

Revisiting the Interaction of the Trilogy of Sources of International Law

Timothy F. Yerima, Ph.D.

Associate Professor & Dean Faculty of Law, Kogi state University, Anyigba, Nigeria.

*tfyerimah1@yahoo.com

Abstract

This article revisits the interaction of the primary or trilogy of sources of international law, drawing particular references from international human rights. The article reveals the pivotal role of consent in the formation of treaties (expressed consent) and customary international rules (implied consent); and points out that, in view of the rapid development of international law, the general principles of law would continue to develop new spheres of international law, including international criminal law, international humanitarian law, international environmental law and so on. The article also reveals that consent is a connecting factor of the trilogy of sources of international law. It concludes that since the internationalization of human rights in the 20th Century, respect for human rights itself becomes a rule of customary international law (implied consent) to the effect that no State can embark upon flagrant violation of human rights under the façade of State sovereignty without the intervention of international body or bodies.

Key Words: Sources, human rights, international law, treaties, custom, general principles of law

1. Introduction

In all legal systems, there must be some accepted criteria or sources by which “laws” are established. Although, the concept of sources is a difficult one, it is fundamental in any viable legal system. Sources of law are vital to establishing the validity of legal rules. Through its sources, international legal system accommodates the changing requirements for regulation-law making in new areas and upgrading the existing laws (Omar, Online).

Within municipal systems, sources of law can be simply identified. In the Nigeria legal system, for example, the written Constitution is one source of law; as in the United Kingdom, the Acts of Parliament is the primary source of law. The effect is that in municipal systems there are always institutions where the sources of law are derived.

On the contrary, international law has *sui generis* distinct from national systems. International law does not base itself on a single unified legislation, an executive organ and a Court with compulsory jurisdiction. This is not to deny that “international law is aimed to be construed also by broader concepts like justice, good faith, international well-being and so on” (Castaneda, On-line); nor is it to say that international law exists in a *vacuum* or exists without sources. It has been rightly pointed out that concomitant to the absence of a legislative organ is the consensus regarding the list of sources of international law. Since 1945, Article 38 of the Statute of International Court of Justice (ICJ Statute) has been accepted as providing sources of international law.

Apart from treaties and customs, which are well established and classified as recognized sources of international law, there also exists other less conventional and traditional subsidiary sources. Since the formation of the UN, the General Assembly has been playing pivotal role in developing international law. There are also norms of international law from which no derogation is permissible. The task in international law today is not only to re-evaluate the sources enumerated in Article 38 of the ICJ Statute but also to, importantly, determine the inter-play and disconnection among the sources and their effectiveness. Some issues emanating from the interpretation of Article 38 of the ICJ Statute and complex interaction of the trilogy of sources of international law are also considered imperative for revisiting; but the meaning of source is worth considering.

2. Meaning of Sources

Although, the concept of sources is considered unclear and confusing, some definitions have been attempted. “To have a source is to have a basis for determining the origin and legality of a system. In legal discourse... ‘source of law’ refers to something specific and technical. It generally means the authority by which legal rules derive their force” (Abbas, 2012: 28).

Sources of international law are the methods by which the rules of international law have been discovered or created. A distinction has always been drawn between formal sources and material sources of international law. The former, “confer upon the rules an obligatory character, while the later comprises the actual content of the rules” (Omar, On-line: 5). This distinction, according to a scholar, “appears to embody the constitutional mechanism for identifying law while the material sources incorporate the essence or subjects matter of the regulation” (Shaw, 2010:)

The distinction shows that formal sources refers to sources of law in technical sense, for example, sources of international law, material sources deal with the historical evolution of a particular law, not where the law derives its force; for example, morality and reason. In other words, formal sources represent the mechanism through which the law comes into being; while the material sources indicates where the legal rules come from – where the rules are located (O'Brien, 2002:67). In short, what the law is, is the constituent of former sources; the identification of where the law is to be found constitutes material sources (Wallace, 2005: 8).

3. Clearing some Fogs on the Trilogy of Sources of International Law

One important question that comes to the fore is whether the term “formal sources” can be applied in international law the same way it applies to domestic law. The question is significant in view of the fact that there is no equivalent of the national law-making bodies in the international legal system. This is partly because of the horizontal nature of the subject. That is why the question of the authority for the rule as a rule, binding on States, is determined by the formal sources of the rule. So the questions of where international law comes from and how it is made become very important in international law.

