

IMPLEMENTATION OF TREATIES IN NIGERIA: ISSUES, CHALLENGES AND THE WAY FORWARD

Abstract

Treaties between Nigeria and other subjects of international law do not transform into domestic laws unless they are specifically domesticated, that is, enacted into laws by the National Assembly. But the National Assembly has, over the years, shown little interest in discharging this all-important constitutional task; hence, most treaties, which Nigeria is a party to, have not been domesticated many years after their ratification. And this has stripped Nigerian legal system of the requisite support and complementarity which it ought to derive from those ratified but domesticated treaties. The objective of this paper is to examine the relevance of treaties in the development of the Nigeria legal system and the place of treaties in the hierarchy of Nigerian law. The paper also examines the causes of poor implementation of treaties in Nigeria, as well as the effects of the 1999 Constitution (Third Alteration) Act, 2010 on the application of treaties in Nigeria. The research methodology adopted by the researchers is purely doctrinal whereas the approaches employed herein are chiefly analytical, descriptive and prescriptive. This paper concludes that noninvolvement of the National Assembly in the negotiation of treaties is largely responsible for the poor implementation of treaties in Nigeria. The researchers therefore, recommend immediate amendment of the Treaties (Making Procedure Etc) Act, 2004 by the National Assembly so as to make the participation of the National Assembly compulsory in treaty-making in Nigeria. Also, the paper recommends an outright repeal of section 12 of the 1999 Constitution so that every treaty to which Nigeria is a party shall be justiciable in Nigeria without any legislative intervention.

Keywords: *Treaties, International law, Constitution, Implementation, National Assembly.*

1. Introduction

Nigeria adheres to a dualist approach to application of international law, a practice which is common in common law countries.¹ Thus, treaties validly concluded between Nigeria and other subjects of international law do not automatically transform into Nigerian laws without legislative intervention – they must be specifically enacted into law by the National Assembly in accordance with section 12 of the Constitution of the Federal Republic of Nigeria, 1999, as amended (the 1999 Constitution)² before they can have the force of law. The relevance of treaties in the progressive development of the Nigerian legal system cannot be over emphasized. As we shall see below, they do not only fill the gaps in the Nigerian legal system, but also expands its frontiers. Yet, the National Assembly has not shown sufficient commitment in carrying out its constitutional role of transforming treaties into domestic laws. This has not only resulted in the poor implementation of treaties in Nigeria, but has also stripped the Nigerian legal system of the requisite support and complementarity it ought to derive from those ratified but undomesticated treaties. The nonchalant attitude of the National Assembly in transforming treaties into domestic law has been blamed on the fact that the National Assembly is not carried along during the negotiation of treaties. This is because, neither the Constitution nor the Treaties (Making Procedure Etc.)

*By **C.E. OKEKE, LL.B, BL, LL.M**, Private Legal Practitioner based in Awka, Anambra State, Nigeria, Tel.: +2348033126074, E - mail: speak2winnas@gmail.com; and

***M.I. ANUSHIEM, LL.B, BL, LL.M**, Lecturer, Faculty of Law Nnamdi Azikiwe University Awka, Anambra State Nigeria. Tel.: +2348032641757, E - mail: mi.anushiem@unizik.edu.ng

¹ C A Okenwa, 'Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice?' *Journal of Law, Policy and Globalization*, Vol.35, (2015), p. 116.

² Constitution of the Federal Republic of Nigeria, 1999 (as amended), Cap C23, LFN, 2004.

Act 2004 (the Treaties Act)³ assigns any role to the National Assembly in respect of treaty-making in Nigeria.

