

The Relevance of International Law in the Contemporary Global Community*¹

Abstract

An overview of the opinions of legal scholars and jurists over the years on the status of international law points to the fact that there is a divergence of opinions as to whether or not international law can be properly regarded as law or a mere moral rule. This divergence emanated from the dichotomy on the understanding of law between the positivists and the naturalists. While some argue that international law is not and should not be regarded as law properly so-called, others argue that such opinion is rather misconceived as it is based on a narrow understanding of the meaning of law as a command of a sovereign, with the direct implication that customary law is no more part of the legal corpus. The immediate effect of this assertion is that there could be no binding legal rule in the international arena. If this assertion is to be accepted, its legal consequence will be very devastating and disastrous in the present global order. The aim of this research is to ascertain the veracity or otherwise of this assertion. The methodology employed in the research is doctrinal using primary and secondary resources available to us. It is our finding that, although to all intents and purposes the rules of international law are binding legal rules, the challenge of having an effective enforcement mechanism to ensure compliance with those rules remains as pertinent today as it was many years ago despite the efforts so far made and being made by the United Nations in this regard. It is our recommendation that if the global community hopes to sustain progression and civilization and not chaos in the global plane, it must devise a better means of ensuring that the rules of international law are complied with in order to realize the main purpose of its formulation- the maintenance of international peace and security.

Key words: International Law, International Peace and Security, Legal Rule, Sovereign Equality, Global Community, States/Nation-states.

1. Introduction:

Law is commonly referred to as an instrument of social engineering. According to Eric Ibe, “The law is a vital instrument in social engineering. Laws are necessary for bringing about social change and are crucial in forming and directing society (sic) behaviour.”² The term, “social engineering” has been defined as “The process of influencing and altering a society's social structures, behaviours and conventions. ...It entails utilizing a variety of instruments and methods to effect the intended changes in the society.”³ The international community is, no doubt, a society- consisting mainly of States or Nation-states. Thus, law can be used as an instrument of social change in the international arena for the purpose of influencing the behaviours of the members of the international community towards peaceful co-existence.

Coincidentally, law in the positivists' understanding of the concept may appear a weak tool in the international plane owing to the absence of a supra-national legislative body with the authority to

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²E C Ibe, “Understanding the Potentials of Law as an Instrument of Social Engineering and Change”, Law and Social Justice Review Vol. 4 (3), September, 2023, Abstract, p.68.

³ Ibid.

make laws which can be binding on the states unlike what is obtainable under the domestic

environment where there is in existence a national legislature with an authority to make binding laws. This is simply based on the established international law principle of sovereign equality of states. Going by this reasoning, therefore, international law cannot have a binding force against any State nor is any State bound to obey any rule of international law. If this argument is anything to go by, can law still play any significant role in the maintenance of international peace and security? This is the core of this research paper.

2. Basic Definitions of the Key Terms:

a. International Law:

In the first place, it needs to be pointed out that the term, “law” as used in the context of the theme of this work refers to the law operating in the plane of international relations otherwise known as “international law”. What then is international law? The term “international law”, according to the Merriam Webster's Collegiate Dictionary,⁴ means “a body of *rules* that *control* or affect the *rights* of *nations* in their relations with each other”. Similarly, the Concise Oxford English Dictionary⁵ equally defined the term as “a body of *rules* established by *custom* or *treaty* and *recognized* by *nations* as binding in relations with one another”. On its part, Osborn's Concise Law Dictionary, defined the term “international law” as

*The rules accepted by civilised societies as determining their conduct towards each other, and towards each other's subjects. It is a law of imperfect obligation inasmuch as there is no sovereign superior to enforce it...In order to prove an alleged rule of international law, it must be shown either to have received the express sanction of international agreement or it must have grown to be part of international law by the frequent practical recognition of states in their dealings with each other.*⁶

Finally, according to Black's Law Dictionary,⁷ the term “international law” refers to:

The legal system governing the relationships between *nations*; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes). – Also termed *public international law*; *law of nations*; *law of nature and nations*; *jus gentium*; *jus gentium publicum*; *jus inter gentes*; *foreign-relations law*; *interstate law*; *law between states* (the word *state*, in the latter two phrases, being equivalent to *nation* or *country*).

A close look at the various definitions given above from different sources will readily reveal some important elements in the understanding of *international law*. These include the concepts of *rules*, *custom*, *treaty*, *recognition/acceptance* as well as the concept of *nation/state*. While the concepts of *custom* and *treaty* refer to the two major sources of international law as established by Article 38 of

⁴ Merriam Webster's Collegiate Dictionary, (Tenth Edition), (Merriam Webster, Incorporated, Springfield, Massachusetts, USA, 1993), p. 611.

⁵ Concise Oxford English Dictionary, (Eleventh Edition).

⁶ M Woodley, Ed., Osborn's Concise Law Dictionary, Twelveth Edition (London: Sweet & Maxwell: 2013), pp.231-232.

the Statute of International Court of Justice, the notion of “rules” entails that each of such sources of law must establish some legal “bindingness” as every *rule* implies a general norm or established principle or standard guiding or mandating conduct or action.

