

## Issues in the Application and Enforcement of International Treaties before a National Court: Nigeria and Selected Jurisdictions in Perspective

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### ABSTRACT

Nigeria has ratified international treaties on a wide range of subjects, some of them have been domesticated thereby guaranteeing their domestic application before Nigerian Courts. Some others (a whole lot) even though ratified are yet to be domesticated in Nigeria, thereby casting a big doubt on their applicability before a Nigerian court, in view of the provisions of section 12 of the 1999 constitution. This paper examined some issues in the application of international treaties before a Nigerian court. Also, it considered the place of treaty in the hierarchy of norms in Nigeria. This paper went further to examine whether a national court can interpret international law, among other issues. The methodology adopted in this work is the doctrinal (desk-based) research method, which relied on both primary and secondary sources of data, which were subjected to content and contextual analysis. The significance of this paper is that it has further deepened the law on this area. It is the finding thereof, that the courts (Nigerian courts in particular) need more dosage of judicial activism to be able to implement or apply treaties domestically, especially those bothering on human rights, liberty and freedom. It ended with some concluding remarks and recommendations.

**Keywords:** international law, domestic courts, treaties, implementation, state responsibility, Nigeria.

### INTRODUCTION

Nigeria has been actively involved in the negotiation, signing and ratification of several international treaties, even though much less attention is given to the domestication of such treaties. Consequently, a large volume of ratified treaties are undomesticated in Nigeria today, thereby depriving numerous citizens and aliens alike residing in and or doing business in Nigeria, the benefits accruable from such treaties<sup>1</sup>. Worse still, citizens cannot enforce their right if and when breached. It is the humble and popular view, that it is through the enforcement of international law within the municipal courts of a country that the rights of individuals, as expressed in the international law can be protected.<sup>2</sup>

<sup>1</sup>D. Bush-Alebiosu, "Non-Domestication of Treaties Deprives Nigerians of Expected Benefit" (2013), <www.channelstv.com/.../non-domestication-of-treaties-deprives-nigerians-of-expected...>accessed 30 July, 2017; R. Olawale, "Domesticating International Treaties in Nigeria". The Eagleonline, 15 February, 2016.

<sup>2</sup>E. A. Oji, O.D. Amucheazi, and M.V.C. Ozioko, (2016) "The Relevance of International Labour Organisation Conventions to Promote Rights of Workers and Fair

Simply put, treaties are international agreements. A treaty has been comprehensively defined as a consensual engagement, which subjects of international law have undertaken towards one another, with the intent to create legal obligations under international law<sup>3</sup>. Treaties therefore, are agreement under international law entered into either between states or between a state and international organization.<sup>4</sup> Treaty is a generic

Labour and Industrial Practice in Nigeria", (VOL.7, Issue 1,) *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)*, (2016), pp. 65-72; J.A.S.Grenville, (1974) *The Major International Treaties 1914-1973*, ( London: Methwen & Co, 1974); A.Omoware, "Child Rights Act in Nigeria-Reality or Farce" (1974) <<http://www.mediafire.com/?daadight32t7cp>> accesses 27 August, 2017.

<sup>3</sup>G. Schwarzenberger *International Law as Applied by International Courts and Tribunals*, (London: Stevens & Sons, 1968), Vol. 1, p. 438. See also, A.G Hamid, "Treaty Making Power in Federal States with Specific Reference to the Malaysian Position", (Vol.30) *Journal of Malaysian and Comparative law (JMCL)*, (2003), pp. 65-88.

<sup>4</sup>C.D. LongJohn, "Implementation and Application of Treaties in Nigeria", Dissertation submitted to the

term, it may sometimes be referred to as convention, protocol, covenant, exchange of letters, act, charter, concordant, statute, etc.<sup>5</sup>

Regardless of the multiplicity of nomenclature or designation used in describing a treaty, the fundamental principle in operation is that, the parties are *consensus ad-idem*, thereby making the treaty binding on them with an obligation to perform in good faith.<sup>6</sup> Certain theorists, for example, Anzilotti, have rested the binding force of treaties on the latin phrase-*pacta-sunt-servanda*—meaning, that states are bound to carry out in good faith the obligations they have assumed by treaty. This is reiterated by Article 26 of the Convention on the Law of Treaties, that, all treaties in force or binding on the parties thereto must be performed in good faith<sup>7</sup>. Also, states party cannot invoke the provisions of domestic laws as justification for the failure to perform a treaty.<sup>8</sup> This is a reinstatement of the decision in the case of *Polish Nationals in Danzig*,<sup>9</sup> where the court declared that a state cannot adduce as against another state, its own constitution with a view to evading obligations incumbent upon it, under international law or treaty in force. Once a state has bound itself by agreement in a treaty, it is not entitled to withdraw from its obligations without the consent of the other states parties.<sup>10</sup>

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Nigerian Institute of Advanced Legal Studies, School of Post Graduate Studies, University of Lagos Campus, Lagos, 2010.

<sup>5</sup>B. Abegunde, Public International Law, (Ado-Ekiti: Petoa Educational Publishers, 2009) pp. 174-176. See also section 3(3) Treaties (Making Procedure etc) Act 2014 Law of Nigeria. See also, A. Anthony, Modern Treaty Law and Practice, (United Kingdom: Cambridge University Press, 2013), pp. 23-27. The term treaty is a generic term. Grenville, J.A.S. (*Supra*).

<sup>6</sup>M.N. Shaw, International Law, (United Kingdom: Cambridge University Press, 2013) 6<sup>TH</sup> ed. p. 903. See also Articles 26, 31, 46 and 49 and 69 of the 1969 Convention on the Law of Treaties.

<sup>7</sup>Article 26, Vienna Convention on the Law of Treaties 1969

<sup>8</sup>Article 27 *Ibid*

<sup>9</sup>*Danzig Case (1931) PCIJ Reports, Series A/B, No. 44, p. 24*. See also Article 13 of the Declaration on Rights and Duties of States 1959.

<sup>10</sup>In 1871, Great Britain, France, Italy, Prussia, Russia, Austria and Turkey subscribed to the following Declaration made at a Conference in London: “That the powers recognize it an essential principle of the Law of Nations that no power can liberate itself from

## DOMESTICATION OF TREATIES IN NIGERIA

The issue of treaty domestication is a constitutional issue in Nigeria, as such, section 12 of the 1999 Constitution<sup>11</sup> clearly provides that:

- “No treaty between the federation and any other country shall have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly.
- The National Assembly may make such laws for the Federation or any part thereof with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty.
- A bill for an Act of the National Assembly passed pursuant to the provisions of subsection 2, shall not be presented to the President for assent, unless, it is ratified by a majority of all the Houses of Assembly in the federation.

The possible implication of the foregoing constitutional provisions is that no international treaty can have any force of law in Nigeria, unless and until same has been enacted (domesticated), by the National Assembly<sup>12</sup>.

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the engagements of a treaty nor modify the stipulations thereof unless with the consent of the contracting parties by means of an amicable understanding.”

<sup>11</sup>Section 12 1999 Constitution of Nigeria, is *impari-materia* with section 12 of 1979 Constitution of Nigeria, section 74 of the Republican Constitution of Nigeria 1963 and section 69 of the Independence Constitution of Nigeria 1960.

