 1500

The consensus among scholiast is that, a recognize corpus of international law is no more than 500 years old.

However, even before that, some international practices were already taking place. For example, states were involved in the concluding of treaties and sending of ambassadors even from the time of ancient Egypt of records of Greek city states found evidence pertaining to the conduct of relations and declaration of war.

1.2.2 The 16th Century

In this period, most notable development in Western Europe that had an impact on international law was the general thinking about the source of the secular power. This came about out of the trend of that time, to break away from religion – controlled states, to secularism.

Once of the prominent proponents of this persecution was NICCOLO MACHIAVELLI (1469 – 1527) Machiavelli perceived that, that the spiritual unity of Europe under the pope, and the political unity provided by the stake, Holy Roman Empire had been fracture? The take he argued had become a self – standing entity. Thus, he started pondering on two important things namely how the prince (ruler) should retain power within the state and how he might conduct himself visa – a visa his fellow's rulers.

In summary, what Machiavelli simply said is that, the fracturing of Christendom and the Roman Empire created a gap or vacuum which gave birth to international law.

However, following this development, jurists in that time become pre-occupied more with the first element, namely the power within the estate. This preoccupation focused on the question of severity. Thus the period saw the emergence of political philosophers

like Team Bodin, Thomas Hobbes, and John Austin, developing a theory of sovereignty. However, all the theories were enlivened by natural law thinking.

1.2.3 The 17th Century:

The 17th century marlins a transition from natural law theories to secular positivism. The most significant writer was HUGO GROTIUS (1583- 1645). HUGO GROTIUS is sometimes referred to as ″ the founder of international law″

1. Mare Liberum (1609)
   - This argned for the freedom of the seas
2. De Jure Belli ac Pacis (1625)

While remaining in the natural law tradition, sought to found the law of nations upon a secular form of natural law. Grotius argued that, human beings were both competitive but at having a desire for harmony. Based on the above faits Grotius that, a secular form of natural law would demonstrate how states could live together without conflict. But, this secular natural law should not be the product of divine revelation, but a product of sobe reflection on the human condition.

Therefore , by the use reason, it would be posit to determine the rules that should operate to govern relations between rulers.

After Grotius, the law of nations would be founded on a mixture of secular natural law and position′ms.

Grotius´ssideas that later grinded acceptance

i). International relationed are subject to the rule of law, and this exists independent of theology
ii). A secular natural law has a role as a source of international law
iii). the social nature of man is the basis of the law of nature
iv). the basic unit of international relations is the state
v). There is need to differentiate between just and unjust was
vi). Once of the tasks of the law of nations is to promote peace.

Other writer on international Law:

i). Samuel Pufendorf (1632 – 1694)
   - wrote on natural law and issues of war
ii). Richard Zouche (1590 – 1661)
   - rejected natural law and concentrated on issues of sovereign mills behavior
iii). Thomas Hobbes
   - focused on the location of sovereign power within the state. Sovereign power is not derived from natural law, but from social contract. Only the sovereign could Declan war or peace or make law.
iv). John Locke
   - Government was legitimate if formed on consent.

- On the law of nations, it should be formed upon the actual and expressed conduct of states, rather than on principles to be deduced with the aid of divine revelation
- Thus, the law of nations must be about independent states, regulating relations among those states, and examining the actual conduct of those states.

1.2.4 The 18th Century.

Development in the law of nations in the 128th century took place against the background of alignment. This was the period of rise of freedom of thinking.

The period saw the development of both positivism and natural law, as well as theories of natural rights.

At this time, already the law of nations was viewed as a horizontal system regulating the relations sovereigns, and distinct from the vertical system training in domestic law.

i). the circumstances in which force was justified
ii). the rulers related to the conduct of diplomacy
iii).the law of the sea – because of mercantilism

1.2.5 The 19th Century.

In the 19th century, a number of developments took place. The first was the increasing realization that international relations required to be managed.

Secondly, it was realized that some attenuation need to be paid to the individuals interests. This was manifested in the campaign against slewed trade.

1.2.6 The 20th Century .

During the 20th century start, the world saw the occurrence of the first world (1914 – 1918). This war prompted a reconsideration of the met words employed in international relations.