Today there exist the International Court of Justice, Specialized Courts and Tribunals; but their respective jurisdiction depends on the consent of States. That the corner stone of international law is the consent of States depicts that the outcome is given explicitly by adoption of treaty or implicitly by customary law to a rule of international law (Schreuer, On-line:1). In the last two and half decades, Article 38 of the ICJ Statute provides the most convenient summary of the sources of international law. Article 38(1) identifies five sources:

- a. International Conventions;
- b. International custom;
- c. The general principles of law recognized by civilized nations;
- d. Judicial decisions; and
- e. The teachings of the most highly qualified publicist.

The first three sources-treaties, customs and general principles of law- are referred as primary sources; and the last two sources-judicial decisions and the teachings of publicists are referred as subsidiary or secondary sources. A perusal of Article 38(1) reveals that it does not mention decisions or determinations of the organs of international institutions; today, it has become a well recognized source of international law. In fact, since international law is dynamic and fast with the passage of time, the sources enumerated in Article 38(1) and the decisions and determinations of the organs of international institutions are not even exhaustive; lawyers are beginning to suggest that the existence of additional sources should be accommodated. For now, these sources “constitute recognized sources of international law.

But one must not sink into oblivion that Article 38(1) is further given impetus by Article 38(2) by recognizing the power of the ICJ “to decide a case *ex aequo et bono*, if the parties agreed thereto”. This means the ICJ has power to ignore rules which are the products of the applicable law and make reference to other principles subject to the agreement of the parties. States may request the ICJ to decide a case not just on the application of strict rules of law but by the reference to such principles as fairness and equity.

In another interpretation, the parties to the matter before the ICJ may ask the Court not to apply any of the elements listed in Article 38(1) to their case. If the Court accepts, it acts *ex aequo et bono* – the Court ignores the rules created by the sources listed in Article 38(1). Article 38 has not been free from criticism; it is considered as not being adequate, it is out of date and ill-adapted to the conditions of modern international intercourse. The emergence of the new areas of international law in the 20thC, “don't fit the traditional pattern of a legal system concerned solely with relations among sovereign states” (Schreuer, On-line:2)

There is nothing in Article 38 to expressly stipulate that the sources are hierarchical. In fact, an attempt to use the phrase: “in the under- mentioned order,” in Article 38 of the Statute of the P CIJ was turned down in 1920. But it is apposite to state that Article 38 establishes a hierarchical of procedure for the application of international disputes.

Be that as it may, it is accepted that whether or not Article 38 is obsolete as a general statement, the ICJ remains bound by it. If there is substantive change in international law on the question of sources, it is the duty of the Court to take note of it, even if the Court is reluctant to go beyond the terms of its own Statute. The ICJ, therefore, is expected to apply the sources in Article 38 in an order in which they appear. Accordingly, International Conventions (Treaties) are applied and given preference by the Court in deciding a case which the parties refer to it. Where the Conventions are not available, the cases will be decided in accordance with

international custom. In the absence of the two sources, the general principles of law recognized by civilized nations apply. These three sources are regarded by some writers as formal sources (Wallace, 2005: 8); or what I regard in this article as trilogy of sources of international law; while judicial decisions and juristic teachings are regarded as material sources or subsidiary means for the determination of rules of law that are taken into consideration when the sources referred to in Article 38(1)(a)(b)(c) are not available.

4. Treaties

Conventions are referred to as treaties in international law. Reference to treaty in this article means Convention used in Article 38; and that is Convention in international law. Generally, a treaty is a legally binding agreement deliberately created by, and between two or more subjects of international law who are recognized as having capacity (Dixon, 1990:47). Similarly, treaties are agreements between two (bilateral- *bi partite*) or more States (multi lateral-*multipartite*) or between other subjects of international law by which they create or intend to create a relationship between themselves (Ladan, 1999:41).

It is gratifying to distill from these definitions that treaties are agreements between subjects of international law or between or among States, creating a binding obligation(s) in international law or as simply put: "...a treaty is an agreement between parties on international plane" (O'Brien, 2002:80). Treaty is, therefore, an evident of formal source of international law and one way in which rules binding on two or more States comes into existence.