Again, by the operation of the rules of customary international law, for a rule to become binding on states, such rules must have either been *accepted* or *recognized* by the parties concerned as binding on them as no rule will have a binding force under customary international law unless and until they are accepted or recognized as binding on such parties. Thus, by *Article 38(b)* of the Charter of the United Nations, international custom is defined as the “evidence of a general practice accepted as law”. And, in his explanation of the nature of this rule, Malcolm Shaw has opined that “The existence of customary rules can be deduced from the practice and behaviour of states...”⁸ Shaw further reasoned that,

[i]t is possible to detect two basic elements in the makeup of a custom. These are the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is 'law'. As the international Court noted in the Libya/Malta case, the substance of customary law must be 'looked for primarily in the actual practice and *opinion juris* of states’.⁹

Despite the above, Shaw, however, further noted that, “One can conclude by stating that for a custom to be accepted and recognized it must have the concurrence of the major powers in that particular field.”¹⁰ In the same vein, before the rules of international law in the form of treaties will become binding on any state party, such state must have signed and ratified the treaty in question. It follows then from all the above that international law being the rules guiding relationships between states *inter se* or between states and other non-state parties, such rules, where it is customary, must express the *opinio juris* of the states in question, and where it is a treaty, must have been signed and ratified by the state party concerned.

Lastly, the notion of “nation” or “state” simply refers to the independent political entity having a distinct international personality with the sovereign power to manage and control its internal and external affairs as it deems fit subject only to the established rules of international law. Therefore, a basic understanding of international law simply means that the law mainly concerns itself with the regulation of the relationship between two or more independent political entities called *nations* or *states*. This is notwithstanding the fact that rules of international law can, in some cases, involve the relationship between a state and its members or between a state and members of another state or even between a state and an international organisation. Yet, owing to the major roles played by *states* or *nations* in the international arena, “international law” is often referred to as “the law of nations”.

b. Legal rule:

In the course of defining the meaning of international law, we saw that the word “rule” featured very prominently. The significance of *legal rules* as against other rules such as moral or social rules, is that they are binding on their subjects. It is this “bindingness” that readily separates legal rules from other rules. A rule does not mature as a rule of international law unless and until it becomes recognized as binding on the conduct of the subjects of international law. The process of

⁷Bryan A. Garner, Ed., Black's Law Dictionary, (Nineth Edition) (Minnesota: West Publishing Co., 2009), p. 892.

⁸M.N. Shaw, International Law (Fifth Edition) (Cambridge: Cambridge University Press, 2003), p.69.

⁹Ibid., p.70.

¹⁰Ibid., p.76.

achieving “bindingness” of legal rule in the international arena can either by way of signing and ratifying a treaty or a result of crystallization of customary international law.

c. Sovereign Equality:

In the first place, the word, “sovereignty” refers to the absolute or supreme authority which every state has and exercises over its internal affairs. By this authority, every state is entitled under international law to manage its internal affairs as it deems fit without any external interference. Whether this definition can still be strictly applied to the authority of states in the current international arena is a different matter altogether which is quite beyond the scope of this paper. Secondly, from the meaning of sovereignty, the concept of sovereign equality refers to the international law principle that every state is equal in status notwithstanding its size or capacity. This principle is a major challenge to the operation of international law.

a. States or Nation-states:

States or nation-states are simply defined as independent political entities recognized under international law as sovereign bodies with all the rights and duties pertaining to such recognition. Once a political entity is recognized as a state, it enjoys the privilege of sovereign equality with every other state notwithstanding the size or strength of such entity.

b. International Peace and Security:

One of the major purposes of the United Nations as enshrined in Article 1(1) of UN Charter of 1945 is to achieve international peace and security. Thus, international peace and security has more or less become the mainstay of the global community. However, such intended global peace and security cannot be achieved or realized without the instrumentality of rules hence the role of international law.

c. Global Community:

In the first place, the term, “community” has been defined as “A society or group of people with similar rights or interests.”¹¹ It also refers to “a group of people who live in a particular area or who are alike in some way”.¹² It can as well be defined as “all the people who live in a particular area, country etc. when talked about as a group e.g. a local community or the international community”.¹³ However, of all the definitions given for community, the broadest definition is the one given by the *Merriam Webster's Collegiate Dictionary* to the effect that, community, among other things, refers to “a unified body of individuals such as a State, a Commonwealth; the people with common interests living in a particular area; a group of people with a common characteristic or interest living together within a larger society; a body of persons or nations having a common history or common social, economic and political interests.”¹⁴

From all the above, one thing that is common is that community is a society of human population living together and having common interests either within or without one particular country or of different countries. In the context of global community, it then refers to the entire population of the human race living in an inter-related society which is known today as a global village. It may appear that the terms “community” and “society” more or less refers to one and the same thing. However, there may be a slight difference in the sense of size and commitment to each other. In other words, while every society can be called a community, not all communities can be regarded as a society. Thus, according to *Merriam Webster's Collegiate Dictionary*, a society, among other

¹¹BA Garner, *Black's Law Dictionary*, Ninth Edition (St. Paul, MN: West Publishing Co., 2009), p.317.

¹²BBC English Dictionary (London: HarperCollins Publishers Ltd, 1992), p.227.

¹³A S Hornby, *Oxford Advanced Learner's Dictionary*, Eighth Edition (Oxford: Oxford University Press, 2010), p.290.

¹⁴F C Mish, Editor in Chief, *Merriam Webster's Collegiate Dictionary*, Tenth Edition (Springfield, Massachusetts: Merriam Webster Incorporated, 1993), p.233

things, can be defined as “a part of a community that is a unit distinguishable by particular aims or standards of living or conduct; a social circle or a group of social circles having a clearly marked identity.”¹⁵ Therefore, the word society engenders much more companionship, friendship or intimate relationship or intercourse than community. In other words, while society refers to a smaller unit with greater commitment to each other, a community may, though having common interests, lack the commitment required to form a society.