Thus, the ″ League of Nations ″ was established to prevent any further inflict in Europe. To this effect the ″ Treaty of versatile ″ provided the government for the league of nations, which would contain provisions designed to restrict the recourse to force at the some time, the post – war treaties with newly independent states would contain guarantees of minority protection, as well as a desire to improve human ring.

At Versailles, the permanent court of international justice was also born, though it started sitting at the Hogue in 1922.

The League of Nations made some achievements. However, at the outbreak of second world, war in September, 1939, the existing international machinery collapsed.

Developments towards the new international order 1945.

There are many events that took place, and led to the post war international structure. The important among them are as follows:

i). The inter – Allied Declaration (June 1941)

- Representatives of Great Britain and her dominions issued this declaration pledging to establish a post – war world formed on peace and security.

ii). The Atavistic charges (August 1941)

- The leaders of Great Britain and USA agreed on the broad principle that should govern any postwar international machinery.

iii). The United Nations Declaration (January 1942)

- Representatives of 26 states meant in Washington De to approve the principle of the Atlaritic chaiter and to consent the establishment of new international organization that would be provisionally called ″ the united Nations ″

iv). The London Committee (May 1943)

A committee met in London to consider a new international count of Justice. It produced it report in February 1944.

v). The Moscow Declaration (October, 1943)

Representatives of the United States, Britain, cluing and the Soviet Union signed the Moscow Declaration general security indicating their approval of the concept of an international body changed with the responsibility for the maintenance of peace.

vi). Tehran Iran Meeting (November 1943)

Presidents Roosevelt, Prime Minister Churchill, and General Secretary Stalin met in Tehran to review the course of the conflict. The three leaders agreed in principle that, a new international body would be established to maintain world peace.

vii). Breton Woods initiatives (July 1944)

The United States oversaw the establishment of the international Monetary Fund (IMF), and the international Bank for reconstruction and Development (The World Bank).

vii). The Yalla conference (February 1945)

President Roosevelt meant with Joseph establish and vision Churchill to settle a structure of the new post – war institutions. In this meeting, the constitution and powers of the Security Council were agreed.

ix). The San Francisco Conference (April - June 1945)

The conference concluded with the signs of the united Nations Charter on 26 June 1945 by . At the same time, the draft situate for the international court of Justice was approved.

As an international organization, the United Nations was designed to play a central role in the post war world. In broad terms, the objectives of the organization were set out in article 1, and may be summarized having four main aspects:-

i). To maintain international peace and security
ii). To develop friendly relations among nations
iii) To achieve international cooperation in solving problem of international nature
iv).To is a centre for harmonizing the actions of nations in the attainment of common ends.

1.2.7 International law and the Modern world

After formation of the United Nations in 1945, more events unfolded, which had impact on international law.

(i). Decolonization
The event decolonization brought with notions of self- determination. Thus, in the 1950s and 1960s, international law was operatives in greatly changed environment
Decolonization led to the increase in the number states, hence augmenting the membership of the general assembly.

ii). Growth of the Human rights regime the safeguard for human sright became one of the prominent post was agenda. This was a revival of interest in natural law. This the universal declaration human rights was adopted in 1948. Many states followed by starting to confer basic guarantees in human rights or by providing that rules of international should be incorporated into municipal law, since 1948, international human rights law was grown tremendously.

1.2.8 The Current Foundations of International Law

Currently, international law is said to be founded on the following billows:

i). The charter of the United Nations (1945)
ii). Statute of the international court of Justice (1945)
iii). Vienna convention on diplomas tic relations (1961)
iv). Vienna convention on the law of treaties (1969)

1.4 Public and Private International Law

The distinction between public and private international law is sometimes conventional. However, in simple terms, public international law generally involves states and internationals organizations in their relations with each others, or with individuals and companies.

On the other side, private international law involves individuals or companies in their relatives with each others, but at the international sphere

Some writers are of the view that, private international law partly includes norms of public international, and partly norms of domestic legal system.