<sup>12</sup>F.A. Onomrerhinor, “A Re-Examination of the Requirement of Domestication of Treaties in Nigeria,” *Nnamdi Azikwe University Journal of International Law and Jurisprudence*, (2016), <[www.ajol.info/index.php/nauijilj/article/viewfile...](http://www.ajol.info/index.php/nauijilj/article/viewfile...)> accessed on 20 September 2017>; Egede, “Bringing Human Rights Home: An Examination of the Domestication of Human Right Treaties in Nigeria” Vol. 51, *Journal of African Law*, (2007), p. 249; O. Nwankwo, “Briefing on the Domestication of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)”, Civil Resource Development and Documentation Centre (CIRDDOC) Nigeria, <[www.aacoalition.org/domestic\\_cedaw.html](http://www.aacoalition.org/domestic_cedaw.html). > accessed on 28 August, 2017. The position is the same with South Africa, see the case of *Azanran Peoples Organisation (AZAPO) and others v President of the Republic of South Africa &ors (1996) 8 ECLR 1015, para 26*, where parliamentary enactment is required.

Furthermore, section 12 of 1999 Constitution of Nigeria, brings to the fore, the distinction between 'being bound' by an international agreement on the one hand, and for an international agreement 'being law' in Nigeria on the other hand.

In Nigeria, no statute (including the constitution) expressly name who has the capacity to negotiate and ratify treaty. Also, the constitution only expressly but miserly provide for domestication of treaties, as can be seen from section 12 of 1999 Constitution reproduced above. The constitution fails to provide for the procedure to be followed in domesticating a treaty,<sup>13</sup> thereby creating a situation of uncertainty<sup>14</sup>. However, according to some scholars, a treaty maybe domesticated in either of two ways, namely: (a) domestication by *re-enactment* and (b) domestications by *reference*.<sup>15</sup>

The component states within the Nigeria vis-a-vis their treaty-making capacity has been aptly and judicially captured in the case of the *Attorney General of the Federation v Attorney General of Abia State & 35 ors*,<sup>16</sup> where the Supreme Court held that:

*Nigeria as a sovereign state is a member of the international community...dependent states not being sovereign, are not either individually or collectively. In the exercise of its sovereignty, Nigeria from time to time enters into both bilateral and multilateral treaties. The conduct of external affairs is on the exclusive legislative*

<sup>13</sup>The procedures for domestication are well stated in British and American Legal Systems, as well as, in South Africa.

<sup>14</sup>The uncertainty created in the area of treaty making and domestication procedure in Nigeria has been resolved by Article 7, 1969 Treaty Convention. See also, B.O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, (London: Sweet & Maxwell, 1983), pp.255-256.

<sup>15</sup>Domestication (Transformation or Transplanting) by re-enactment is when the transplanting statute directly enacts specific provisions or the entire treaty, usually in the form of a schedule to the statute. Whereas, domestication by reference is usually contained either in a long title or short title of the statutes or in the Preamble or Schedules. See A. O. Oyeboode, "Of Norms, Values and Attitudes: The Cogency of International Law". An Inaugural Lecture delivered at the University of Lagos, (Lagos: University of Lagos Press, 2011), p.40-41

<sup>16</sup> (2002) 16 WRN 1 at 75

*list. The power to conduct such affairs is therefore in the government of the federation to the exclusion of any other political component in the federation.*

The policy justification for the exclusion of states from treaty-making is said to be for the purpose of avoiding conflict or discordance in the area of foreign policy.<sup>17</sup>

Therefore, the component states within Nigeria, though have no power to participate in treaty-making process,<sup>18</sup> however, they are competent to participate in the process of domestication of treaties, specifically, on items listed in the residual and concurrent legislative lists.<sup>19</sup>

### **THEORETICAL/CONCEPTUAL FRAMEWORK GOVERNING THE RELATIONSHIP BETWEEN TREATY AND DOMESTIC LAW**

The scope of international law continues to expand. Today, matters of social concern such as health, education and economy fall within the ambit of international law regulation. The expansion of international law into dimensions once considered the exclusive domain of states has created an extensive overlap of subjects over which both international and municipal laws purports to regulate.<sup>20</sup> This has led to problems in the application of municipal law before

<sup>17</sup> Oyeboode, A. (2003) "Treaty Making Powers in Nigeria", in Oyeboode, A. (ed) *International Law and Politics: An African Perspective*, (Lagos: Bolabay Publishers, (2003), p.118. Although this policy justification will not fly when silhouetted against the background of Canadian Federalism. In the Federal Republic of Canada, each of the provinces (states) of Quebec, Alberta, Ontario, etc. have the right, power and capacity to enter into foreign relations, sign treaties with other countries and have foreign missions and embassies abroad. See F. De Kerkhove, "Quebec Rethinks its Approach to Foreign Relations," (2015) available at <<http://www.globeandmail.com> /.../>. See generally, B.R. Ketter, "Canadian Federalism and the International Activities of the Three Provinces: Alberta, Ontario and Quebec" (1980), *being Master of Arts Dissertation submitted to Simon Fraser University*.

<sup>18</sup> See section 12(2) 1999 Constitution of Nigeria as amended.

<sup>19</sup> Section 12(3) *Ibid.* see also Item 26 of the Second Schedule, part 1 made pursuant to section 4 of 1999 Constitution of Nigeria.

<sup>20</sup> Lord Templeman: *Revision Workbook on Public International Law*, (London: Old Bailey Press, Reprinted 2000), p.32

international courts/tribunals and in turn international law in municipal forums.

It has become conventional practice for most studies touching upon the relationship between international law and domestic law to devote some attention, cursory as it may be, to two contrasting theoretical constructs. This controversy between the *dualist* and the *monist* schools is one that has, over the years taxed the minds of many distinguished international lawyers.<sup>21</sup> The dualist thinking emerged a little over a century ago. The essence<sup>22</sup> of this approach was based on the proposition that international law and domestic law are distinct legal orders that operate in distinct spheres and regulate different relations: international law regulates the behavior of, and relations between, sovereign states whilst domestic law regulates the relations of individuals both inter-se and in their relationship to the state. Being distinct legal orders, it follows that the conditions for the validity and duration of international rules and those of the domestic law depends exclusively on the domestic law<sup>23</sup>. The dualist school is thus able to accept the supremacy of international law, at the international level, while maintaining the supremacy of domestic law, at the domestic level. None can be said to be superior to the other.<sup>24</sup> Another tenet that flow from the foregoing is that when international law rules are applied in a municipal court, they are applied as part of the municipal law of the state in whose court the application is made and not because of the superior nature of international law in municipal court.<sup>25</sup>

<sup>21</sup>M. Mendez, "The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts", (2013), available at <[http://www.oxfordscholarship.com/view/10.1093/acprof:oso/978019...>](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/978019...)

<sup>22</sup>*Ibid.* The dualist position was first propounded by the German Jurist Heinrich Triepel in 1899. See also Anzillotti (1929)

<sup>23</sup>M. Mendez, (*Supra*), p.19; M.M.W.Rebecca, *International Law*, 5<sup>th</sup> ed. (London: Sweet & Maxwell, 2005), p.37. For recent affirmation by a prominent dualist scholar, see Arangio-Ruz (2007:19).

<sup>24</sup>F.A. Onomrerhinor, op.cit. P.9. Fitzmaurice, "The General Principles of International Law considered from the Standpoint of the Rule of Law". 92 *Hague Recueil* 5

<sup>25</sup>*Ibid.* B.Bazuaye, and O. Enabulele, (2006)( Benin City: Ambik Press, 2006), p.31.