In the context of global community as employed in this work, the term *community* is understood to refer to the whole human population occupying the entire space of the planet earth and who are loosely bound together by the common ties of humanity. In the post 1945 world, the term global community has acquired a much more concrete significance by the bond created by the UN Charter which has created a community of a global village assisted, of course, by the emergence of modern Information, Communication and Transportation Technology. The result of the above is that the saying that “no man is an island” has now become much more applicable with equal force to the member nations of the global community than ever before.

3. The Origin, Meaning and Nature of International Law:

In his cerebral work, *The Law of Nations*, Brierly traced the origin of the concept of *society of nations* where the law of nations initially operated and why it is impossible to have a society without the existence of one form of law or the other. As he explained it:

Law can only exist in a society, and there can be no society without a system of law to regulate the relations of its members with one another. If then we speak of the “law of nations”, we are assuming that a “society” of nations exists, and the assumption that the whole of the civilized world constitutes in any real sense a single society or community is one which we are not justified in making without examination. In any case the character of the law of nations is necessarily determined by that of the society which it operates, and neither can be understood without the other.¹⁶

The simple implication of Brierly's postulations above is that, firstly, no society, including the society of nations, can exist without laws. Secondly, in order to understand the nature of the *Law of Nations*, one equally needs to understand the type of society in which that law started its operation. In other words, one needs to understand the sort of *society of nations* in existence at the time when the *Law of Nations* came into being in order to understand the sort of *society of nations* we have in our world today to which the rules of international law is expected to regulate. In his explanation of the sort of *Society of Nations* under which the *Law of Nations* came into operation, Oppenheim had explained that:

International law in the meaning of the term as used in modern times did not exist during antiquity and the first part of the Middle Ages. It is in its origin essentially a product of Christian civilization, and began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematized body of rules to the Dutch jurist and statesman, Hugo Grotius, whose work, “*De Jure Belli ac Pacis libri III*”, appeared in 1625 and became the foundation of all later development.¹⁷

¹⁵ Ibid. at p. 1115.

¹⁶ Brierly, *The Law of Nations*, (Waldock, 6th Edition, 1963), 41-42, cited in D.J. Harris, *Cases and Materials in International Law*, 6th Edition, (London: Sweet & Maxwell, 2004), 1.

Taking a cue from Oppenheim above, Brierly has also added his own explanation as to the origin of the law of nations and the kind of society in existence under which it initially operated. According to Brierly:

The law of nations had its origin among a few kindred nations of western Europe which, despite their frequent quarrels and even despite the religious schism of the sixteenth century, all had and were all conscious of having a common background in the Christian religion and the civilization of Rome and Greece. They were in a real sense a society of nations.¹⁸

In line with the above elucidations of the duo of Oppenheim and Brierly, the former Nigerian President of the International Court of Justice, Hon. Justice T.O. Elias, has equally explained that:

Under customary international law it is certainly necessary to remember that up to a few years ago we generally regarded international law as belonging to an era which began shortly after the Treaty of Westphalia of 1648, following the break-up of Western Europe which preceded the birth of new nations out of old, almost monolithic Christendom, the cradle of Western civilization. Indeed, it would be true to say that for the next decade or two the position remained much the same until after the Franco-German War of 1870 and probably until about 1911. Kingdoms and empires succeeded one another after the break-up, between 1700 and about 1911, and they were governed after a fashion by rules of international behaviour and international relations partly governed by age-old religious scruples and prevailing human political and economic ideas of world order.¹⁹

However, the situation of the *society* or *community* of nations changed with time. Thus, as Justice Elias put it,

[E]vents evolved almost unprecedentedly, within 1911 and 1914, to produce a change in the climate of world opinion as well as in government and State relations of the big States, leading to the First World War which was, by a twist of world fortune, sparked off in Sarajevo.²⁰

This change in situation of things that occurred with time as noted by Justice Elias above, was owing to the “rise of the modern state system” which consequentially “undermined the tradition of the unity of Christendom, and eventually gave rise to those sentiments of exclusive nationalism which are rife in the world today.”²¹

Going by the above, therefore, it follows then that the kind of *society of nations* we have today is not exactly like the kind of *society of nations* which existed when the law of nations originally came into being. Unlike the then nations of western Europe which had so much similarity arising from their common Christian background and so were in many respects a true reflection of a “nation”, the modern states are not just different both in their socio-economic, political and cultural perspectives but are so independent and equal to one another by virtue of the doctrine of sovereign equality of States to the extent that some scholars have even questioned whether there can in fact be

¹⁷ Oppenheim, op. cit.

¹⁸ Ibid.

¹⁹ T.O. Elias, United Nations Charter and the World Court (Lagos: Nigerian Institute of Advanced Legal Studies, 1989), p.3.

²⁰ Ibid.

²¹ Ibid.

anything like a “law of nations” if law is to be understood as a means of regulating another's behaviour even against that other's wish. Yet, as we have seen above, if one accepts the notion of the need for the regulation of human conduct to ensure peace and order in every community, then one would readily accept the fact that, for there to be such peace and order, there must be rules to regulate or to ensure the maintenance of that order.