Article 2 of the Vienna Convention on the Law of Treaties, 1969 (Vienna Convention), provides the most comprehensive definition of treaty. It provides:

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.

The foregoing definitions reveal some examinable features and interaction of treaty with customs and general principles:

i. International Agreement with some Features of Domestic Agreements

Treaty only applies to those States or subjects of international law that have agreed to its terms. This notion itself reveals an interaction between treaty and customary international law that there is a rule in customary international law- *pacta sunt servanda* –that agreement must be kept or the idea that treaties must be adhered to and that breaches of treaties are importantly and fundamentally wrong. Article 26 of the Vienna Convention is explicit on this that "[e]very treaty is binding upon the parties to it and must be performed by them in good faith" (*Abacha & Ors v Fawehinmi*). Under the African human rights, for example, African States ratification of African Charter creates, for that State, an obligation that demands concrete results (Udombana, 2009:126). The African Commission on Human and Peoples' Rights, in predicating its decisions on the principle of *pacta sunt servanda*, took the view that when a State ratifies the African Charter, it is obligated to uphold the fundamental human rights contained therein, even if it does not enact domestic legislation to effect the Charter's incorporation (*Purohit v The Gambia*). The principle extends to the effect that "a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken" (*Exchange of Greek and Turkish Populations*); and also to the rule that a State cannot invoke the provisions of its domestic legislation, including its Constitution, to invade its treaty obligations" (Vienna Convention, Art. 27). This has been the practice both in the PCIJ (*Chorzow Factory (Merits)*), the ICJ (*Fisheries (U. K. Norway)*), African Commission on Human and Peoples' Rights ((*Purohit v. The Gambia*) and the ECOWAS Court of Justice (*SERAP v. Nigeria & UBEC*).

Flowing from the principle, it can, on the *contra*, be argued that a State, which is not a party to a treaty, is under no such obligation under the treaty-*pacta terus nec nocent nec prosunt*. That is why, Article 34 of the Vienna Convention, makes it explicit that "[a] treaty does not create either obligations or rights for a third party state without its consent" - buttressing the description of treaties as sources of obligation under international law.

Giving the place of consent in international agreements, it is glaring that failure of a powerful State to give its consent could be disastrous to the effectiveness of the treaty. It is hard to debunk the fact that the effectiveness of the Rome Statute of International Criminal Court (ICC), for example, was undermined by the failure of the United States of America to ratify the treaty. Till date the failure of some powerful States such as America, China and Russia, to ratify the ICC Statute, notwithstanding that they are members of the Security Council-an

organ of the UN with power to refer matter to the ICC (ICC Statute, 1998: Art. 17), has sparked-off a negative reaction, particularly by members of the AU, purporting to establish an equivalent of the ICC in Africa (Draft Amended Protocol to the Merged Court Protocol, Art.28 (A)).

There is at least one exception to the rule that a State, which is not a party to a treaty, is under no such obligation under the treaty. The first is when obligation expressly stated in a treaty becomes an obligation of general customary law. A State is bound by the obligation as a matter of customary law; not by the effect of the treaty. The Genocide Convention on the Prevention and Punishment of the Crime of Genocide, 1948, is a typical example.

A State may not take part in treaty but it may find that certain matters covered by the treaty are already part of international customary law. It becomes bound not by the treaty but by the principles of the treaty (Umuzurike, 2001: 42).

Article 38 of the Vienna Convention makes it glaring that “[n]othing in articles... precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” Thus, [a] State that has not ratified or acceded to the Genocide Convention 1948 will find no succour in committing genocide. It is bound by the principles of the Convention which have become part of customary law. (Umuzurike, 2001: 42)

Self-defence was drawn as a political doctrine in customary international law and reinforce as a legal doctrine in *Caroline’s* case in the mid- Nineteenth Century; it was codified in Article 51 of the UN Charter as an exception to the prohibited use of force under Article 2(4) of the UN Charter, which itself is a customary rule of international law, in the Twentieth Century (Agwu, 2005). In *Military and Parliamentary Activities in and against Nicaragua*, (*Nicaragua v. United States (Merits)*), the ICJ stated that it is difficult to see how the inherent right of self-defence or its non-justiciability can be conceived other than within the context of customary law, the content of which has been confirmed by the UN Charter. This reveals a complex interaction of treaties, customary international law and judicial decisions.