The monist approach, in contrast, was premised on the unity of international and domestic legal orders: they are part of one and the same legal order. In its dominant variant, this model posits the supremacy of international law. That is to say, that international law sits at the apex of this hierarchy.<sup>26</sup> For the monist scholars, international law could be applied directly as international law in the domestic legal order. A state is monist if it accepts international law automatically as part of its municipal law and does not demand an express Act of the legislature.<sup>27</sup> Whilst some monist scholar went as far as suggesting that any domestic law contrary to international law should be abrogated<sup>28</sup>, Kelson was of the view that contrary domestic law is valid until domestically annulled, for whilst it will remain illegal from an international law perspective, international law itself does not provide for any annulment procedure<sup>29</sup>.

Some scholars have however, described "monism" and "dualism" concepts as misleading labels in classifying different domestic approaches to the relationship between treaties and domestic laws.<sup>30</sup> In earlier times, there was much debate

<sup>26</sup>Mendez, op.cit., p.20. see A. Oyeboade, *International Law and Politics: An African Perspective*, (Lagos: Bolabay Publications,2003) p.45. The theory asserts that international and municipal law are both elements of one all embracing and universal system of law, in which the overriding principle is the supremacy of international law. The most notable exponent of monism is Hans Kelsen (1945) *General Theory of Law and the State*,(1945), 363-380.

<sup>27</sup>B.Abegunde, (2009), op. cit., p.74. Through adoption or incorporation. See also, B. Abegunde, "Reflecting on the Syndrome of Non-Domestication of International Treaties in Nigeria : Charting the Way Forward", accepted for publication in *Sri-Lankan Law Journal*(2018).

<sup>28</sup> Notably Georges Scelle, (1933: 331), but it has been suggested that it was a figure of speech: Darliier, Fortealk and Pellet (2009:109). Mendez, p.20.

<sup>29</sup> Kelson, 1961:371-2) (1923:315). And for Kelson, the basic norm of international law that, "states ought to behave as they have customarily behaved is the ultimate reason of the validity of the national legal order". Lauterpacht's monistic construction in contrast, is of a natural law bent with an emphasis on the individual as "the ultimate unit of all laws", and the supremacy of international law being asserted based on its capacity to protect the individual. See Shaw, (2008: 31-132)

<sup>30</sup> For example, Dupuy and Kenbrat, (2010:1452:4); Henkin (1995:65-77); Aust (2007); Higgins (1995:205) Most of the Country reports in the two recent general

as to whether treaties become part of a domestic legal order via transformation, whereby the treaty was transformed (re-enacted) into national law such that it is apply as national law and not international law or whether it applied by virtue of “adoptions” or “incorporation”, such that it retained its character as international law.<sup>31</sup> The tendency was to consider transformation as representing dualism and adoption or incorporation as representing monism.<sup>32</sup>

Indeed, the terminology niceties of ‘transformation’ versus ‘adoption’ or ‘incorporation’, that had troubled many scholars, appears to have now been wholly eschewed after a scholar explored how some monist states transform treaties into domestic law.<sup>33</sup>

Further terminological confusion has emerged due to the various permutations in the use of the dualist and monist labels, with some legal orders in the treaty context being described to use only a handful of variations, as ‘radically dualist’,<sup>34</sup> formally dualist with monistic character,<sup>35</sup> ‘mitigated dualism’,<sup>36</sup> dualistic but representing ‘defacto monism’,<sup>37</sup> moderately dualist,<sup>38</sup> moderately monistic,<sup>39</sup> quasi-monist<sup>40</sup>, hybrid monism<sup>41</sup> etc.

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surveys of domestic practice use the terminology to refer to the different domestic constitutional approaches to treaties (Sloss: 2009, Shelton: 2011, NolKeemper, Keller and Stone Sweet: 2008) Mendez, *op.cit.*, p.20-21.

<sup>31</sup>Triepel (1923:91); Anzilotti (1929:62-63). Mendez, *op.cit.*, p.21.

<sup>32</sup>See e.g. Morgenstern (1950).

<sup>33</sup>Buergenthal (1992:341).

<sup>34</sup>The UK according to Pescatore (1987:191).

<sup>35</sup>Spain according to Bermejo Garcia, et al (1996).

<sup>36</sup>Schermes (1979: 83-4) referring to Germany and Italy. For The debate in Germany concerning moving from transformation to ‘adoption /incorporation’ model, see Mosler (1957), Paulus (2009). Note Frowein (1987:66) stating that ‘the law transforms, adopts or incorporates, the rules of the treaty into the German legal system’. For a similar debate in Italy, see Condorelli (1974), Hollis (2005)

<sup>37</sup>Finland according to Karapuu and Rosas (1990; 201); Scheinin (1996:258) referring to “dualism in form but monism in practice”.

<sup>38</sup>Papier (2006) the then President of the German Federal Constitutional Court referring to the German System. Terminology which some use with respect to Italy: Wildhaber (2007:218)

<sup>39</sup> The Netherlands. See Alkema (2011:408) Spain, See Candela Soriano (2008:403)

From the foregoing, the analytical utility of the monist-dualist terminology as shorthand of the different constitutional approaches to the relationship between international treaties and domestic legal order appears to have been compromised. Therefore, the continuous usage of the terminology is questionable.<sup>42</sup>

In a related development, the terminology ‘automatic treaty incorporation’ and ‘non-automatic treaty incorporation’ is also used to explain the relationship between international treaty and domestic legal order<sup>43</sup>.Hence, automatic incorporation approach is a constitutional systems that automatically incorporates at least certain categories of treaties into the domestic legal order, while, non-automatic incorporation approach are those that do not.<sup>44</sup>

In the circumstance, Nigeria appears to be a dualist state by virtue of the provision of section 12 of the 1999 constitution.<sup>45</sup> However, it is not every international treaty signed by Nigeria that requires ratification and or domestication. In other words, some non-normative treaties appears to be enforceable in Nigeria by virtue of section 3(1) (b) and (c) and section 3 (2) (b) & (C) of the Treaties (Making Procedure etc) Act, without domestication<sup>46</sup>. This is a tendency towards some form of hybrid model.

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<sup>40</sup> The US according to Weiler (1991:2415)

<sup>41</sup> V. ALsteine (2009); Sloss (2009) using this terminology in relation to Germany, the Netherlands, Poland, Russian and the U.S.

<sup>42</sup> It should be noted that attempts have been made by some scholars to reconcile the controversy between the two theories of monism and dualism, this has led to the harmonization or co-ordination theory. See I.Brownlie, Principles of Public International Law,( 1990), pp.34-35

<sup>43</sup>D. Sloss, (1999) The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties”, 24 *Yale Journal of International Law*, (1999) 129.

<sup>44</sup> Mendex, *op. cit.*

<sup>45</sup>Section 12, 1999 Constitution of Nigeria as amended makes provision for domestication (transformation, re-enactment) of international treaty for it to be enforceable in Nigeria. See *Abacha v Fawehinmi (supra)*

<sup>46</sup> See generally, section 3 of The Treaties (Making Procedure) Act, 2004, LFN (Nigeria)

## STATUS OF INTERNATIONAL TREATY IN THE HIERARCHY OF NORMS IN NIGERIA

The position of law with respect to the application of domesticated treaties in Nigeria is influenced largely by the doctrine of state sovereignty- a traditionally central tenet of international law. Section 1(1) of the 1999 Constitution of Nigeria asserts the supremacy of the constitution thus:<sup>47</sup>

### Section 1(1) Provides

This constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.<sup>48</sup>

### Section 1(3) Provides

“If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void.”<sup>49</sup>

Hence, the extant fundamental law that seeks to make international treaty enforceable in Nigeria is section 12 of the constitution of Nigeria.<sup>50</sup> This provision limits the application of international law and standards to only treaties that have been domesticated (re-enacted) by the legislature. The essence of section 12 is to reiterate the doctrine of supremacy of the Nigerian constitution<sup>51</sup>, and the Sovereignty of Nigeria.