The status of undomesticated treaties in the Nigerian legal system which hitherto generated considerable controversy among scholars and jurists was settled in the celebrated case of *Abacha v. Fawehinmi*,⁴ where the Supreme Court held per Ogundare, J.S.C, (as he then was) that undomesticated treaties have no force of law whatsoever in Nigeria. However, the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010,⁵ appears to have reopened this controversy. This is so because this Act appears to have made ratified but undomesticated labour related treaties justiciable in Nigeria without any legislative intervention. On the other hand, the controversy surrounding the place of domesticated treaties in the hierarchy of Nigerian laws has remained substantially unresolved notwithstanding the frantic effort of the Supreme Court to lay the issue to rest in the said case of *Abacha v. Fawehinmi*.⁶

2. Nature and Definition of Treaty

Treaty is an international agreement concluded between states in written form and governed by international law.⁷ It includes any international agreement concluded between one or more states and one or more international organisations which is in written form and governed by international law.⁸ According to the Treaties Act, a treaty means any instrument by which an obligation under international law is undertaken between Nigeria and any other country.⁹ The framers of this Act seem to have ignored the fact that under the contemporary international law, both states and international organisations have the capacity to enter into treaties as evident in the 1986 Vienna Convention on the Law of Treaties. The Treaties Act should, therefore, be amended in order to reflect the current position of international law in relation to treaty-making by providing in clear terms that international organisations may enter into treaties with Nigeria. Usually, a treaty binds only parties which signed and ratified it. However, there are cases where treaties may enter into force immediately upon signature and therefore, automatically binds the parties thereto without any need for ratification. This is usually the case in bilateral treaties. This point was amply made clear in the case of *Cameroun v. Nigeria*,¹⁰ where the International Court of Justice held as follows: “while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature.” Consequently, the Court rejected Nigeria’s argument that the Maroua Declaration, a bilateral treaty between Cameroun and Nigeria, was invalid under international law because it was signed by the Nigerian Head of State of the time but was never ratified.¹¹ It follows from the foregoing that a treaty which is yet to be ratified may also be domesticated by the National Assembly.

³ Treaties (Makin Procedure, Etc.) Act, Cap. T20, LFN, 2004, s. 3 (3).

⁴(2000) FWLR (Pt.4) 553 at 586.

⁵ Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010, s. 6 (2).

⁶ AA Oba, ‘The African Charter on Human and Peoples’ Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11’ (2004) 2 *AHRLJ*, 275 at 280.

⁷Vienna Convention on the Law of Treaties, 1969, Article 1 (a).

⁸ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, Art. 1 (a).

⁹ *Op cit*, (n. 3).

¹⁰ Land and Maritime Boundary between Cameroon and Nigeria (Cameroun v Nigeria) (Judgment) (2002) I.C.J. Reports, p. 264.

¹¹ *Ibid*.

3. Treaty-Making Power in Nigeria: A Prerogative of the Federal Government

Nigeria is a federation consisting of the federal government and the governments of the federating units,¹² and one of the common features of federal system of government is the political autonomy of the federating units or devolution of governmental powers.¹³ Thus, in every standard federal system, the relationship between the central government and the governments of the federating units are clearly delimited and delineated in a written constitution which specifically divides governmental powers between them, each having total control within its sphere of function and jurisdiction.¹⁴ Since Nigeria embraced federalism in 1954, the framers of its successive constitutions have always incorporated this common feature into them in the form of legislative lists. Thus, the 1999 Constitution, like its predecessors, contains two legislative lists, namely, Exclusive Legislative List, and Concurrent Legislative List.¹⁵ While the Exclusive Legislative List spelt out the legislative powers exclusive to the Federal Government,¹⁶ the Concurrent Legislative List contains legislative powers that are concurrently exercised by both the federal government and State government.¹⁷ But the Concurrent Legislative List is subject to the common law doctrine of covering the field.¹⁸ There are, however, residual matters which, as the name implies, are matters that are neither contained in the Exclusive Legislative List nor in the Concurrent Legislative List. This has given rise to a third legislative list, which is informally termed 'residual legislative list' in which only the House of Assembly of the states can legislate on.¹⁹

Unlike most federal constitutions, the 1999 Constitution does not specifically place treaty-making powers under the Exclusive List. This has made some people view treaty-making as residual matter in which federating states can legislate on. But this is not the true position, since treaty-making traditionally forms part of external affairs which is specifically placed in the Exclusive Legislative List of the Constitution.²⁰ This point was amply made clear by the Supreme Court in the case of *Attorney General of Federation v, Attorney General of Abia & Ors*²¹ where Ogundare, JSC, held that:

In exercise of its sovereignty, Nigeria from time to time enters into treaties - both bilateral and multilateral. The conduct of external affairs is on the exclusive legislative list. The power to conduct such affairs is, therefore, in the Government of the Federation to the exclusion of any other political component unit in the Federation.