Again, a treaty that is freely negotiated by many States is considered as having authoritative statements of writing down unwritten rules of customary law. The African Charter is a typical example; “the widespread ratification of the African Charter indicates a willingness on the part of the Government to accept binding obligations.... [I]t also suggests at least a formal commitment by African States to conform their national law and practice to international standards” (Udombana, 2004: 107) .This also demonstrates an interaction of treaties and customary international law because the treaty is considered as a codification of the existing law. The ICJ applies the Vienna Convention to all States, including non- State parties to the Convention, because more than half States of the World are parties to the Convention.

On the *contra*, where a treaty provision is designed to change the rule, it becomes part of customary law if it is accepted in practice (*North Sea Continental Shelf*.) This can be deduced, for example, by evidence of a large number of States, including those that are not parties to the treaty, applying that treaty provision. This analysis in international law has catapulted a distinction between contractual treaties (*traites contracts*) –agreements between the parties- and law-making treaties (*traites lois*). By the same token, evidence of recurrence of a provision in treaties may create an international customary law to that effect. The principle of *pacta sunt servanda* codified in the Vienna Convention itself is a rule of customary international law.

Like agreements that are governed by domestic civil law, in treaties, the intent of the parties are seen in the language and context of the document concerned; the circumstance of its conclusion and the explanation given by the parties determine whether or not a particular agreement is a treaty. But, unlike ordinary contract that parties have no right of “opting out,” this option exists and is available to members of the international community. This is done by reservation, where the treaty provisions allow it (Vienna Convention, Art. 2(1)(d)). Examples are: International Convention on the Elimination of all Forms of Racial Discrimination, 1965, Art. 20; Convention on the Elimination of Discrimination against Women (CEDAW), 1979 (Art. 28); Convention on the Rights of the Child, 1989 (Art. 51).

Reservation reduces the impact of the treaty and also gives rise to the right of objection by the other State Parties. So, what determines admissibility of the reservation is whether or not “it conforms to the treaty’s objective and purpose” of the treaty (Reservation to the Genocide Convention case). One important multi-lateral treaty which has passed through test is the CEDAW. While many Islamic States have ratified the treaty with far reaching reservations; many other State Parties have vehemently objected to these reservations as being

defeating the objective and purpose of the Convention. Some treaties, by their provisions, expressly prohibit reservations. But this appears mostly in supplementary to the main treaties. The Optional Protocol to the CEDAW (Art. 17); Optional Protocol to the CAT Convention (Art.30), demonstrate treaties that prohibit reservation under the universal system. However, certain rights, including non-derogable rights, judicial guarantees, the peremptory norms of human rights law and rules of customary international law have been declared by the UN Human Rights Committee to be outside the subject of reservations (Human Rights Committee, General Comment 24(52), UN DOC. CCPR/C/21/Rev.1/Add. 6,1994).

It is gratifyingly interesting to note that though customary law and treaty law have equal legal force in international law, where these two laws exist together on the same issue in dispute, treaty provisions take precedence, unless the parties have agreed to the contrary. Professor Wallace rightly stated that a rule established by agreement (treaty) supersedes a previous conflicting rule of customary international law (Wallace, 2005: 21; *Wimbledon* case, 1923). But where identical rules exist in both existing customary international law and treaty law, there is no basis for establishing that the treaty law supersedes the customary international law, so as to relegate the customary international law non existence of its own.

A more complex situation may exist where custom and treaty law conflict concurrently. Recent development in international law, particularly international criminal law, reveals a concurrent conflict between the customary international rule of sovereign immunity of Heads of State and the removal of such immunity under Article 27 of the Rome Statute of International Criminal Court (ICC), 1993. As a scholar pointed out:

[B]ased on the involvement of international criminal law, the argument has been made that the rules of customary international criminal law on personal immunities of current Heads of State do not bar the exercise of the jurisdiction of the ICC with respect to an incumbent Head of State (*Advocats Sans Frontieres*, On-line).