In this regard, some case-laws are instructive on the hierarchy of norms in Nigeria, vis-à-vis, international treaties. For instance, in *Aeroflot v Air Cargo Egypt*,<sup>52</sup> the court held that the provisions of international treaty which has been ratified, prevail over the rules of domestic law when they are incompatible with the other.<sup>53</sup> Also, in the case of *Registered Trustees of the Constitutional Rights Project (CRP) v President*

*of the Federal Republic of Nigeria and others*,<sup>54</sup> the court held that the African Charter on Human and Peoples Rights being an international treaty is superior to local legislation, including the Decrees of the past Military Governments of Nigeria. This case is of great significance, as it touches on the interpretation where there is conflict between the African Charter and the domestic law of member state. Similarly, in *Oshievere v British Caledonia Airways*<sup>55</sup>, the court held that international treaty is an expression of agreed compromise by the contracting states and is generally autonomous of the municipal laws of the contracting states, as regards its application and construction. It is useful to appreciate that an international agreement embodied in a convention or treaty is autonomous as the contracting parties have submitted themselves to be bound by its provisions which are thereafter above domestic legislation, thus every domestic legislation in conflict with the convention is void.

The foregoing case-laws appears to suggest that international treaty is higher than municipal law. As if that was not enough, the court in *UAC (Nig) Ltd. v Global Transport SA*<sup>56</sup>, held per Muhammed JCA as follows:

I quite agree that an international agreement embodied in a convention such as the Hague Rules is autonomous and above the domestic legislation of the contracting states and that the provisions of such conventions cannot be suspended or interpreted even by the agreement of the parties.<sup>57</sup>

While the debate was raging on, the Supreme Court was presented with an opportunity in the case of *Fawehinmi v Abacha*,<sup>58</sup> and the Court held per Ogundare, Justice of the Supreme Court (J.S.C.):

No doubt CAP 10 is a statute with international flavor. Being so, therefore, I would think that if there is conflict between it and another statute, its provisions will prevail over those of other statutes, for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent, I agree

<sup>47</sup> 1999 constitution of Nigeria (as amended)

<sup>48</sup> Section 1(1) *Ibid*

<sup>49</sup> Section 1(3) *Ibid*

<sup>50</sup> Section 12 *Ibid*

<sup>51</sup> *Ibid*

<sup>52</sup> (1987) ULBR 669

<sup>53</sup> The same rule of validity applies even where the contracting state has not ratified the treaty. This was the view in *Attorney General v Unity Dow, Suit No C.APP/4/91*; I. Hayatu, “Human Rights and Military Rule in Nigeria: Issues and Options”, in *Text for Human Rights Teaching in Schools*, (Lagos: Constitutional Rights Project (CRP), 1999), pp.138-157

<sup>54</sup> (1990) 7 NWLR (pt 163) 489-502; Hayatu, *op.cit.*

<sup>55</sup> (1987) 2 ULBR 669 Per. Ogundare (JCA) as he then was.

<sup>56</sup> 7 NWLR (pt 448) p.291 at 300

<sup>57</sup> *Ibid*

<sup>58</sup> (2000) FWLR (pt 4) p.533

with their Lordships of the court below that the Charter possess a greater vigour and strength than any other domestic statute. But that is not to say that the Charter is superior to the constitution.<sup>59</sup>

### On the Contrary per Achike (JSC)<sup>60</sup> Held

The general rule is that a treaty which has been incorporated into the body of municipal law ranks at par with the municipal laws. It is rather startling that a law passed to give effect to a treaty should stand on a higher pedestal above all other municipal law.<sup>61</sup>

The above position of Acholonu Justice of the Court of Appeal (JCA) and Ogundare (JSC) on the superiority of treaty over municipal law has been heavily criticized by several scholars,<sup>62</sup> who prefer the position of Achike (JSC), that both laws are at par. However, this writer supports the position of Acholonu and Ogundare, on the basis that Article 27 of the 1969 Vienna

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<sup>59</sup>*Ibid.* Per Ogundare JSC's lead judgment. The Fact of the case was that Chief Gani Fawehinmi, a lawyer was arrested without warrant at his residence by Police and the State Security Service. He sought to enforce his fundamental human rights under Articles 4,5,6 & 12 of African Charter on Human and Peoples Rights (Ratification & Enforcement) Act. The respondent argued that the Military Decrees ousted court's jurisdiction. The trial court upheld the Ouster Clause, but both the court of Appeal and Supreme Court rejected the clause. The Court of Appeal, Per Acholonu (JCA) held that African Charter having been enacted into our body of law is greater in vigour and has been elevated to a higher pedestal.

<sup>60</sup> *Fawehinmi v Abacha (supra)*. Per Achike (J.S.C.) dissenting opinion.

<sup>61</sup> *Ibid*

<sup>62</sup> I.O. Babatunde, "International Law Before Municipal Tribunal: Has the Last Been Said by the Nigerian Supreme Court?", Vol. 3, *Igbinedion University Law Journal*, (2005), pp. 91-99; A.O. Enabulele, "Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts", Vol.17, Issue 2, *African J. Inter'l Comp.L.*, (2009), pp. 326-336; U.O. Umzurike, U.O (1995) "The Status of Human Rights", Vol. 4, No.14, *Constitutional Rights Journal*, (1995), p.36; U.O. Umzurike, "The Application of International Human Right Instruments and Norms to Nigeria". Paper presented at Human Rights Training Seminar for Law Students, organized by Constitutional Rights Project, Nicelake Hotel, Enugu, 8-11 October, 1997, p.14; U.O. Umzurike, *The African Charter on Human and People's Rights*, (The Hague: Martinus Nijhof Publishers, 1997). Professor Umzurike argued that where there is conflict between African Charter and Municipal Law, the Municipal law must prevail.

Convention on the Law of Treaties provides that "a party cannot invoke the provisions of its internal law as basis or excuse for its failure to perform a treaty obligation."<sup>63</sup> Also, once a state becomes a signatory to a treaty, that state is bound by its provisions. Where there is conflict between the domestic law of that state and the international treaty signed, the state is bound by the provisions of international treaty.