This is in fact the case in virtually all federal states. Thus, according to Dinah Shelton 'in all federal states, foreign affairs, including issues relating to international law, are generally considered matters for the national government.'²² Moreover, under the Vienna Convention on the Law of Treaties, only central governments have the legal capacity to validly conclude treaties on behalf of sovereign states.²³

¹² *Op cit*, (n. 2), s. 2(2).

¹³ *Attorney General of Lagos v. Attorney General of Federation* (2003) 12 NWLR (Pt. 883) 1 at 1006-1007..

¹⁴ *Attorney General of Abia & ors v Attorney General of Federation & ors* (2007) 6 NWLR (Pt. 1029) 200 at 350.

¹⁵ *Op cit*, (n.2), 2nd Sch.

¹⁶ *Ibid*, s. 4(3).

¹⁷ *Ibid*, ss. 4 (4) (a) and (7) (b).

¹⁸ The doctrine of covering the field is provided for in s. 4 (5) of the 1999 Constitution, which provides that where there is a conflict between an Act of the national Assembly and a law enacted by the State Houses of Assembly, the former shall prevail.

¹⁹ See *Attorney General of Qgun State v Abeniagba* (2002) Vol. 2WRN 52 at 77.

²⁰ *Op cit*, (n. 2), 2nd Sch, Part I, Item 26.

²¹ (2002) FWLR (Pt. 102) 1 at 92-93.

²² D L Shelton, 'Introduction' in Dinah L. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011), p. 21, available at <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1389&context=faculty_publications> (last accessed 20 November 2015).

²³ *Ibid*. See also *op cit*, (n. 7), Art. 1 (a).

4. The Role of the National Assembly in the Implementation of Treaties in Nigeria

The role of the National Assembly in the domestication of treaties in Nigeria is not only primary, but also exclusive. Thus, section 12 (1) of the 1999 Constitution provides that ‘no treaty between the Federation and any other country shall have the force of law [in Nigeria] except to the extent to which any such treaty has been enacted into law by the National Assembly.’²⁴ This section makes it very clear that the National Assembly is the only legitimate organ of government that is responsible for implementing treaties in Nigeria. The logic behind this provision is not far-fetched: the National Assembly is the only entity empowered by the Constitution to make laws on behalf of the federal Government. Of course, it would amount to usurpation of the legislative powers of the National Assembly if a treaty that is made by the executive is allowed to have the force of law in Nigeria without the intervention of the National Assembly. Thus, it was once observed that ‘law-making power is given to the Legislature, not to the Executive. Accordingly, the signing of a treaty by the Executive cannot promulgate law.’²⁵

The power of the National Assembly to enact laws for the purpose of implementing treaties is not limited to matters under the Exclusive Legislative List and Concurrent Legislative List, but also extends to matters under the residual list. Hence, section 12 (2) of the 1999 Constitution provides that “[t]he National Assembly may make 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.” This subsection specifically empowers the National Assembly to make laws for the Federation or any part thereof with respect to matters in the Concurrent Legislative List and residual matters for the purpose of implementing a treaty. It is, however, our view that this subsection is a mere surplusage as regards matters included in the Concurrent Legislative List because section 4 (4) (a) of the Constitution has already empowered the National Assembly to make laws with respect to matters included in the Concurrent Legislative List. It would have sufficed if the National Assembly was empowered by the said section 12 (2) to make laws with respect to matters not included in the Exclusive Legislative List and Concurrent Legislative List. This was in fact the case under the 1963 Constitutions which empowered the Parliament to make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List and Concurrent Legislative List for purposes of implementing treaties.