This concurrent conflict has led to the withdrawal by African leaders of their support to the ICC (Bangamwabo: On-line). Ironically, a provision *pari materia* with Article 27 of the ICC Statute has been incorporated into the Draft Amended Protocol to the Merged Court (Art. 46B). Opinion has been given that:

[I]f the treaty is more recent than the customary law the treaty will bind States that are parties. If the principle of customary law has developed after the adoption of a treaty, the treaty will generally continue to govern the relations between the parties” (LIAC). This situation will appropriately attract amendment of the treaty to accommodate the new customary rule (Beckman & Putte: On-line).

Treaty, which seek to modify or alters established custom, should be strictly interpreted to conform to accepted principles of international law; and a treaty must not prevail over prior customary law if the latter is *jus cogens* or peremptory norms-norms that have been accepted and recognized by the international community of States as so fundamental and so important that no derogation is permitted from them. Genocide, the use of armed force, the prohibitions against slavery, torture and the right to self-discrimination are some examples. The list is not exhaustive and will continue to increase due to changes in international law.

ii. *Written or Oral Agreement*

One point that scholars use to distinguish between customary law and treaty is that treaties exist mainly in written form, relying on the text of Article 2(1) of the Vienna Convention. But neither the Vienna Convention nor any rule says all provisions of treaty must be contained in a single document or must be in writing. Both the PICJ and the ICJ had affirmed the validity of oral agreements as binding between States in the cases of *Legal Status of Eastern Green Land* and the *Nuclear Test Cases* respectively. This indeed brings into fore the interplay between treaty and customary rule of international law.

The foregoing points should not be mistakenly construed to mean that the use of an unwritten agreement has no limit. In practice Article 102 of the UN Charter has limited the use of unwritten agreements. The Article provides:

1. Every treaty...entered into by any member of the United Nations...shall soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty...which has not been registered...may invoke that treaty or agreement before any organ of the United Nations.

Applying Article 102 of the UN Charter would mean that “if the Vienna Convention is to apply to an international agreement, the agreement must be in written form (and) reflect the intentions of the parties to be bound by international law.”

iii. *Particular Designation: Intention not nomenclature*

Article 2 of the Vienna Convention uses the phrase: "...whatever its particular designation..." Meaning the nomenclature used in referring to treaty does not matter; it is only of relative interest (Ladan, 1999:): 'Protocols' 'Pacts' 'General Act' 'Accords' 'Statutes', 'Charters', 'Covenants', 'Conventions' 'Concordat', (Harris, 1998) *et cetera*, all are names used in describing treaties at one time or the other Charter of the United Nations; International Covenant on Civil and Political Rights; Convention on the Rights of the Child.; Statute of the International Criminal Court (ICC); Protocol to the African Charter on the Rights of Women in Africa; Constitutive Act of the African Union, ECOWAS Treaty, *et cetera*, all refer to international agreements or treaties. What matters is what passed through the minds of the parties at the time the agreement was entered into. Different words could be used to demonstrate the intention of the parties. The most important question is whether the international agreement creates legally binding obligations for the States that are parties to the agreement. Terminologies such as "shall", "agree", "undertake", "rights" "obligation" and "enter into force" have been used over the years (Harris, 1998:).

5. Customs

3.2.1 *Meaning and Criteria*

Article 38 (1) (b) of the Vienna Convention refers to custom as evidence of general practice accepted as law. This is not a written source. Custom is not only the original and the oldest source of international law but also the foundation stone of modern international law. In every society, there are indisputable and acceptable rules that were developed at an early stage, and have acquired a status of inexorability: "the ways things have always been done", it is said, "becomes the way things must be done" (Thirluray in Harris, 1998:).

Custom in international law is a practice followed by those concerned because they feel legally obliged to behave in such a way. Customary international law emanates from patterns of behaviour or practice of States, coupled with the belief that the practice is based on a legal obligation or *opinio juris*. Custom is not only an act done but also act omitted to be done by States in circumstances in which such act or omission is regarded as having legal effects on all States that recognize it (Abbass, 2012).

Although, custom as a source of legal rules in international law, does not deviate from the pattern discernible in municipal legal systems, it has been uncovered that customary law is much more common in international law than in most domestic legal systems and represents the essential basis upon which modern human rights regime is grounded.