With respect to the nature of international law, James Summers in giving Bentham's perspective on the nature of international law asserted that, “international law was infused with liberal nationalist values.” According to him:

He [Bentham] envisioned a society of nations which worked together for the advancement of mankind: “nations are associates and not rivals in the grand social enterprise.” Love of country could be compatible with love of humanity, while the “unjust love of country which turns to hatred against other nations”, was to be rejected.²²

Summers equally noted that Bentham, “In a series of essays later titled (sic) *Principles of International Law*, developed this idea of a community of nations conducting their relations on the basis of mutual utilitarian benefit, facilitated by common institutions, like an international court.”²³ In that *Principles of International Law*, Bentham set out what he termed the “four objects of international law”²⁴ and further emphasized that it is to the first two objects that the duties a given nation ought to recognise may be referred and that it is to the last two objects that the rights which it ought to claim may be referred.²⁵

From the above, it is quite clear that the nature of international law was developed on the basis of “mutual utilitarian benefit” for all the members of human community as, according to him, “society of nations” should be a communitarian enterprise working “together for the advancement of mankind”.

Again, in view of the fact that we are interested in finding out the meaning and significance or role of international law in the maintenance of international peace and security in the modern international community, we will further x-ray some of the opinions of legal scholars and jurists who have, over the years, made scholarly contributions in this respect, which have thrown much light as to the meaning and nature of international law. Prominent among such scholars are the two leading English experts in international law namely *Oppenheim* and *Lauterpacht*. Thus, according to Lassa Francis Lawrence Oppenheim:

Law of Nations or International Law is the name for the body of customary and conventional rules which are considered *legally binding* by civilised States in their intercourse with each other. Such part of these rules as is binding upon all the civilised States without

²² J Summers, THE IDEA OF THE PEOPLE: THE RIGHT OF SELF-DETERMINATION, NATIONALISM AND

THE LEGITIMACY OF INTERNATIONAL LAW, Doctoral Dissertation, submitted with the permission of the Faculty of Law of the University of Helsinki, and presented on the 11th of November, 2004, pp.96-97.

²³ Ibid., p.97.

²⁴ For a detailed discourse on those four objectives of international law, kindly see, Bentham, J., “Principles of International Law”, in J. Bowring ed., *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1838), Vol. No. 150 at p.538.

exception is called universal international law, in contradistinction to particular international Law, which is binding on two or few States only. The Law of Nations is a *law for the intercourse of States with one another, not a law for individuals*.²⁶

He then further explained that, “As, however, there cannot be a sovereign authority above the several sovereign States, the Law of Nations is a law *between*, not above, the several States, and is, therefore, since Bentham, also called “International Law”.²⁷ It should, however, be noted that this definition of “international law” as given by Oppenheim above no longer represent the current position of international law. This is simply because, international law rules presently is no longer limited to mutual relationships between states but affects natural persons as well as corporate personalities and other non-state entities. Thus, the definition given by Philip C. Jessup appears to be more embracing when he defined “international law” or “the law of nations” as “law applicable to *states* in their mutual relations and to individuals in their relations with *states*”²⁸. Indeed, much more than the above, the current international law is neither limited to states in their mutual relations nor to individuals in their relations with states. It rather affects other corporate bodies and international organizations as well as other non-state entities. In this light, Malcolm Shaw has noted that:

One of the distinguishing characteristics of contemporary international law has been the wide range of participants. These include states, international organizations, regional organizations, non-governmental organizations, public companies, private companies and individuals. Not all such entities will constitute legal persons, although they may act with some degree of influence upon the international plane. International personality is participation plus some form of community acceptance. The latter element will be dependent upon many different factors, including the type of personality under question.²⁹

After noting the observation of Lauterpacht to the effect that, “the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law”, Shaw went ahead to conclude that:

...it is less clear that in practice this position was maintained. The Holy See (particularly from 1871 to 1929), insurgents and belligerents, international organizations, chartered companies and various territorial entities such as the League of Cities were all at one time or another treated as possessing the capacity to become

²⁵ Those Four Objectives of International Law, according to Bentham, are as follows: i. First Object: Utility General- in so far as it consists in doing no injury to the other nations respectively, saving the regard which is proper to its own well-being; ii. Second Object: Utility General- in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being; iii. Third Object: Utility General - in so far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the wellbeing of these same nations; iv. Fourth Object: Utility General - in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations.

²⁶ L.F.L. Oppenheim, *International Law - A Treatise*, Vol.1, Peace, Second Edition (London: Longmans, Green & Co., 1912), p.1.

²⁷ Ibid.

²⁸ P.C. Jessup, *A Modern Law of Nations*, Quoted by G.A. Bryan, ed., *Black's Law Dictionary*, op. cit., note 7 above.

²⁹ M.N. Shaw, *International Law*, Fifth Edition, (Cambridge: Cambridge University Press, 2003), p.177.

international persons.³⁰

Inasmuch as we agree with the position of Shaw above, we must nevertheless observe that the prominent roles being played by states in the development and promotion of international law still place states at the centre of the effectiveness of international law today. Thus, where States decide, as a matter of state policies and practices, to disobey the rules of international law, international law will definitely lose its efficacy and effectiveness.