It appears that, the expression private international law comprises those rules that apply when a domestic court is confronted with a claim that concerns a foreign element. The major questions are: which court should exercise Jurisdiction, and which law should be applied.

Thus, private international law can comprise three elements:-
i). which court should exercise jurisdiction?
ii). which law should be applied?
iii).to what extent wills country A derecognizes and ensures judgments given by the court of country B.?
Clearly, the subject of private international law is concerned with rights arising in private law and enforceable by individuals against each other. In the United States, private international law is referred to as ″ conflict of laws ″

2. THE SOURCES OF INTERNATIONAL LAW

It is generally agreed that article 38.1 of the statute of the international court of justice lists what are now considered as sources of international law.

By sources, the general agreement is that, their are areas where we can find an international legal norm,
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The said article 38.1 states that: The court, whose function is to decide in accordance with international law, such disputes as are submitted to it, shall apply.
a). international conventions, whether general or particular, establishing rules express by recognize by the contesting states
b). international custom, as evidence of a genera; practice accepted as law
c). the general principles of law recognized by civilized nations
d). subject to the provisions of article 59, Judaic decisions and the teachings of the most highly qualified publicists of the various nations

3.8.2. However, this provision shall not prejudice the power of the court to decide a case ex aqua et bono, if the parties agree thereto.

And article 59 provides that. The decision of the court has no binding force accepts between the parties, and in respect of that particular case.

2.1 TREATIES:

Article 38 (1) (a) of the statute of the international court of justice requires the court to use international conventions. Whether general or particular, establishing rules expressly recognized by the contesting states

The term convention also means treaties. The difference in vocabulary will be dealt with later. Also, there will be a chapter devoted entirely to the law of treaties.

The definition provided by article 2 (1) (a) of the Vienna convention on the law of treaties (1969) is that, the word treaty means:

"An international agreement concluded between states, in written form, and governed by international law, whether embodied in a single instrument or in two or more related instrument and whatever its particular designation"

As a source of law, the treaty is founded on certain accepted principles which may be summarized as follows:

i).The treaty arises from the express consent of a state. Being on consent. Tue general principle is that on the parties to a treaty are bound by its terms. However, there is a category called disparities treaties that create an objective legal regime binding upon third state.

ii). The treaty governs the relations of parties inter se. This means a state signatory to the treaty is bound by the treaty in its dealings with other signatories. I t is not bound in its dealings with non-signatory state. However, this position changes if the treaty in question will have acquired the status of customary international law.

c). Where a treaty codifies customary international law, the parties (signatories) will be bound according to the law of treaties, and non- parties (non – signatories) may be bound because the obligation arise in customary international law.

- Nicaragua case (1986) ICJ; 14
- North Sea continental shelf case (1969) ICJ; 3

All treaties contain obligations for states that are parties to them. However, a distinction is always drawn between law making treaties and treaty contracts.

Law making treaty will purport to lay down general rules and will be multilateral in character treaty contracts are treaties which resemble contracts. An example is where state a makes a trade treaty with state B.

2.2 CUSTOM:

Article 38(1) (5) provably that international custom as evidence of a general practice accepted as law shall apply. This leads to international customary law.

So for, there is a difference between custom and Usage, Usage represents a praline nany stage regarding rules of conduct which are being observed by force of social press is. A custom may be said to arise when the practice has become general.

Customary international law is greatly deeded from state practice and opinion Jurist:-

2.2.1 State practice

The following are the element of state practice
i). Diplomatic relations between states official statements by foreign ministers, the opinion of legal advisors, and bilateral treaties all constitutes evidence of state practice. Similarly, statements by ambassadors or diplomatic representatives fall within this category.

ii). The practice of international Organizations
Since much activity between states is conducted though the auspices of international organizations the cumulating conduct of an international organization constitutes evidence of state practices.

iii). State Laws and Decisions of Municipal Courts
In seeking evidence of state practice, it is legistion to examine the judgments of municipal courts and the enactment of individual legislatures.

2.2.2 Opinion Jurist sive necessitates
The purpose of the doe trice of opinion julis is to demonstrate that, the right or obligation comprising the rule is not a mere matter of usage or practice but recognition by states as obligatory.