It is appositely reiterated that Article 38 (1) of the ICJ Statute captures two criteria for proving the existence of customary international law: "general practice" and the "acceptance of this practice by law." This means States must, in general, have a practice of the act, and secondly, there must be *opinio juris*, that is "a belief in legal obligation". (*North Sea Continental Shelf* case) These two criteria must exist simultaneously for a new rule of customary international law to be created. A rule cannot be created by *opinio juris* without act practice (*SS Lotus* case and the *Advisory Opinion on Nuclear Weapons*).

Over the years, some acts have been shown to constitute evidence of the existence of custom, including: diplomatic correspondence, press release, policy statement, the opinion of official legal advisers, executive decisions and practices, national legislation, national judicial decisions, the practices of international organs and resolutions relating to legal questions in the UN General Assembly. Others are the approach adopted by representatives in the UN Organs such as the General Assembly and the Security Council. The significance of this could be seen from the extent which many of the General Assembly Resolutions have established fundamental principles of human rights. The Universal Declaration of Human Rights (UDHR) (1948) today represents a major milestone in human progress and a document of the widest significance. Though the provisions:

are not binding *qua* international Convention, they can bind States on the basis of custom ... whether because they constituted a codification of customary law or because they have acquired the force of custom through a general practice accepted as law (*Namibia (South-West Africa)*).

Again, apart from Article 2(7) of the UN Charter, which prohibits intervention in matters that are essentially within the domestic jurisdiction of Member States of the UN, intervention is not allowed as a matter of custom in view of the Declaration on the Principle of International Law Concerning Friendly Relation and Co-operation among States in Accordance with the Charter of the United Nations, 1970. It has been proven that International organizations may be instrumental in the creation of customary law. For example, in the *Reparation* case, the ICJ

in its advisory opinion declared that the UN possessed international personalities. This decision was partly predicated on the actual behaviour of the UN (*Anglo-Norwegian Fisheries*).

State practice is a term which incorporates not only actions by States but also omissions in taking part in certain activities (Rehman, 2010). For there to be custom in international law, it is necessary that a usage is practiced by States and that practice must be accepted by these and other States as creating a legal obligation. Therefore, regular State behaviour in respect of an issue or a situation determines the existence of custom. There is a plethora of authorities of the ICJ establishing that for the State practice to become a custom, it must be uniform and consistent (*Asylum case- Columbia v. Peru*).

The State practice had to be both extensive and virtually uniform in the sense of the provision invoked. But this does not mean an absolutely rigorous conformity with a particular practice by State nor is it a requirement that the uniformity must be complete. Substantial conformity is enough. The implication of this is that while substantial inconsistencies of the practice prevent the creation of a rule of customary international law, minor inconsistencies do not.

In the same vein, inconsistency *per se* is not sufficient to negate the effectiveness of a rule into customary international law. Factors such as subject matter, the identity of the State practicing the inconsistency, the number of States involved, *et cetera*, are all relevant factors for consideration. All things being equal, inconsistencies of the rule, amount to violation rather than indications of the recognition of a new rule (*Nicaragua's case*).

It has never been a requirement that the practice must be in existence for a particular time. The fact that the practice has been engaged in only short period is not a bar to the formation of a customary rule provided other requirements are available. A usage may become custom even in a short time. All depends on the circumstances of the case and the nature of the rule involved.

ii. *Opinio juris*- Psychological Element

Article 38 (1)(b) of the ICJ Statute refers to “international custom, as evidence of a general practice accepted as law.” A certain practice by itself remains insufficient. In order to distinguish customary law from habits or codes of morality, States need to feel convinced that a certain action (or omission) is required of them by law. This is the psychological element - *opinio juris*- in the formation of customary law; the effect of which all States, including those that initially failed to contribute to the practice, are regarded as being bound by the practice. *Opinio juris* helps in determining whether the existence of a specified usage is regarded as legally obligatory and not merely a moral or political statement. States will behave a certain way because to them, it is binding upon them to do so. This, indeed, is an implied consent to the formation of customary international law.