With respect to the application of customary international law, Nigeria can be said to have adopted the Blackstonian doctrine of incorporation of customary law, as applicable in England<sup>64</sup>. Nigeria lacks statutory or constitutional provision on the status of customary international law in the hierarchy of norms in Nigeria.<sup>65</sup> The failure of Nigerian constitution to expressly provide for the status of customary international law give room for uncertainty. Accordingly, a rule of customary international law will not be implemented if it run counter to a municipal statute or decision of a higher court.<sup>66</sup>

### COMPARATIVE SURVEY OF HIERARCHY OF INTERNATIONAL LAW IN SELECTED JURISDICTIONS

The issue involved here is how far a rule of international law can be applied by a municipal court. On a practical note, however, whenever international law is invoked before a domestic court, its applicability to the matter in dispute would depend on the position of international law within the hierarchy of sources of the state's legal system.<sup>67</sup> In fact, the constitution of many

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<sup>63</sup> Article 27 of 1969 Vienna Convention on the Law of Treaties. *Lockerbie Case*, *ICJ Reports*, 1992, p.3; *La Grand case*, *ICJ Reports*, 2001, pp.466-498

<sup>64</sup> A. Oyeboode, "Treaty Making and Treaty Implementation in Nigeria: An Appraisal" Unpublished D. Jur. Dissertation, Osgoode Hall Law School, York University, Toronto, Canada, (1988), p.343; Blackstone's Commentaries, IV, chapter 5

<sup>65</sup> Section 1(1) of 1999 Constitution of Nigeria, never made express mention of treaty or customary law, unlike the position in South Africa where section 232 & 233 of the 1999 constitution of the Federal Republic of South Africa provides that international customary law "is law in the Republic unless it is inconsistent with the constitution or an Act of Parliament."

<sup>66</sup> Shaw, (2013) p.143

<sup>67</sup> See generally, Shaw, (2013). Pp. 129-194; A. Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press, 2013).

states provide a pointer on the relationship between domestic law and international law.<sup>68</sup>

The way that treaties are dealt with under the United States Constitution embodies aspects of both dualist and monist approaches and so has been described as remarkably complex.<sup>69</sup> Under Article VI, section 2 of the US constitution, all treaties are ‘Supreme Law of the Land’.<sup>70</sup> Hence, a treaty or an executive agreement,<sup>71</sup> is part of the law and may come into conflict with US domestic law. Whenever possible, the courts will seek to reconcile the two, but that is not always feasible. Hence, when this happens, the residuary rules are: (i) treaties prevail over common law; (ii) treaties prevail over state law; (iii) the constitution prevails over all treaties; (iv) in case of conflict between a Treaty and an Act of Congress, the latter in time prevails<sup>72</sup>. When a court in the United States is called upon to interpret a treaty, it sometimes has less regard to the text and more to the intention of the parties<sup>73</sup>.

In America, with respect to the customary international law, the incorporation doctrine is applicable in a modified form.<sup>74</sup> However, the

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<sup>68</sup>See e.g. Grundgesetz, Article 25 (1949 amended 1961) Germany; Article 10, Italian Constitution (1947), Article 9 Austrian Constitution (1920); Article 55 French Constitution (1958) etc.

<sup>69</sup>A. Aust, (2013) *op.cit.* p.174; J. Jackson, in F.G. Jacobs and S. Roberts (eds), *The Effect of Treaties in Domestic Law*, (London: Sweet & Maxwell), pp.141-69. See also L. Henkin, *Foreign Affairs and the US Constitution*, 2<sup>nd</sup> edn., (Oxford: Clarendon Press, 1996); D. Vogts, “Taking Treaty Less Seriously”, *A.J.I.L.* (1998) 458-62.

<sup>70</sup>Aust. *op.cit.*, p.175. The provision is often misleadingly described as making treaties “self-executing”. A self-executing treaty operated automatically within domestic sphere without any municipal legislation, but non self-executing treaty need an enabling Act to operate domestically.

<sup>71</sup>Executive agreements are agreements that the executive can conclude without submitting it to the Senate for approval.

<sup>72</sup>Aust, *op.cit.*; D. Vogts “The United States and its Treaties: Observance and Search”, *A.J.I.L.*, (2001), 313, 319-20

<sup>73</sup>Aust, *op.cit.*; see *United States v Palestine Liberation Organisation (PLO)* 695 F. Supp. 1456 (1988)

<sup>74</sup>*US v Belmont (1937)* 301, *US* 324; Third US Reinstatement of Foreign Relation Law, St. Paul, (1987) vol. 1 pp.48-52; *Kadic v Karadzic (1995)* 70 F.3d 232 (2<sup>nd</sup> Cir)

rules of international law were subject to American Constitution.<sup>75</sup>

In Britain, treaties are not applied as a matter of course (*ex proprio vigore*). Unless and only to the extent that enabling legislation has been enacted by parliament would treaties be enforced by English Court. Treaties are not Supreme law in the United Kingdom, even if they have been incorporated, the Parliament being the Supreme body in the British Constitution can enact legislation that is inconsistent with treaty obligation.<sup>76</sup> The United Kingdom adopts a dualist approach to treaty law.

Britain adopts a monistic approach to customary international law. However, any rule of customary law which is inconsistent with municipal law of Britain will not be enforced in British Court.<sup>77</sup> The domestic legislation will be upheld while the state will incur liability on the international scene.

In South Africa, the constitution provides that any international agreement becomes domestic law when enacted by national legislation, unless it is inconsistent with the constitution.<sup>78</sup> The current South African constitution has both monist and dualist elements, which are uneasy bed fellows.<sup>79</sup>

The 1993 constitution of the Russian Federation provides that both treaty law and customary law

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<sup>75</sup>*Boos v Barry (1988)* 99 L.Ed. 2d. 333, 345-7

<sup>76</sup>See *R (Norris) v Home Secretary (2006)* EWHC (Adwin) 280

<sup>77</sup>See *Mortensen v Peters (1906)* decision of the High Court of Justice, Scotland, 8 F.93; *Polites v Commonwealth (1945)* 70 CLR 60, decision of the High Court of Australia.

<sup>78</sup>See generally, section 231 of the 1996 constitution of the Republic of South Africa. See also *Glenister v President of the Republic of South Africa & ors (2011)* ZACC 6; *Kaunda & ors v President of the Republic of South Africa (2004)* ZACC 5; J. Duggard, “Kaleidoscope: International Law and the South African Constitution”, Vol.1. *European Journal of International Law*, (1997), p.84; B. Meyersfield, “Domesticating International Standards: The Direction of International Human Rights Law in South Africa” (2014), <[<sup>79</sup> See Austs, \(2013\) \*op.cit.\* p.173; Under section 232 of the South African Constitution of 1996, customary international law is a domestic law in South Africa, unless it is inconsistent with the constitution.](http://www.constitutionalcourtreview.co.za/.../...></a>; Shaw, (2003) pp.174-176</p></div><div data-bbox=)



are incorporated into Russian law, but treaty rules have a higher status.<sup>80</sup> It is by no means settled as a general principle whether treaties prevail over domestic rules. However, some countries allow treaties to supercede all municipal laws, whether made earlier or later than the agreement.<sup>81</sup>

### DOMESTIC APPLICATION OF UNITED NATIONS CHARTER, RESOLUTIONS AND EUROPEAN COMMUNITY LAWS

In *Sei Fuji v California*, the issue was raised whether the UN Charter is a self-executing treaty, which would supercede inconsistent local statutes.<sup>82</sup> The court declared that, in making a decision as to whether a treaty is self-executing or not, it would have to consult the treaty itself, to try to deduce the intentions of the signatories and examine all relevant circumstances.<sup>83</sup> The court concluded after a comprehensive survey that the relevant provisions of the UN Charter are not intended to be self-executing.<sup>84</sup> It was further held that the UN Charter does not create rights in private persons.<sup>85</sup> The court held that it

was obvious that further legislative action by signatories would be required to enact UN Charter, (principles and Objectives) into domestic law binding upon individual citizens of states.<sup>86</sup> Accordingly, the UN Charter having not been so domesticated could not operate to deflect or supercede the Californian legislation in question. The case was decided in favour of the plaintiff, but on other grounds altogether.<sup>87</sup>

The United Nations Security Council Resolutions have become a more important form of international law. However, the UN Resolutions are not automatically enforceable within the domestic jurisdiction of member states. For instance, within United Kingdom (UK), incorporation of the terms of these resolutions requires implementing legislation<sup>88</sup>.