Opinion Julis is actually what turns a mere usage into custom, because states will behave a certain way because they are commenced that it is binding upon them to do so

2.2.3. The Test of Custom
i). Duration
If the constancy and generality of a practice are proved, no particular duration is required. The passage of time will, of course, be a paint of the evidence of generality and consistency. It is not very necessary that a practice be long or even immemorial

ii). Informing and Ansistency of the practice.
For a customary rule to be recognized as a rule of international law, it should be uniform

In the Asylum Case (ICJ Reports (1950),P 276 -277 the ICJ pronounced that, that the party which relies on a custom, must prove that this custom is establish in such a manner

that it had become binging on the other party, and that, it is in accordance with a instant and uniform usage précised by states in question.

iii). Generality of practice
Once of the proofs of custom in the generality of practice among states. Generality of practice he to do with level of acceptance of the concept.

Therefore, customary law is thus established by virtue of a pattern of claim, absence of protest by states particularly interested in the matter at hand, and acquiescence by other states.

2.3 THE GENERAL PRINCIPLES OF LAW
Article 38(1) © of the statute of the international court of justice refers to the general principles of law recognized by civilized nations

In any system of law a situation may well arise where a court is considering a case before it realized that there is no law covering exactly that point. In such instances, the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules, or directly from the general principles that guide legal system.

The following are some of the sources, or instances of general principles

2.3.1 Recourse to Equity.
Equity is one of the general principles of law found in many legal systems. Equity could be understood as set of principles constituting the values for the legal system.

In the case of Rann of Kutch Arbitration between India and Pakistan in 1968, (50ILR,P. 2), the attribution agreed that equity formed paint of international law and that, accordingly the parties could rely, on such principles in the presentation of their cases.

The international court of justice in the North Sea continental Shelf cases (ICJ Reports, 1969 p. 3) took the some stand.

2.3.2 General Principles of Law in the Practive of Tribunals.

i) Arbitial tribunals
Arbitral tribunals have frequently resorted to Municipal analogies. This could include issues of responsibilities of a state for the acts of its agents, or in assessment of damages, or any other subject matter.

ii). The International Court of Justice
The court has used this source (general principles) as paint of juclicial reasoning. For example, on a umber of occasions, the principle of occasions, and acquiescence have been relied on by the court.

The court has also used most frequently and successfully the domestic law analogies in the field of evidence, procedure, and jurisdiction questions.

2.3.3. General Principle of international Law.
This may refer to logical propositions resulting from judicial reasoning on the basis of existing international law, as well as municipal analogies.

There are already agreed principle of internations law such as pact sund servanda, principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, etc.

2.4 SUBSIDIARY MEANS
Article 38 (1) (d) provides that the court shall apply judicial decisions and the teachings of the most highly qualified publicists of the vision nations, as subsidiary means for the determine of the rules of law.

2.4.1 Judicial Decisions
i). Decisions of international tribunals judicial decisions of international tribunals are not strictly speaking a formal sources but in some instances they are regarded as authoritative evidence of the state of the law

ii). Arbitral tribunals
In a number of awards given by arbitral tribunal, there are obtained notable contributions to the development of the law by eminent jurists sitting as arbitrators, umpires or commissioners.

iii). Reference to arbitral awards by the international court of justice
The court has on few occasions refereed to particular decisions of it self, and referred more to the jurisprudence of international arbitrations

iv). Decisions of the international court of justice
The general trend is that, the ICJ applies the law and does not make it (no precedent). However, a unanimous decision has a role in the progressive development of the law. Example is decisive infthences of decision of the following cases in the development of international law.

- The Reparations Case
- The Genocide Case
- The Fisheries Case, and
- The Nottebohm Case

v). Decisions of Nations Courts
Article 38 (1)(d) of the statute of the ICJ is not confined to international decisions. Decisions of national courts and tribunes have euidlentional value. For example, some decisions provide direct evidence of state of practice, state succession; sovereign immunisty, diplomatic immunity, extrachiction,, was orimes,etc.