For *opinion juris* to be inferred from a particular pattern of practice, the State involved must be “conscious of having a duty” in that regard (*Nicaragua's case*). To determine the existence of State practice, one needs to consider what States do in relation to a particular issue(s). Developments in Africa over a decade now has shown that African States and members of the UN have unanimously consented that coup d'etat is condemnable. This implied consensus has found itself into treaty law currently as an international crime under the Draft Amended Protocol (Draft Amended Protocol, Art. 28(e)).

Also what States say by their officials in newspapers, official publications and from statements made in the parliament at Conferences will determine whether the State considers itself under an obligation to act in a particular manner (Abass, 2012:).

Writers have identified some problems associated with *opinio juris*. One is the difficulty in proof. It is difficult to determine when opinion has been transformed into law. This was the message passed in the case of the *United Kingdom v. Iceland (the Fisheries Jurisdiction case)*, where judge Sorenson, in his dissenting opinion, did not find it necessary to go into the question of the *opinio juris* because it was a problem of legal doctrine which might cause great difficulties in international adjudication. It is extremely difficult to find evidence of the reason why a State followed a particular practice (Berkman and Butte). This is compounded by the fact that *opinion juris* is not only related to international motivation, but also of a psychological nature. Research has, however, shown that if a particular practice or usage is widespread, and there is no contrary State practice proven by the other side, the Court often finds the existence of a rule of customary law.

Setting aside the problems associated with *opinio juris*, once there is sufficient practice together with *opinio juris*, a new rule of custom will emerge and subject to the principle of “persistent objector.” Persistent objector is a principle which permits a State, which has persistently rejected a new rule, even before it emerged as such, to avoid its application (*Nicaragua’s* case). The new rule binds all States.

6. General Principles of International Law

Article 38 (1) (c) of the ICJ Statute requires the Court to apply “the general principles of law recognized by civilized nations”. As a source of international law, the general principles of law recognized by civilized nations was inserted into the ICJ Statute to enable the Court decide disputes in circumstances in which neither treaties nor customs provide guidance or solution regarding a particular claim, with the aim to closing the gap not covered by the Statute or case law and to allow the ICJ draw analogy directly from the general principles that guide the legal system, which might emanate from justice, equity or considerations of public policy. While this was seen as an incorporation of natural law into international law, some jurists did not see the significance of the provision on the basis that national law cannot be part of international law save as it has been expressly adopted in State treaties and State practice (Guggenheim and Tunkin, in Harris, 1998).

It has been accepted that legal principles have been drawn from the developed municipal systems. This is so when one takes into account the State of international relations at the time the ICJ Statute was drafted. The Statute was originally drafted for the use of the PCIJ. It was not clear then whether anything other than treaties and customs governed the international legal relations of States. In view of this argument, it has been suggested that the general principles of international law referred to in the Statute mean those principles that are mainly derived from municipal law. But the use of the words: “civilized nations”, further confuse the application of general principles in contemporary international law. The criteria for determining a “civilized nation” is a problematic one.

The second segment of the issue deals with the question of the basic conditions that must be satisfied before a principle qualifies as “a general principle of law recognized by civilized nations.” It has been pointed out that the phrase often implied a more general distinction between developed and underdeveloped States, and was utilized during the colonial era to distinguish between colonial governments and the colonized peoples. This was justified because in ancient times, only general principles of law developed and practiced by “civilized nations,” qualified as a source of international law (Abbas, 2012). With the adoption of the UN Charter, the phrase has now been replaced by the words “peace loving nations” (UN Charter, Art. 4), and today it is seen simply as “the general principles recognized in the legal systems of independent States” (Waldock in Harris, 1998).

In view of the foregoing analysis, it is gratifyingly convincing to accept the view of majority that Article 38(1) (c) enables the ICJ to take principles recognized in national law and to apply them in appropriate situations provided the application is relevant to the resolution of an international dispute. The essence, as noted by Shaw, is “to close the gap that might be uncovered in international law and solve the problem of *non liquet*.”- a kind of situation in which the Court would be forced to declare a case inadmissible due to lack of applicable Law (Shaw, 2010). Thus, the significant role of general principles cannot be in doubt: aside that they are referred in international jurisprudence and relied upon in the course of treaty interpretation, their functions reveal their interaction with treaties and customs. The general consensus is that general principles “provide a valuable and jurisprudentially coherent supplement to treaty and custom”; they lay the foundation of treaty law, fill gaps left open by treaty law and guide the adjustment of existing treaties to new challenges and concerns of the international community (Voigt: On-line).