The position in Nigeria is not any different from what obtains in the United States and United Kingdom, with respect to the enforceability of the UN Charter, principles, Objectives and Resolutions. They are not self-executing treaties within Nigeria, being a dualist nation.

With respect to the European Union Law (a.k.a. European Community Law (ECC)), although, the treaties and judgments of the European Court of Justice (ECJ) maintain that the provisions of the treaties, legal instruments made under them and judgments of the court have “*direct effect*” in the domestic laws of all the member states, EU Law is enforceable in the United Kingdom only because UK legislations makes express provision for this.<sup>89</sup> But, when applying EU law, the UK courts must interpret it as EU law not as UK law, and follow decisions of the European Court of Justice.<sup>90</sup> However, since certain decisions are not required to have direct effect

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<sup>80</sup> See Article 125(6), Article 15(4) of the 1993 constitution of Russia. See also Article 5 of the Russian Federal Law on international Treaties adopted on 16<sup>th</sup> June, 1995, 34 ILM, 1995, p.1370; W.E. Butler, *The Law of Treaties in Russia and the Commonwealth of Independent States*, Cambridge, (2002). The position of the court is that customary international law and international treaties ratified by Russia are norms incorporated into Russian Law with primacy of treaty over domestic law.

<sup>81</sup> Shaw (2013) *op.cit.* p.178; Blaustein and Flanz *Constitutions of the Countries of the World.*; W. Czaplinski, “International Law and Polish Municipal Law as Case Study”, 8 *Hague Yearbook of International Law*, (1995), p.31. see generally, some examples of (monist) states where treaty supercede the municipal laws – The Netherlands, France, Germany, Poland, Russia, Switzerland.

<sup>82</sup> See *Sei Fuji v California* (1952) 38 Cal. (2d) 718. In this case, the plaintiff was a Japanese citizen who had purchased some land in 1948 in California. By legislation enacted in that state, aliens had no right to acquire land. To prevent the property from going to the state, the plaintiff argues that amongst other things, such legislation was inconsistent with the UN Charter, an international treaty which called for the promotion of human rights without racial discrimination. The plaintiff also relied on the Universal Declaration of Human Rights 1948.

<sup>83</sup> *Ibid*

<sup>84</sup> *Ibid*

<sup>85</sup> *Ibid*

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<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid.* see e.g *People of Saipan ex rel. Guerrero v United States Department of Interior* (1974) 502 (F.2d) 90; See generally, M.N. Shaw, (2013) *op.cit.* pp.163-164

<sup>88</sup> Inside the UK, Resolutions are given effect to by means of the United Nations Act 1946 which empowers the Crown to enact subordinate legislation. In the absence of such an instrument, the UN Resolution have no internal effect and the U.K courts will not give effect to them. See also *Walida Sark v Arab Bank* (1992) *The Times* 23<sup>rd</sup> December.

<sup>89</sup> See section 2 (1) of the European Community Act 1972; See generally, A. Aust, (2013) *op.cit.* p.173

<sup>90</sup> Aust, A. (2013) *op.cit.*

in the domestic law of the member states, they are not enforceable in the UK without further legislation.<sup>91</sup>

In contrast, no enabling Act has been passed to give effect to the European Convention on Human Rights 1950 and as such their provisions form no part of the English Law.<sup>92</sup>

European community law is neither international law nor national law, infact, it is better described as a supranational law.<sup>93</sup>

### STATE RESPONSIBILITY TO INDIVIDUAL UNDER HUMAN RIGHTS TREATY

The friction between a state's law and international law often revolves around the rights of the individual.<sup>94</sup> The international human rights law requires state to respect a panoply of human rights. National laws and policies are quite often found to be inconsistent with international human rights law and standard. While traditionally, international law only bound a state vis-à-vis other states, it has morphed into a system which now also binds the state vis-à-vis individuals.<sup>95</sup> In the late 19<sup>th</sup> and 20<sup>th</sup> centuries, the state-centric nature of international law began to subtly shift.<sup>96</sup> Human rights law and humanitarian intervention were some of the first areas of international law to recognize the rights of individuals, especially in cases in which a state maltreats its subjects in a manner which shocks the conscience of mankind.<sup>97</sup> These doctrines introduced the notion that a state could be liable, not only for conducts committed against another

state, but also for conduct committed against a state's own citizens. This shift led to the question as to whether an individual possesses, or can possess rights given to him/her directly by customary international law or treaties.<sup>98</sup>

Underlying this movement was the issue of so-called 'fundamental rights' of the individual. As fundamental, these rights could be protected by international law against the sovereign power of the state.<sup>99</sup> John Locke had originally articulated this duty as the government's obligation not to act capriciously against its citizens.<sup>100</sup>

A pertinent question here is: To whom is the state responsible when ratifying a human rights treaty? It stands to reason that while ratifying a treaty a state seeks to be bound vis-à-vis other states as well as individuals, because, human rights treaties are enforced not by other states, (although technically this is possible), but ,by individuals in domestic courts.<sup>101</sup> According to Lauterpatcht, the Charter of the UN finally recognize the dual proposition that the individual human being is entitled to fundamental human rights and freedom and that fundamental human rights are superior to the law of the sovereign states.<sup>102</sup>

<sup>91</sup>*Ibid*

<sup>92</sup>Lord Templeman, *op.cit.*, p.36

<sup>93</sup>The sources of the Community Law are three Community Treaties (EU Treaty, EEC Treaty, Treaty on Functioning of EU) entered into by twelve member states. The European Courts have for long time, recognized the supremacy of the community law over national law. See *Costa v Enel (1964) CMLR 425*, *R v Secretary of States for Transport, exporter Factor Tame (No 2) (1990)3 WLR 818*. see generally, the East Africa Community Treaty (a.k.a. EAC Treaty) on this subject matter.

<sup>94</sup>B. Meyersfeld, *op.cit.*, p.399

<sup>95</sup>*Ibid.* see M.N. Shaw,(2013)*op.cit.*. C.B. Meyersfield, *Domestic Violence in International Law*, 1<sup>st</sup> ed, (2010), p.195.

<sup>96</sup>H. Lauterpacht, *International Law and Human Rights*, (1968) p.32

<sup>97</sup>*Ibid.*

<sup>98</sup>*Ibid.* Meyersfield (2013 *op.cit.*. P.409-410; A.V. Freeman, *The International Responsibility of states in International Law*, (1938).Shaw, *op.cit.*

<sup>99</sup>Meyersfield (2013 *op.cit.*, p. 410; Lauterpacht, *op.cit.* p.23

<sup>100</sup>J. Locke, *Questions concerning the Law of Nature with an Introduction* (text and translation by R.Horwitz, J.Straws Clay, and D. Clay), p.213.

<sup>101</sup>H.J. Stainer, and P. Alston, *International Human Rights in context*, 2<sup>nd</sup> ed.,(2000), p. 987; Meyersfeld (2013), *op.cit.*.410.