Again, as explicit in the positions of Oppenheim and Lauterpacht above, the effect of the definition of the law operating in the international plane as “international law” is that it is a law operating *between* and not *above* nation-states who in fact enjoy the status of sovereign equality. According to James Summers, the origin of the term, “international law”, is attributed to the eighteenth century English philosopher and political thinker, Jeremy Bentham (1748-1832). In the words of Summers, it was “[T]he great liberal thinker and father of utilitarianism, Jeremy Bentham,” who “...in 1789 coined the phrase ‘international law’”. However, as was also acknowledged by Summers, this fact of the coinage of the term does not imply that *Law of Nations* started in the year 1789. It simply means that the usage of the term originated with Bentham as expressed in his work published that year. In other words, the *Law of Nations* has been in existence long before the year 1789 and even beyond the year 1648 when the popular “Westphalia Conference” took place. Thus, as Summers put it, “The Peace of Westphalia 1648, which recognised a system of independent states, is usually seen as a *watershed* in the development of international law”.³¹ By this statement of Summers, it can be gleaned that international law only attained *watershed* in its development in 1648. It does not mean that the year marked the beginning of international law as international law has been in existence prior to the Westphalia Conference of 1648.

It is worthy of note here that the Peace of Westphalia was a result of the treaty signed on October 24, 1648 in the German city of Westphalia mainly between France and Sweden on the one hand and Spain and the Holy Roman Empire on the other to end the *Thirty Years War* in Europe.³² By virtue of that treaty, the sovereignty and independence of each state of the Holy Roman Empire was fully recognised leading to the emergence of many new nation-states in Europe. The emerging nation-states of Europe saw the need to ensure that peace, order and respect for their independence will guide their future relations. Consequently, they decided to come together to fashion out a body of rules in form of the treaty which will act as the standard of behaviour for such future relationship. This was what led to the 1648 Westphalian Peace Conference.

However, despite the long existence of international law in the global arena, many scholars of positivism school of thought have, over the years, raised the question as to whether international law qualifies as law properly so-called. A few instances of such assertions may suffice here. According to H.L.A. Hart, “[T]he question ‘Is international law really law?’ can hardly be put aside.”³³ He then argued that “[T]hough it is consistent with the usage of the last 150 years to use the expression ‘law’ here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists.”³⁴ In raising the same question, Brierly has equally stated that, “It has often been said that international law ought to be classified as a branch of ethics rather than of law.”³⁵

³⁰ Ibid.

³¹ J. Summers, *The Idea of the People: The Right of Self-Determination, Nationalism and the Legitimacy of International Law*, published Doctoral Dissertation (Helsinki: University of Helsinki, 2004), at p. 80.

³² Encyclopaedia Britannica available at www.britannica.com/westphalia-conference, accessed last on 11th August, 2024.

³³ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 209.

³⁴ Ibid.

On his own part, John Austin, a leading positivist scholar, had argued that international law should not be regarded as law properly so-called. In his work, *The Province of Jurisprudence Determined*, Austin strongly contended that “The matter of jurisprudence is positive law: law, simply and strictly so called; or law set by political superiors to political inferiors”.³⁶ From this perspective, Austin defined law to be a “rule laid down for the guidance of an intelligent being by an intelligent being having power over him”.³⁸ He then grouped law into two namely: (i) Laws set by God to his human creatures; and (ii) Laws set by men to men and submitted that though the former is frequently styled the “law of nature or natural law”, he preferred to call them “the *Divine law*, or the *law of God*” because “the appellation Law of Nature” is “ambiguous and misleading”. He further classified the laws “set by men to men” into two namely “those established by political superiors”, which he styled “positive law or law existing *by position*”, and those “not established by political superiors, or are not established by political superiors in that capacity or character”. He finally grouped *international law* as part of this second group- i.e. those not established by political superiors which he considered to be rules set and enforced by *mere opinion*.³⁹

As to the nature of this “International law”, Austin opined that, “Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author”.⁴⁰

The pertinent question now is: if States which are the major subjects of international law accept the existence and legal validity of international law and indeed enjoin their officials to act accordingly, why then are the legal positivists still denying the legal validity of international law? And does arguing that international law is not law properly so-called lead to a better international community or to a chaotic one? These are some of the questions to which the positivist theorists must address themselves to. However, it is interesting to note that even Austin himself conceded that such rules of international law, even if formed by *mere opinion* and enforced by *moral sanctions*, is usually obeyed by states in order to avoid “provoking general hostility, and incurring its probable evils”. If then disobedience to international law could “provoke general hostility” and incur “probable evils”,⁴¹ it follows, therefore, that international law has a major role to play in the avoidance of hostilities and prevention of probable evils.

Perhaps, Malcolm Shaw has supplied what may be considered as the justification for the positivists' argument that international law is not law properly so-called. As he put it:

Virtually everybody who starts reading about international law does so having learned and absorbed something about the principal characteristics of ordinary or domestic law. Such identifying marks would include the existence of a recognized body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws and an accepted system of enforcing those

³⁵ Brierly, *The Law of Nations*, op. cit., p.42.

³⁶ J. Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (George Weidenfeld & Nicolson Ltd, 1954), p.9, Quoted by Freeman, M.D.A. in *Lloyd's Introduction to Jurisprudence*, Seventh Edition, (London: Sweet & Maxwell Ltd, 2001), p.242.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid., p.10.