2.4.2 The Writings of Publicists
In principle, the writings of publicists only constitute evidence of the law. However, in some areas individual writers have had a formative influence E.g Giclel has had some formative influence on the law of the sea.

Not forgetting the need for caution, the opinions of publicists are used widely.

3. SUBJECTS OF INTERNATIONAL LAW.

Subjects of international laws are entities capable of possessing international rights and duties, and having the capacity to maintain its rights by bringing international claims.

However, a distraction should be made between subjects of international law, and main players in the international systems

3.1. STATES AS SUBJECTS OT INTERNATIONAL LAW.

The rise of positivism in the 18th authors placed the state as the basic polical unit at the centre of international diplomacy. It was them assented that, only states are subjects of international law. However. This view later changed to include other entities.

3.1.1 Creation of statehood
Today it is generally accepted that, the legal criteria for statehood are those set out in article 1 of the Montevideo Convention on the rights and Duties of states (1933). This reads;
"The state as a person in international should possess the following qualifications a) Permanent population b) a defined territory c) a government d) capacity to enter into relation with other states. "

i) Defined Territory
Territory is the essence of statehood. In principle a state must enjoy sovereignty over a defined area. Thus, within a defined area, the sate will possess sovereignty, and may prevent other state/states act without its consent.

ii) Population
A second requirement it that, there should be a stable population. The evidence must disclose some degree of permanence, sop that, it is possible to attribute statehood to nomadic tribes moving through temitories.

iii) Consol by a government
There must be a degree of effective government control over the territory in question. A state is a political entity, and there must be an element of control by government.

However, once a state is established, its existence will not, be terminated by civil war, in by political instability, or frequent revolutions, or by attempts at secession. Likewise,

defeat in war inoccupation by a victorious army or annexations will not lead to extinction.

iv). Capacity to enter interrelations with other states.
The object of oratorio is act a barrier to acknowledging by satellite states or pessimist ones, in order to deny them recognition like when the Japanese invades Manchuria, in 1931, and declared it an independent state with the name MANCHUKUO.

3.1.2 Special Types of State
i). Protectorates, usually there was treaty such that the local ruler retained control of internal affairs, but the protecting state would conduct external relations on its behalf once the protectorate ceased, the territory become a state by itself.

ii). Feudal states
There are several ways in which a state can exist. It might be a unitary state where al power are concentrated at the centre, or feudal state in which there is formal distribution of powers, between the centre and constituent paits. Thirdly there ca be a confederation where a number of states come together in a loose association, with few power held at the centre.

iii). The Sovereign order of Malta
The order was established as a military and medical association. It was govern the Island of Malta as an extension of the kingdom of Sicily this sovereignty was lost in 1798, and in 1834 the order established its headquarters in Rome as a human tarian Organization.

The order had international personality and continued to exchange diplomats with most European countries. Italia declared that Malta is still an international person. Hence it continues to maintain diplomatic relations with over 40 states.

iv) The Holy see and the Vatican
Up to 1870. the papal estates (land) served as the territory and sovereignty of the papacy there were conquered by Italy in 1870 in 1929, the Lateran treaty was signed between the Vatican and Italy, recognizing the state of the Vatican City – and the sovereignty of the Holy see.

Since them, the Holy See has continued to engaging diplomatic relations and enters into international agreements and concordats. According, its status as an international person was accepted by many states.

3.1.3 Recognitions
One of the most important things in international law is recognition. This is the legal reaction of other states

Non recognition by other nations, of a government claiming to be a national personality, is usually appropriate evidence that, it has not attained the independence and control evitithing by international law to be classed as such.

3.2 Individuals

At the start pf international law, it was conceive that only states have international legal personality , and international law was about rights and duties of state only.

When treaties were concluded providing for the predation of selves, this was considered to be an exception.

The 20th century has seen a change. The Nuremberg tribunal (1945) was premised on the personal responsible of individuals during the conduct of was. Art 7 of the charter establishing the tribunal made it clear that there would be no immunity by virtue of office. This meant imposing obligations and duties on individuals.

In terms of granting rights the whole human rights, regime grants rights to individuals emanate from international law. This enables individuals to pursue cases before international tribunals, against states.