<sup>102</sup>Lauterpacht, *op.cit.* .38. The Universal Declaration of Human Rights 1948 and the reverberation of "Never Again". The two rights covenants of 1966 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties together with authoritative statements from the International Court of Justice confirmed that both states and individuals acquire international rights under treaties. Shockingly enough, in the case of *Alhaji Asari Dokubo v Federal Republic of Nigeria*, (2007) *NWLR*, <[www.ilaw.ng/alhaji-mujahid-dokubo - asari...](http://www.ilaw.ng/alhaji-mujahid-dokubo - asari...)> accessed on 21 October,2017, the Supreme court of Nigeria, held that fundamental human right is secondary to national security.

In this connection, the failure of the government of Nigeria to comply with the judgment of the ECOWAS court in *Sambo Dasuki v Federal Republic of Nigeria*<sup>103</sup> amounts to internationally wrongful act<sup>104</sup>. On Tuesday October, 4, 2016, the ECOWAS Community Court of Justice (ECCJ), otherwise called the ECOWAS Court, declared the arrest and continued detention of the Nigerian former National Security Adviser-Col. Sambo Dasuki, as unlawful, unreasonable and arbitrary.

The court was established pursuant to Article 6 and 15 of the Revised Treaty of the Economic Community of West Africa States (ECOWAS).<sup>105</sup> By virtue of Article 10 of the Supplementary Protocol<sup>106</sup> of the ECOWAS Court, adopted in January 2005, by the Authority of the Heads of States and Government, individuals, cooperate bodies and non-governmental organizations, have direct access to the court for the enforcement of human rights. The Court has held, in a number of cases brought before it, that the principle of 'exhaustion of local remedies' which is well entrenched in customary international law, is not applicable to it.<sup>107</sup>

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<sup>103</sup>Rtd Col. *Sambo Dasuki v Federal Republic of Nigeria* <[www.courtecowas.org/.../index.php?](http://www.courtecowas.org/.../index.php?)>

<sup>104</sup>The most authoritative guidance on the responsibility of states is the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles). UN DOC. a/56/1043. The Articles contains a comprehensive description of a circumstances in which a states is responsible for internationally wrongful acts, the obligation of states to remedy such acts and applicable reparations. The Articles apply irrespective of whether the obligation is owed to one or several states, to an individual or group, or to the international community as a whole. See paragraph 5 of commentary to ILC Articles.

<sup>105</sup>Article 6 & 15 of the Revised Treaty of ECOWAS

<sup>106</sup>Article 10 of the Supplementary Protocol of ECOWAS court

<sup>107</sup> Commenting on the effect of non-application of the principle of exhaustion of domestic remedies, a legal scholar, Prof. M.T. Ladan, presented a paper titled "The Prospect of Public Rights Litigation before the ECOWAS Court of Justice", where he submitted, that 'the effect of this is far reaching because victims of human rights violation may chose to directly approach the ECOWAS court of Justice straight away, without exhausting local remedies at the National Court'. This is because there is no nexus between Nigeria Court and ECOWAS Court, as there is no hierarchical relationship and it is not an

The ECOWAS Court has both an advisory and contentious jurisdiction, under the former, the court gives legal advisory opinion, on any matter that requires interpretation of the community law and under the latter, the court examines cases of failure by member state to honour their obligation under the Community Law. It also has the competence to determine cases of violation of human right that occur in any member state and so on. Article 15(4) of the revised Treaty of ECOWAS provides that the judgment of the court of Justice shall be binding on the member state, the institutions of the state and on individuals and cooperate bodies.

As a signatory to the Revised Treaty of ECOWAS, Nigeria is legally bound by the judgment of the Court, this is consistent with the elementary principle of international law "*Pact- Sunt-Servanda*", meaning that agreements are binding on parties thereto.

The Federal Government of Nigeria, in recognition of the legal status of the court and the binding nature of its judgment voluntarily entered appearance and vigorously defended itself in the Dasuki case before ECOWAS court. Having submitted itself freely to the jurisdiction of the court, it will be disingenuous for the same government to resile from its obligation under the Revised Treaty and the relevant protocol and supplementary protocol relating to the Court.

The issue of the Revised ECOWAS treaty, not having been domesticated in Nigeria, is immaterial here.<sup>108</sup> The ECOWAS Court's judgment in Dasuki case is binding on Nigeria. Besides, under international law, member states are not allowed to cite the provision of their municipal

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appellate court. In the case of *Valentine Ayika v Republic of Liberia (ECW?CCJ/APP/07/11)* cited with approval by the learned Professor Ladan, the ECOWAS court ruled that the case was admissible, notwithstanding the fact that it was alleged to be pending before the Supreme Court of a member state, Liberia. See generally, Effiend Inibehe "Dasuki: Is the ECOWAS Court Judgment Binding on Nigeria" <[www.courtecowas.org/.../index.php?](http://www.courtecowas.org/.../index.php?)>

<sup>108</sup> See section 12, constitution of Nigeria 1999 (as amended). See also *Moukhtar Ibrahim Aminu v Government of Jigawa State and three Ors, (2011) ECW/CCJ/APP/08/08*, where the court held that its jurisdiction shall be activated notwithstanding the non-domestication of the Revised Treaty and Protocols of the Court by Nigeria since Nigeria has already ratified same.

law, including their constitution, as a basis to evade their treaty obligations.<sup>109</sup>

Nigerian government would still have failed to comply with ECOWAS Court decision, even if the Revised Treaty had been domesticated. This is in view of the government's characteristic disobedience of court rulings, orders and judgments delivered by various levels of court of Nigeria, including the Supreme Court of Nigeria.<sup>110</sup> Nigeria government has both legal and institutional apparatus that can be used to enforce the judgment, if there is political will. After all, Nigerian law allows for enforcement of foreign judgment, a situation whereby decisions of municipal courts of other states are enforced in Nigeria.<sup>111</sup> Hence, there is no sound basis why decisions of international courts or tribunals in respect of treaty obligations, should not be readily enforceable.

The International Court of Justice, considered the provision of Article 46 of the Convention on the Law of Treaties<sup>112</sup>, in *Cameroon v Nigeria*<sup>113</sup>, in the context of Nigeria's argument that the Marova Declaration of 1975 signed by the two heads of state was not valid as it has not been ratified.<sup>114</sup> It was noted that Article 7(2) of the

<sup>109</sup>Articles 27 and 46(1) of the 1969 Treaty Convention

<sup>110</sup>See for instance, *The Attorney General of Lagos v Attorney General of Federation*, (2004)18 NWLR (Pt 904) 1, in respect of Local Government Creation in Lagos, vis-à-vis, allocations to Local Government Councils from the Federation Account. See also, *Military Governor of Lagos State & ors v Chief Emeka Odumegwu Ojukwu*, (1986) NWLR (Pt18) 621.

<sup>111</sup>The enforcement of Foreign Judgments in Nigeria is governed by two statutes, namely : (a) the Reciprocal Enforcement of Judgements Ordinance (now Chapter 175, Laws of the Federation of Nigeria and Lagos, 1958), and (b) the Foreign Judgement (Reciprocal Enforcement) Act, Chapter C35, Laws of the Federation of Nigeria, 2004. See also the International Convention on the Recognition and Enforcement of Foreign Arbitral Award (a.k.a New York Convention) of 10 June, 1958.

<sup>112</sup>Article 46 (1) 1969 of the Treaty Convention provides that "a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competency to conclude treaties as invalidating its consent" see also Article 46(2) thereof.