Although, scholars have pointed out that the provenance and role of general principle remain obfuscated and they are seldom mentioned in judgments, they “constitute a crucial element of international law, without which its effective functioning would be jeopardized...(and) progress and responsiveness of international law to modern challenges would be considerably constrained” (Voigt: On-line). The ICJ has also revealed their significance. In *Corfu Channel* case, the Court, when dealing with circumstantial evidence, stated that “this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions...” Similarly, in the *Right of passage over Indian Territory* case, Portugal relied on the general principle of “right of way of necessity” to argue its right to passage on India territory. To strengthen its case Portugal embarked on a comparative survey of this principle in various legal systems.

The relevance of general principles has also been extended to international criminal justice. The International Criminal Tribunal for the former Yugoslavia utilized the general principle in *Blaski* case. According to the Trial Chamber of the Court: “[T]he proportionality of the penalty to the gravity of the crime is a general principle of

criminal law common to the major legal systems of the world". Two years later, the Tribunal applied the principle in *Furundzija* case. "[G]eneral principle of respect for human dignity", the Trial Chamber held:

[I]s the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed, in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity.

That the ICJ and the International Tribunals have applied the general principles should not be misconceived as meaning that the judicial and *quasi*-judicial bodies will simply take principles common to domestic legal systems and apply them to cases. In fact, it has been warned that it is dangerous to try to transfer ideas from national legal systems to the very different context of international law.

One of the advantages and distinctive features of general principles over customary law is that the former, unlike the latter, will apply even in the absence of general practice. "In the definition of the third source of international law", a scholar pointed out, "there is also an element of recognition on the part of civilized peoples but the requirement of a general practice is absent" (Cheng, in Voigt: On-line). This disconnects the requirement of general principles from customs which depend on actual State behavior for its existence.

Again, the development of international law will determine whether a particular general principle is eligible for absorption. Prohibition on the use of force is now part of international law because theoretically it is prohibited in all legal systems. This shows another interaction of the trilogy of the sources of international law. The ICJ or any international tribunal would apply the general principle only in the absence of treaty provision(s) and rule of international customary law. With the rapid growth of international law, which in turn culminates to increasing number of treaties covering different sphere of international issues within the UN system, it is tempting to say that in the nearest future, the general principles would not be very relevant. But such conclusion would be misleading when one considers the evidence of the growth of international law into many diverse fields. The logical and convincing conclusion will be that the general principles of law in contemporary international law will be utilized to close gaps in more special areas of international law, such as international criminal law, humanitarian law, outer space law and others.

7. Concluding Remarks

Though Article 38 of the Statute of the ICJ provides for three separate and independent sources of international law, it is not in doubt there is interaction among the three sources. In consideration of both treaties and customary rules, it is shown that consent plays pivotal role in the formation of international rule; and since international law is dynamic and fast with passage of time, through express and implied consent, treaties and customary rules of international law will continue to grow. The relevance of general principles in the development of international law also cannot be under-estimated. General principles will continue to close gaps left opened by treaties and international customary rules, most especially in more special and recent areas of international law such as international criminal law, international humanitarian law, environmental law, space law and so on.

It is finally submitted that with the internationalization of human rights since the 20th Century, respect for human rights itself is a customary rule. A State cannot embark on flagrant violation of human rights of its citizens or the citizens of other State(s) under the façade of State sovereignty without the intervention of international body or bodies; the era of absolute state sovereignty is outmoded (Udombana, 2004: 18) and has gone (Yerima, 2010: 67). This is so most especially that even states that are not members of the UN are expected to observe the principles of the UN (UN Charter (Art. 2(6)). Despite the foregoing, it is recommended that states should cooperate to give international law its deserved efficacy or else, the relevance of the trilogy of sources of international law and the interplay *inter se* will not be relevant without the consent of state parties. The insistence of the AU states, including those that are parties to the ICC Statute, to withdraw their support for the ICC is a clear lesson that cooperation among nations of the globe is not only pivotal but also imperative for peaceful co-existence of states and global security.

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