3.3 INTERNATIINAL ORGANIZATIONS

Since the 19th century the world has seen leverage number of international organizations. However, they were not deeper to posses international personality.

However, the issue came of deliberation before. International court justice in the reparation for injuries case – (reparations for injuries suffered in the device of the United Nations – 1949 the court pronounced thus.

" Fifty states, representing the vast majority of the members of the international community, have the power, in conformity with international law, to bring into, bring, an entity possess by objective international personal and not merely personality recognized by them alone, together with the capacity to bring international claim "

However, the important thing for international organization is the power enjoyed by it. The decision above, was based on the power enjoyed by the United Nations.

4. INTERNATIONAL LAW AND MUNICIPAL LAW.

Introduction:

With regard to internationals law and municipal law the theoretical question is whether international law and municipal law are part of a single legal order or whether they comprised two districts systems of law.

The question above raises further questions, namely;

i). The status of rules of municipal law before international tribunals,

ii) The circumstances in which rules of public international law will b e applied by a municipal court and

iii) What is to happen if a rule of municipal law is in conflict with a rule of international law.

4.1 THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW.

There are two doctrines that have sought to illumine the relation between municipal law and international law. These doctrines are referred to as monism and dualism.

4.1.1. Monism;

Monism holds that, international law and municipal law are both plait of a single legal structure. Thus the monist considers the two to operate within a common fiels and to be concerned with the same subject mater. If there is a conflict between the two, then the rules of international law shall prevail.

In the monist practical therefore, once a treaty is, signed it becomes paint of the law of the land immediately.

4.1.2 Dualism

The dualists argue the international law and municipal law are separate system. The former requlater relations between states, and record regulates relations between the state and its citizens.

Thus, since they are two different systems, international law operates in the municipal sphere only when there is a specific act yp sdopt the law. In the event of conflict between the two, municipal can should give effect to municipal law.

4.2. MUNICIPAL LAW BEFORE INTERNATIONAL COURTS AND TRIBUNALS

As noted earlier, in appropriate circumstances, the judgments of a national court may constitute a source of international law

While this the case, the general rule is that the state may not rely upon a provision of municipal law, to excuse a breach of international obligations, under article 27 of the Vienna convention on the law of treaties 1969, provides that,

A party may not involves the provisions of its, internal law as justification for its failure to perform a really
Therefore, obligations amassing under international law prevail over the term of municipal law.

A dodctrice development in recent years asseits that, a state will need to ensure that its domestic legislastion is in liene eith the sprovisings of any international obligation

4.3. INTERNATIONAL LAW BEFORE MUNICIPAL COURTS.

The stay and treatment of international law will differ from state to state. The starting point is the constitutional arrangement of a particularly state.

In the legal system of county, it is stated how international law is to be treated by the courts of that state.

So far, there are two doctrines in this regard namely doctrine of Incorporation and transformational

4.3.1 Incorporaration
The doctrine of incorporation holds that, linter nation law is automatically paint of municipal law, without any express act of adoption

In such situation, treaty signed and satisfied by a state would become binding on the citizen of that state, without any legislation being passed. As such in some states the writer constitution of the state will provide that rules of international should become automatically paint of municipal law. In principle, this doctrine follows the monist approach.

4.3.2. Transformations
The doctrine of transformation holds that, the rules of international law do not become paint of municipal law, unless and until there has been an express act of adoption.

Thus, the rule of international law must be transformation into domestic law. Thus, if a state has entered into a treaty, that instruments would not be given effect to in the courts of the state, unless domestic legislation had been enacted to transform is into municipal law.

Again, this is the general trend undertake by dualists.

4.4. INTERNATIONAL LAW AND THE MUNINCIPAL LAW OF TANZANIA.

Tanzania follows the dualist tradition. There fore the position is that, linter national law, and the municipal law of Tanzania is two different systems.

Being adherent of the dualism system, any rule of internationals law, must be transformed into the municipal law to be enforceable by the courts of law in Tanzania.

The process is such the, it is the excusive that signs the treaty. However, a after signed some should be tabled in parliament for stratification. Once satisfied, the same is then tabled as a bill, and on Act of parliament will be enacted to that effect.

