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TABLE OF CONTENTS

1. THE EFFECT OF SECTION 20 OF THE ADMIRALTY JURISDICTION ACT No. 59 OF 1991 ON INTERNATIONAL ARBITRATION CLAUSES 1-8
*ADEWUYI, ADEYEMITAIWO
2. THE NIGERIAN VICE-PRESIDENT: REALITY AND RELATIVITY OF POWERS IN A GLOBAL PERSPECTIVE 9-30
*A. T. SHEHU
3. INTERNATIONAL LAW AS A MECHANISM FOR THE DEVELOPMENT OF ENVIRONMENTAL PROTECTION LAW 31-48
*JONATHAN EHUSANI
4. THE GLOBAL PHENOMENON OF CYBER LAUNDERING: THE NIGERIAN ANTI MONEY LAUNDERING LAW AND REGULATIONS 49-73
*YUSUF, IBRAHIM AROWOSAIYE
5. THE INTERNATIONAL CRIMINAL COURT AND THE UNITED STATES' RELUCTANCE TO JOIN: SOME OBSERVATIONS 74-89
*MUHTAR ETUDAIYE
6. HUMAN RIGHTS: GENDER DISCRIMINATION AGAINST FEMALE CHILDREN IN NIGERIA 90-99
*HAKEEM IJAIYA
7. EQUITY AS A SOURCE OF INTERNATIONAL LAW 100-105
*O. S. AFOLABI
8. AN OVERVIEW OF THE LEGAL INSTRUMENTS REGULATING THE REGIME OF FREE "INGRESS AND EGRESS" WITHIN THE ECOWAS NEIGHBOURHOOD 106-116
*DR. M. M. AKANBI
9. ECONOMIC INTEGRATION WITHIN ECOWAS 117-144
*AMOLYE-ADEBAYO AZIZAT OMOTOYOSI
10. ISLAMIC FINANCIAL SERVICES: THE WAY FORWARD FOR THE FINANCIAL REGULATORY AUTHORITIES. 145-166
*IBRAHIM ABDULKADIR ABIKAN; AND
*DR. (HJ) ZAINUDDIN BIN JAFFAR
11. THE INTERPLAY OF INTERNATIONAL HUMAN RIGHTS LAW: THE SELF-EXECUTING NATURE OF INTERNATIONAL TREATIES AS EXPRESSED IN THE THEORIES OF MONISM AND DUALISM AND ITS IMPLICATIONS IN THE AFRICAN SETTING 167-190
*RUTH OWOJAIYE
12. THE NIGERIAN LIVING LAW AND ITS RELEGATION, THE SOCIOLOGICAL AND HISTORICAL PERSPECTIVES 191-213
*AYINLA LUKMANA.
13. MILLENNIUM DEVELOPMENT GOALS AND THE NIGER-DELTA 214-227
*WAHAB O. EGBEWOLE

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EQUITY AS A SOURCE OF INTERNATIONAL LAW

*O.S. AFOLABI ESQ

There is no area of law that does not have its origin and sometimes referred to as its source or sources.

According to Wallace:

*"Rules and norms of any legal system derive authority from their source; 'sources' articulate what the law is and where it can be found"*¹

While it is easy to identify the source of municipal laws in form of parliamentary legislation and judicial decisions, there is no such international legislature that provides an international constitution to regulate inter governmental relations among nations nor is there any international court to which all members of the international community must compulsorily submit.

By definition "international law refers to those rules and norms which regulate the conduct of states and other entities which at anytime are recognized as being endowed with international personality"²

To Henkin; Pugh, Schachter and Smit, international law is the "body of rules which are considered legally binding by states with each other"³

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¹ Rebecca M.M. Wallace, *International Law A student Introduction Third Edition* (London Sweet & Maxwell) p997 at 7.

² *Ibid* p. 1

³ L. Henkin, R.C Pugh, O. Schachter, H. Smit, *International Law: Cases and materials*, American Case book series (St. Paul Minn. West Publishing Co. 1980 at 11

There is no doubt that international law is law. Nations of the world acknowledge it and some have even gone to the extent of referring to international rules and conventions in their municipal constitution.

As noted earlier in this paper, international law has no such "law giving" sources as municipal law. Although various rules conventions and treaties have been entered into by nations within the international community. However, the absence of law giving source has made it sometime difficult to have the legal quality of rules of international law assessed.

It is the absence of this grundnorm of international law that equity had come to play a significant role not only as a source but its rules have been applied in resolving disputes among member nations of international community where other methods have failed or non-existent.

Application of equity

The word "equity" in its ordinary sense means natural justice. However, the term equity is also used in a more technical form than its ordinary usage.

According to Edwards & Stockwell "...equity has a very special and narrow meaning; that body of rules developed and applied by the court of chancery"⁴

Equity was developed to cure the deficiencies in common law. There were some claims for which common law had no remedies. In other cases where remedies were provided, the remedies were found to be inadequate and could not assuage the feelings of the aggrieved litigants.