⁴⁰ Ibid., p.201

⁴¹ Ibid.

laws. Without a legislature, judiciary and executive, it would seem that one cannot talk about a legal order. And international law does not fit this model.⁴²

Shaw further noted that although international law does not fit into the domestic model described above,⁴³ the basis for the reasoning of the positivists is the comparison of domestic law with international law as though they are the same.⁴⁴ He then concluded that although “There is no unified system of sanctions in international law in the sense that there is in municipal law, but there are circumstances in which the use of force is regarded as justified and legal.”⁴⁵ As a result of the above, “[t]hose writers who put the element of force to the forefront of their theories face many difficulties in describing the nature, or rather the legal nature of international law, with its lack of a coherent, recognized and comprehensive framework of sanctions.”⁴⁶

Although it is a fact that, unlike the domestic system where the legal structure is hierarchical and the framework of authority vertical, the international system is rather horizontal based on the principle of sovereignty by which no state recognizes another as being in authority over it leading to what the Israeli diplomat and leading scholar of the World Court (the PCIJ and ICJ), Shabtai Rosenne, called the *law of co-ordination* rather than *subordination*⁴⁷ as is obtained in domestic jurisdiction,⁴⁸ it is worthy to note that Oppenheim has, rightly in our view, opined that in determining the question whether international rule is indeed a law or not then, “we have to inquire whether three essential conditions of the existence of law are to be found in the Law of Nations.”⁴⁹ Those three essential conditions, according to Oppenheim, are: (i) the reality of a body of States or a community of individual community with States (ii) the existence of the body of rules for human conduct and (iii) the existence of originally unconnected people who later came to live together as a community.⁵⁰

In lending his support to the above position of Oppenheim, Brierly has equally argued that, “the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity...”⁵¹ Therefore, once those essential conditions outlined above are in place, such rules of conduct will be validly regarded as a law and binding on the members of such community including the members of the global community.

The Significance of International Law Today:

The significance of law in the international arena has been well-acknowledged by Malcolm Shaw when he explained that:

⁴² Shaw, International Law, op. cit., pp.2-3.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid., at p.4.

⁴⁶ Ibid., p.5.

⁴⁷ S. Rosenne, Practice and Methods of International Law, Dordrecht, 1984, p.2, cited in Shaw, International Law, op. cit., p.6.

⁴⁸ M. N. Shaw, International Law, op. cit., at p.6.

⁴⁹ Oppenheim, International Law - A Treatise, op. cit.

⁵⁰ Ibid.

⁵¹ Brierly, The Law of Nations, op. cit., p.42.

In the long march of mankind from the cave to the computer, a central role has always been played by the idea of law- the idea that order is necessary and chaos inimical to a just and stable existence. Every society, whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop. What can be done, what cannot be done, permissible acts, forbidden acts, have all been spelt out within the consciousness of that community... Law is that element which binds the members of the community together in their adherence to recognized values and standards... Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions. And so it is with what is termed international law, with the important difference that the principal subjects of international law are nation-states, not individual citizens.⁵²

Having made the above explanation, he then concluded that: “Man seeks order, welfare and justice not only within the state in which he lives, but also within the international system in which he lives”.⁵³ And in line with the above explanation of Malcolm Shaw, Sir Hersch Lauterpacht has, in his recently republished work, *The Function of Law in the International Community*, equally explained the role of law in the international community even while noting the challenges being faced by international law arising from the well-established doctrine of state sovereignty. According to him:

The function of law is to regulate the conduct of persons, natural or juridical, by reference to rules whose formal- as distinguished from their historical- source of validity lies, in the last resort, in a command imposed from outside. Within the community of nations this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law exclusively from the will of each individual member of the international community. This is the reason why any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty.⁵⁴

Indeed, this doctrine of state sovereignty, as indicated by Sir Lauterpacht above, has made many to question whether the rules of international law are in fact legally binding. This question was long ago tackled head-on by Oppenheim. In his ground-breaking legal treatise, Oppenheim observed that contrary to the position of positivists such as Hobbes, Pufendorf and John Austin that the rules of international law are not legally binding, such reasoning was not grounded on good reasoning but rather on fiction. According to him:

Almost from the beginning of the science of the Law of Nations, the question has been discussed whether the rules of International Law are legally binding. Hobbes already and Pufendorf had answered the question in the negative. And during the nineteenth century, Austin and his followers take up the same attitude. They define law as a body of

⁵²M.N. Shaw, *International Law*, op.cit., p. 1.

⁵³*Ibid.*, at p.13.

⁵⁴H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011), p.3.

rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law is correct, the Law of Nations cannot be called law. For International Law is a body of rules governing the relations of Sovereign States between one another. And there is not and cannot be a sovereign political authority above the Sovereign States which could enforce such rules.⁵⁵

Having laid down the above background on the position of positivists on the question, he went ahead to assert that such “definition of law is not correct” as it “covers only the written or statute law within a State,” and that such laws only forms “part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some other sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is termed unwritten or customary law.”⁵⁶ Consequently, he emphasized that:

There is in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law was never expressly enacted by any law-giving body, or it would not be merely customary law. Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only by indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary law in the same way as the written law, and that the State does not prevent them from doing so. This is, however, nothing else than a fiction.⁵⁷

As to why he dismissed such reasoning as “nothing else than a fiction”, Oppenheim explained that, “Courts of justice having no law-giving power could not recognize unwritten rules as law if these rules were not law before that recognition, and States recognize unwritten rules as law only because courts of justice do so.” He then gave the example of Britain as an instance of the operation of unwritten law and explained further that the fact that “Parliament has law-making authority is law itself” though such law is “unwritten and customary”. As he put it:

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[T]he very important fact comes to light that all statute or written law is based on unwritten law in so far as the power of Parliament to make Statute Law is given to Parliament by unwritten law. It is the common consent of the British people that Parliament shall have the power of making rules which shall be enforced by external power. But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary, which are day by day recognized by the courts of justice.⁵⁹

⁵⁵ Oppenheim, *International Law - ATreatise*, op. cit.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

Having made the above explanations, he then arrived at his own conclusion as to the true definition of law thus:

[W]e may say that law is a body of rules for human conduct within a community which by common consent of the community shall be enforced by external power. The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community, there must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. It is not an essential condition either that such rules of conduct must be written rules, or that there should be a law-making authority or a law-administering court within the community concerned. And it is evident that, if we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community.⁶⁰

Flowing from the above, Oppenheim opined that there is necessity of law in every human society whether in the narrow context of a “State” or in the wider context of a “Community” thus:

[I]t must be emphasized that, if there is law to be found in every community, law in this meaning must not be identified with the law of States, the so-called Municipal Law, just as the conception of State must not be identified with the conception of community. The conception of community is a wider one than the conception of State. A State is a community, but not every community is a State. Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law but not every law is Municipal Law, as, for instance, the Canon Law is not. Municipal Law is a narrower conception than law pure and simple. The body of rules which is called the Law of Nations might, therefore, be law in the strict sense of the term, although it might not possess the characteristics of Municipal Law.⁶¹

The above explanations of the legendary Oppenheim are, in our humble view, quite explicit enough. And, as we had earlier pointed out, the concept of global community in the post 1945 era is obviously hinged on the operation of international law in the global community. Thus, the UN Charter which is the main legal framework for the operation of modern international community is unmistakably a law operational in the international arena.

Indeed, the law of nations as it operates today is not exactly like the old one. The contemporary law of nations is that which is being fashioned under the United Nations system. This law has grown over the years and is still growing everyday in the course of the development of the United Nations system. Under this system, the impact of the concept of fundamental human rights has grown so much to the extent of whittling down the effect of some of the old doctrines like the doctrine of state sovereignty. The pertinent question now is: What is the purpose or relevance of law in the modern

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

society? To answer this question, one may have recourse to the opinion of an Italian Jurist, Pasquale Stanislao Mancini (1817-1888), who in his famous lecture, *Della Nazionalita come Fondamento del Diritto delle Genti*, by way of question and answer, explained what he called *the limit* and *the ultimate aim* of the law of nations. According to him:

What is the reasonable limit of the law of nationalities? Other nationalities. What finally is the ultimate aim of the law of nations? The humanity of the nations...; that is to say, the celebration of humanity and its civil progress in the free, harmonious and full development of nationalities.⁶²

If Mancini's assertion above is anything to go by, it follows, therefore, that the ultimate aim or purpose of international law is “the celebration of humanity and its civil progress” and that such celebration must be in the context of a “free, harmonious and full development of nationalities”. In other words, international law is aimed at celebrating the development of humanity of different nations in an atmosphere of freedom and harmony. There is no doubt that the above opinion of Mancini is in line with Article 1 of the United Nations Charter, 1945, which provides, among other things, that one of the purposes of the United Nations is to “maintain international peace and security...” and “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”

Indeed, the experience of the Second World War which gave vent to the emergence of the United Nations, showed that humanity had been the subject of flagrant desecration hence the decision and the determination of the founders of the United Nations to ensure its celebration under the UN system. It follows, therefore, that international law as the contemporary law of the modern nation-states regulated by the United Nations is aimed at ensuring the peace, security and civil progress of the nations of the world in an atmosphere of freedom, equality and respect for the rights of people. That is the whole essence of the law of nations.

5. Compliance with the Rules of International Law:

Despite all that we have argued above regarding the relevance of international law today, the question could still be raised as to whether States actually obey the rules of international law? in this regard, a critical review of the acts of States shows that, notwithstanding the absence of a strong enforcement mechanism, States generally obey the rules of international law. For instance, in a research conducted on the compliance with ICJ decisions, Constance Schulte arrived at the conclusion that, “This analysis reveals that the compliance record for judgments is generally satisfactory...”⁶³ This position was also supported by Heather L Jones who concluded in her own research that:

Decisions of the International Court of Justice have been met with substantial compliance in the modern era. Direct, defiant noncompliance, where a state deliberately and ceaselessly rejects a decision of the Court and refuses to implement its judgment, has not occurred in any case. In cases where noncompliance has been present, the noncompliant behavior has been fleeting or slight.”⁶⁴

A typical instance of the States' compliance with the rules of international law is the 2002 decision

⁶² P.S. Mancini, *Della Nazionalita come Fondamento del Dritto Delle Genti* (Turin, 1851), 63, cited in Summers, J., *The Idea of the People*, op. cit. at p. 97.

⁶³ C Schulte, *Compliance with Decisions of the International Court of Justice*, January 2010, available online at www.researchgate.net/compliance-with-decisions-of-the-international-court-of-justice, accessed last on 12/8/24/

⁶⁴ H L Jones, *Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua*, available at www.researchgate.net/

of the International Court of Justice (ICJ) between Cameroon and Nigeria which went against Nigeria and was eventually complied with by the government of Nigeria. What then is the implication of this general compliance with the decisions of the International Court of Justice? It is simply a clear recognition of the role and place of law in the international arena. Therefore, notwithstanding the absence of strong enforcement machinery akin to the ones under municipal law, international laws are still obeyed and complied with by states. Many factors have been attributed to this attitude of compliance by States. These include the element of reciprocity, the advantages or rewards that may occur in certain situations from an observance of international law as well as the constant formulation of international businesses in characteristically legal terms.⁶⁵ As a matter of fact, international law, especially in the form of treaties, is always framed in obligatory terms and not as a matter of mere morality.⁶⁶

In addition to the above-mentioned three reasons, there is also the fourth reason which, in our humble opinion, appears to be the most important: it is the need to maintain a peaceful atmosphere in international relationships. Every responsible person or State desires peace and security in his/her relationship with others. Indeed, in the modern globalised world, no state can actually claim to survive without relating with other states. Therefore, notwithstanding the arguments of some theorists⁶⁷ regarding the weakness of international law, arising from the principle of sovereign equality of states, in comparison with municipal laws, the fact remains that international law cannot not only be regarded as law but should be respected for its profound significance in the maintenance of international peace and security.