In the Tanzania legal system, the hierarchy of laws goes thus;

1. Constitution
2. Psricipal Legislation

3. International Law
4. Etc.

The hierarchy is so because international will to be incorporated into municipal law.

In some circumstances, the rules of international law may simply be satisfied, by the parliament will not enact a parallel legislation if it feels that the matters contained in the international law are already covered in one, or various existing legislations.

So far, two philosophical perspectives try to explain the nature of international law, namely natural law and legal positivism

Natural law: Hugo Gorotius and Samuel Pufendoif
Advocate of natural law theory believe that there are principles of natural law that exists indepently of the people. The test for the people is to find the law

The best known of naturalist writer was Dutchman called HUGO GROTIUS 583 – 1645) He is often regarded as the founded of modern international law. He wrote a book titled ″ De Jure Belli a c Pacis – 1625 ″

In his perception , natural law is the rule of right reason, which teaches us that an act in just in so for as it confirms to natural reason, and morally just or unjust and sequent forbidden or commended by God himself as the author of nature. This natural law does not change. God himself cannot change the scheme of things.

Applying this to international law, natural law is the ever- present source for supplementing the volunteering law of nations, for judging its adequacy. The will of states cannot be the exclusives or decisive source of the law of nations.

On his part, Samuel Pufendorf (1632 – 1694) firmly that, international law cannot arise from suggested custom or from treaties. The only international that could exist should be part of natural law.

Positivism: Lasso Oppenheim
Positivism lies in the simple assertion that law is made by people or its authorities. Therefore, the people and its authorities make the law, and not that law is derived from some higher authorities.

Thus, in the international legal system, states make the law. Therefore, international law is a law between states, and it concerns states only and exclusively.

Positivists argue that, because states make the law the law derivers its authority from the will of states. This is what makes international law obligatory. They further argue that, natural law philosophy has he overall problem of justifying international law as obligatory to states.

This sentiment by the positivist was echoed in the decision of the permanent court of international justice in the Lotus case (supra) as follows:
″ International law governs relations between independent states. The rules of l aw binding upon states therefore emanate from their own free will, as expressed in conventions, or by usages generally accepted as expressing principles of law.

However, neither natural law nor positivism above can explain international law at is a combination of both.

1.1.3 The Function of International Law.
Firstly, international law is expected to facilitate and support the daily business of international relation and politics. It dies so by allocating decision making power within the international system
Secondly, it is supposed to prevent the pursuit of multiple nation's interests, or privet interests from becoming anarchy.

Thirdly, it allows for the co-existence of multiple political unities and their international.

Fourthly, it advances particular values – for example the regulation of the use of force and the protection of individual/human rights.

5.1.5 The dual Character of International Law
International law provides both an operating system- and a normative system for international relations.

Operating System.
As an operating system,. International law sets the general procedure and institutions for the conduct of international relations.

- It provides a framework for establishing rules and norms
- Outlines the parameter for interactive
- Provided and forms for dispute resolution among those taking part in the interactions in this aspect, international law is ″ facilitative ″

Normative System
As a normative system, international law takes a legislative character by mandating particular values, and directing specific state behavior

In the aspect international law is directive as it creates norms. The normative system of international law defines the acceptable standards for behavior in the international system.

1.1.4 Is Interantional Law Really Law?
Once of the most debated issues by writes is whether international law is really law. Those who dispute the legal nature of international law point to a number of pieces of evidence to support their case.
i). Lack of institutions

- In the context of the state, there is legislature judiciary and executive in the international system no legislature judiciary and execution in the real sense.

ii). The Command theory

- The 19th century positivists (analytical posivists) understood law as the communard of the sovereign. This school of thought was expended more by John Austin (1790 -1859). But see mighty international law does not meet one Austin understanding of law.

iii). Effectiveness

There are jurists/writers who argue that, even if international law cem be regarded as law, it is so ineffective to rendu it meaningless

iv). Lack of grund norm

Municipal law can be validated by the presence of a grand norm. International law cannot hence cannot be validated.

This paper was prepared and submitted to legusc.com by saidy kassim