<sup>113</sup>*Cameroon v Nigeria*, ICJ Report (2002), pp.303, 430.. See also *Polish Nationals in Danzig Case*; *The Lockerbie's case* ICJ Report, (1992), pp.3, 33 and 94; *LaGrand Case* ICJ Reports (2001) pp.466, 497-8

<sup>114</sup>*Ibid*

1969 Treaty Convention, provides that heads of state belong to the group of persons, who by virtue of their functions without having to produce 'full powers' are considered as representing their state.

It is the humble opinion of this writer that Nigerian government continues to adopt the non-coercive compliance theory<sup>115</sup>, which it adopted in the ICJ's decision on *Bakassi (Cameroon v Nigeria)*. This is a compliance that flows from enlightened self interest and it goes to the issue of national reputation.

## CONCLUDING COMMENTS AND RECOMMENDATIONS

This paper has examined practical issues relating to the application of international treaties in Nigeria. It examined the distinction between Nigeria 'being bound' by an international agreement, at the international plane, on the one hand and an international agreement 'being law' in Nigeria on the other hand. When the government signs or ratifies a treaty (especially human right treaties), its purpose and objective should distinguish it from other treaties and bind the government, not only to other states but also to individuals at home, in its own courts, even if the treaty has not yet been domesticated or enacted by the Parliament.<sup>116</sup>

<sup>115</sup>*Ibid.* Meyersfield (2013), op. cit., p.41; H.H. Koh, "Why Do Nations Obey International Law?", Vol.106, *Yale Law Journal*, (1997), pp.2599, 2610-2611. Under Article 24(4) of the Supplementary Protocol of the ECOWAS, each member states is expected to determine a competent national authority that shall be responsible for the enforcement of the court's decision, in accordance with her own rules of civil procedure. Interestingly, Nigeria is among the three member states (others are Guinea and Togo) that have put in place appropriate mechanisms for the enforcement of judgments by the court. Also, by virtue of Article 76(2) of the Revised Treaty, the decision of the court is final (not subject to appeal). Furthermore, Article 77 (1) of the Revised Treaty provides for the imposition of sanctions by the ECOWAS Authority against a member state that fails to fulfill its obligation for the community. Unfortunately, up till the point of revising this paper in July 2018, twenty one months after, the ECOWAS judgment delivered since October 2016, is yet to be complied with by the Nigerian government. Hence, Sambo Dasuki has remained in detention in disregard of Court judgment on (human rights) treaty obligations.

<sup>116</sup>Why would the court shy away from such intervention during a period it had to establish and protect its institutional legitimacy. Article 18 of Vienna Convention on Law of Treaties provides that

The power of domestic court to interpret is a wide power, there is therefore a need to have a set of wise, courageous and sympathetic judges who understand the need to interpret international law and constitutional law in a politically tense climate.<sup>117</sup> The bold decision of Kenyan Supreme Court which nullified a national election is a giant step in the right direction, in strengthening the rule of law.<sup>118</sup> It could be an indication of change, and will hopefully inspire leaders and governments to bring the rule of law into the arena of governance. This bold step, it is hoped will be extended to treaty interpretation and application before domestic courts. We all stand to benefit.

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“when a government signs a human rights treaty, it is bound internationally to perform the obligation contained therein and not to act in any manner inconsistent with the treaty provisions”.

<sup>117</sup>In the South Africa case of *S v. Makwanyane* (1995) ZACC CC3, at para 13-14, the court noted that public international law may be used as tools of interpretation. International agreements and customary international law accordingly provide a framework which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the UN Committee on Human Rights, Inter-American Court on Human Rights, Inter-American Commission on Human Rights, European Courts on Human Rights, European Commission on Human Rights, and in appropriate cases, reports of specialised agencies; such as the International Labour Organisation, may provide guidance as to the correct interpretation of the particular provisions of the Bill of Rights. see also the position of the court in *Henry Kyarimoa v Attorney General Uganda* (Reference No. 4 of 2013, <<http://www.ecj.org.kyarimoa-vattorney>>

The East African Court of Justice held on the need to maintain an effective balance between regional and national laws and institutions in a system of community law. This is far from being an easy balance but one that must be effectively worked all the same. See “The Jurisdiction of EACJ vis-à-vis National Legal Domains...” available at <<http://www.ralac.org/.../9417-the-...>> However, on April 27, 2017, the Ugandan High Court of Justice submitted a matter to the EACJ to determine whether national courts have the jurisdiction to interpret and apply the provisions of the treaty for the Establishment of the East African Community.

<sup>118</sup>C. Gerhard, “The Court Ruling on the Elections in Kenya: A Precedent for Inter-State Dispute?(2017)” available at <http://www.tralac.org>. accessed on 24 September 2017; G. Mills, “Kenyan Court Takes Giant Step Forward for Africa” Rand Daily Mail, 6 September, 2017.

Also, there is a desire for flexibility in treaty implementation by states. The role of domestic courts in treaty implementation cannot be overemphasized, hence, the need for avoidance of judicial techniques or technicalities to restrict the impact of treaty law in the domestic legal arena.

The greater the willingness on the part of the domestic judiciary to apply and enforce treaty norms, including setting aside contrary domestic norms, where necessary, the greater will be compliance with treaty norms. There has been an increasing emphasis on the role of national courts in securing compliance with international human rights norms, whether treaty –based or otherwise.<sup>119</sup>

Nigerian Court blew away the opportunity to decry technicality and exhibit judicial courage on treaty enforcement, in the case of *Registered Trustees of National Association of Community Health Practitioners of Nigeria & ors. v Medical and Health Workers Union of Nigeria & ors*<sup>120</sup>

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<sup>119</sup>See Tomuschat (2008:Ch. 5) The relevant supervisory organs of the core UN human rights instruments have also over the years underscored the role to be played by domestic courts. Note also the Bangalore Principles 1998, the Vienna Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms 2003. This emphasis on domestic courts is also apparent in the closely related field of labour rights and standards, as the ILO Committee of experts, alongside scholarly community, has long emphasized.

<sup>120</sup>(2008) 2 NWLR (pt 1072) 575. In that case, the National Industrial Court was called upon to enforce the provisions of International Labour Organisation (ILO) Conventions on the combined strength of section 7(6) of the National Industrial Court, as well as, section 254(c) (2) of the Third Alteration Act to the 1999 Constitution of Nigeria. Section 7 (6) of the National Industrial Act which provides that “The court shall in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practices in labour or industrial relations and what amounts to good or international best practices in labour or industrial relations shall be a question of fact”. And section 254(c)(2) of the Third Alteration Act to the Constitution of the Federal Republic of Nigeria 2010 which provides that: “Notwithstanding anything to the contrary in this constitution, the National Industrial Act shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has *ratified* relating to labour,

## Issues in the Application and Enforcement of International Treaties before a National Court: Nigeria and Selected Jurisdictions in Perspective

While it is difficult to conclude that one approach is better than the other, as far as the theoretical framework of dualism and monism is concerned, it is manifestly clear that we all stand to benefit from the culture of judicial courage, by municipal judges, in the area of interpretation and application of treaty norms.

Another way to make room for easy application and enforcement of treaty at the domestic level, is by states forming more supranational institutions, whose executive, legislative and judicial decisions shall have ‘*direct binding effect*’ on members states.

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employment, workplace, industrial relations or matters connected therewith”. Despite the clear wordings of the above laws, clearly empowering the National Industrial Court of Nigeria to apply ‘*any*’ international convention, treaty or protocol to which Nigeria has *ratified*, the court still failed to so do. Moreso, it is manifestly clear that section 254(C)(2) of the Third Alteration Act has satisfied the definition of domestication by reference.