Perhaps, it is in order to underscore the importance of peace, order and security in the international arena that the rule of *pacta sunt servanda*⁶⁸ by which every treaty in force is binding upon the parties to it and must be performed by them in good faith, was introduced as the first principle of international law. This rule obligates States Parties to any treaty to honour such treaties and to rely on such obligations being honoured. According to Chris Wigwe, “The principle of *pacta sunt servanda* ensures that treaties are binding on all parties who have signed, acceded to or ratified them and further ensures that parties to a treaty do not back out of their obligations.”⁶⁹ The implication of this rule, therefore, is that a party to a treaty in force cannot invoke provisions of its municipal law as justification for negligence of its obligations pursuant to the treaty in question and a failure by a state to observe its obligations arising from treaties may, by virtue of this rule, be enforced by way of imposition of sanctions.⁷⁰

Moreover, as we had earlier noted, one of the three essential conditions precedent for the validity of any law is the common consent by the community that the rules be enforced by an external power. In the case of municipal law, such *external power* can be represented by the central law enforcement authorities of different states. In the international arena, although such a body is none-

⁶⁵ Malcolm Shaw, op. cit., p.8.

⁶⁶ A. O. Obilade, *The Nigerian Legal System*, (London: Sweet & Maxwell, 1979), p.3.

⁶⁷ Such positivists include the English philosopher, Thomas Hobbes, and the German jurist, political philosopher, economist and historian, Samuel Freiherr von Pufendorf, who in fact commented extensively on the natural law theories of Thomas Hobbes and Hugo Grotius as contained in his work, *De jure naturae et gentium libri octo*, published in 1672.

⁶⁸ Latin for “Agreements must be kept” which rule has been codified by Article 26 of the Vienna Convention on the Law of Treaties which was signed in Vienna, Austria on 23rd May, 1969 and came into force on 27th January, 1980; and Article 26 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations signed in Vienna, Austria, on 21st March, 1986, but is yet to enter into force.

⁶⁹ Chris C. Wigwe, *International Humanitarian Law*, (Accra: Readwide Publishers, 2010), p.17.

⁷⁰ There are certain exceptions to this rule including the principles of *jus cogens* as well as that of *clausula rebus sic stantibus*- Latin for “things thus standing” and codified by Article 62 of the Vienna Convention on the Law of Treaties, 1969.

existent, the United Nations General Assembly as well as the United Nations Security Council can and has many times in the past, acted as such *external power*. In this light, Oppenheim has opined that, although there is no central authority to enforce those rules, there is a common consent of the community of States that the rules of international conduct shall be enforced by *external power* when:

The heads of the civilised States, their Governments, their Parliaments, and public opinion of the whole civilised humanity, agree and consent that the body of rules of international conduct which is called the Law of Nations shall be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations.⁷¹

However, it is not in doubt that there is a serious challenge in the enforcement of the rules of international law as compared with its municipal counterpart. In this light, Oppenheim has, rightly in our view, acknowledged that in terms of enforcement, as between the Municipal Law and the Law of Nations, the Law of Nations is the weaker one. Yet, that does not make it less a law. Thus, according to him:

It is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not and cannot be an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak as it sometimes seems to be.⁷²

The implication of the above is that the level of enforcement mechanism of laws is directly proportional to the strength which can be attributed to such laws. Thus, where a law has a weak enforcement mechanism, its strength is of little and vice versa. It is based on this analogy that Oppenheim arrived at the conclusion that, as compared with municipal laws which have strong enforcement mechanism, international law with no defined authoritative body for its enforcement must be considered as the weaker one.

Notwithstanding the observed weaker position of international law in its enforcement as compared with its municipal law counterpart, and not minding the few instances of the breach of rules of international law by States, there is no doubt that States generally obey international law and no State has ever openly denied the existence of international law. On the contrary, rather than denial, States often argue that they have not breached the law and not that the law is not law as being postulated by positivists. Indeed, as Oppenheim put it, “Violations of this law are certainly frequent. But the offenders always try to prove that their acts do not contain a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts.”⁷³

6. Conclusion:

As we saw in the course of this work, no State brazenly asserts that it is not obliged to obey international rules. What is often common amongst States is a denial that they have breached an international rule. This denial, no doubt, invariably implies an admission of the existence of the

⁷¹M. N. Shaw, *International Law*, op. cit., p.8.

⁷²*Ibid.*

⁷³Oppenheim, op. cit., p.

rules of international law and not its absence, notwithstanding the absence of supra-national legislative body akin to municipal legislative bodies. Secondly, by the definition of *international law*, the concept of a “nation” as the main subjects of international law entails that the law can only become effective when the entities within which it operates actually act as such entities called nations- a people bound together by common ties- and not merely as a band of disjointed group of individuals who has nothing in common binding them together nor any intention to be bound together for their common good. Finally, if the international community aims at living in a harmonious atmosphere with civilization as its objective rather than disorder or chaos that will result in retrogression, then obedience to the rules of international law is a condition precedent to the realization of such noble objective.