There were instances where the plaintiff may have obtained a common law remedy but was prevented from enforcing it because of the power or influence of the other party in the case.

⁴ R. Edwards & N. Stockwell, *Trusts and Equity*, Fourth Edition, Financial times, Pittman Publishing, 1999 at 1

According to Jegede;

*"The juristic sense of the term equity may be sub-divided into two, one complementary to the other and both affecting administration of the law and justice by recognized judicial tribunal"*⁵

Going further he explains;

*"In the first place, is the general juristic sense of the term equity. Hence equity means the power to meet the moral standards of justice in a particular case by a tribunal having discretion to mitigate the rigidity of the application of strict rules of law....."*⁶

Although it has been pointed out that the term equity has both general and technical meanings, our concern in this paper is the application of the principles of general equity (i.e. what is "fair" & "just") to the interpretation of international law and resolution of disputes among nations.

The Roman Empire which comprised hundred of different races, tribes and religions could not fashion out an international law in the modern sense within the borders of an empire that comprised almost the entire civilized world.

What the Roman law was able to contribute to international law was "...the development of "jus gentium", a system of legal rules governing the relations between Roman citizens and foreigner. The "jus gentium" contained many principles of general equity and natural law, some of which are similar to certain general principles of law recognized by civilized nations"⁷

That is to say that as far back as during the Roman Empire, the role of general principles of equity had been recognized and applied in

⁵ W.I. Jegede, *Principles of Equity* Ethiope Publishing Corporation 1990 at 7.

⁶ *Ibid* P.8

⁷ L.Henlein, R.C. Rugh, O. Schachtler (*Supra*) at P.2

governing the relations between Roman citizens and foreigners.

As the rules of equity continued to be applied, they eventually formed the basis of Article 38 of the statute of the international court of Justice which is one of the contemporary source of international law.

Justice Hudson in *The Director of Water from the Waste's Case*⁸ had this to say;

"The court has not been expressly authorized by the statute to apply equity as distinguished from law Article 38 of the statute expressly directs the application of the general principles of law recognized by civilized nations and is more than one nation, principles of equity have an established place on the legal system It must be concluded therefore that, under Article 8 of the statute, if not independently of that Article, the court has some freedom to consider principles of equity as part of the international law....."

Similarly, in the *Ram of Kutch Arbitration* "equity was identified as constituting part of international law".⁹

In the *North Sea Continental Cases*, the international court of justice directed the parties involved to seek a solution by reference to equitable principles.¹⁰

Apart from the above, equitable principles are freely mentioned in most multipartite international conventions, treaties and charters.¹²

There are some of the General Assembly resolutions of the United Nations which emphasize the "need to establish a just and equitable economic and social order"¹³

⁸ P.C.I.J. Rep, Sec A.B. No. 70 (1937) at PP. 76-77

⁹ *Ibid*

¹⁰ 50 I.L.R. 2

¹¹ I.C.J. Rep (1982) P. 18 at P.60

¹² See; for example 1982 convention on the law of the Sea General Assembly Resolutions such as the preamble of the 1976 charter of Economic rights and Duties of States.

¹³ G.A. Resolution, 3291 (XXIX) 14 ILM 251 (1975)

From the beginning of civilization and throughout the ages, the positive contribution of the law of nature in the world of human institutions and actions had been recognized. While emphasizing on this, L. Henkins, R.C. Pugh, O.Schachter & H. Smit writes further that:

*"Two of the most important principles of the law of nature in Grotius system of the law of nations are the principle that restitution for a harm done by one party to another and that promises given, through signature to treaties or otherwise must be kept"*¹⁴

The above two principles which form the bedrock of equity have been preserved and developed throughout the many phases to which international law had passed through.

The general rule of equity to any rule of law or legal system is "to ensure that justice is manifestly done in the individual case where the administration of positive law would lead to hardship and injustice."¹⁵

Although some people may argue that since equity does not exist on its own but an appendage of the law and as such cannot be a source of law, it is submitted that some of the principles evolved by equity are generally unknown to law. A part from this, equity affect significantly the way substantive law is administered and applied.

Conclusion;

Just like the way equity functions and impact on municipal laws, there is no doubt that equity had been recognized as a veritable source of international law.

Equitable principles propound fairness, justice and good conscience. Just as between individuals, the equitable principles have impacted on relation among nations of the world.

¹⁴ *Supra* P.3

¹⁵ *Supra* P. 10

It is even possible in international law that disputing nations may agree that the international court should exercise its power "to decide a case *"ex aequo et bono"*, that is, the court may apply equity in precedence over all other rules"¹⁶

Where the international court of justice is unable to resolve a dispute by reference to treaty law, custom or general principles, Article 38 provide that the subsidiary means of judicial decisions and the teachings of the most highly qualified publicists of the various nations may be employed. Certainly the principles of equity form part of the subsidiary means of judicial decision recognized by nations of the world and which are to be applied to international law issues.

¹⁶ *Art. 38 (2)*