The process of enacting a treaty into law in Nigeria by the National Assembly is *in pari materia* with the process of enacting an ordinary bill into law.²⁶ However, a bill for an Act of the National Assembly for purposes of implementing a treaty with respect to matters outside the Exclusive Legislative List shall not be presented to the President for assent.²⁷ It is not very clear why this provision is limited to bills involving matters outside the Exclusive Legislative List. It is submitted that all bills for Acts of the National Assembly for purposes of implementing treaties shall not be presented to the President for assent, because those treaties were *ab initio* signed and ratified by the Executive arm of Government which is headed by the President himself.

Furthermore, a bill for an Act of the National Assembly for purposes of implementing a treaty with respect to matters outside the Exclusive Legislative List shall not be enacted into law unless it is ratified by a

²⁴It is important to note that the phrase ‘any other country’ in this provision includes ‘any other subject of international law’ like international organisations. See section 74 of the defunct 1963 Constitution where this point was clearly made.

²⁵ R B Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, 2008 Routledge, 2008), p. 224. See the dissenting opinion of Hoffman in *Lewis V. AG of Jamaica* (2001) AC 50.

²⁶ *Op cit.*, (n. 2), s. 58.

²⁷ *Op cit.* (n. 2), s. 12 (3).

majority of all the State Houses of Assembly.²⁸ This is to ensure that the Houses of Assembly of the states, which otherwise have exclusive legislative power over residual matters, and share legislative power with the National Assembly over matters in the Concurrent Legislative List, have a say in the implementation of treaties that will affect their respective states. However, this provision constitutes a reasonable clog in the wheel of the National Assembly *vis-a-vis* domestication of treaties, because securing ratification of a majority of ‘all’ the States Houses of Assembly is almost impossible. This is even more difficult than a simple majority of two-thirds of State Assemblies required for the amendment of the Constitution²⁹ which according to Ike Ekweremadu, is ‘like passing a camel through the eye of a needle.’³⁰ Surely, there is a need to water down this procedure so that such bills could easily be passed into law. It is, therefore, submitted that such a bill shall be enacted into law by the National Assembly without recourse to the States Houses of Assembly provided that such law shall not come into force in any state unless the House of Assembly of the relevant State ratifies or domesticates it. This is akin to what obtained under the defunct 1963 Constitution where the Parliament was empowered to enact similar bills into Acts without recourse to the Regional Assemblies upon the condition that such Acts ‘shall not come into operation in a Region unless the Governor of that Region has consented to its having effect.’³¹

Basically, there are two methods of domesticating treaties into laws in Nigeria, namely, domestication by re-enactment or domestication by reference. Domestication by re-enactment, according to Akin Oyeboode, ‘is adopted when the implementing statute directly enacts specific provisions or the entire treaty usually in the form of a schedule to the statute.’³² On the other hand, domestication by reference is the case where the implementing statute transform a treaty into the domestic law merely by reference either *eo nomine* or generally.³³ Reference to a treaty may sometimes be contained either in the long and short titles of the implementing statute or in its preamble or schedules.³⁴ It must, however, be pointed out that domestication by re-enactment is by far more popular than domestication by reference. This is because having both the implementing statute and treaty itself in a single document is a very convenient practice.³⁵ Moreover, domestication by re-enactment is more consistent with the letters of section 12 (1) of the Constitution which provides that ‘no treaty... shall have the force of law except to the extent to which any such treaty has been ‘enacted’ into law by the National Assembly’.

5. Relevance of Treaties in the Progressive Development of the Nigerian Legal System

The role of treaties in the progressive development of the Nigerian legal system cannot be over-emphasized. This underscores the interdependence of international law and domestic law. It must, however, be pointed out from the outset that our discussion in this section will focus more on the role of undomesticated treaties in the development of the Nigerian legal system, because domesticated treaties are already part and parcel of the Nigerian legal system. Suffice it therefore to say that,

²⁸ *Ibid.*

²⁹ *Ibid.* s. 8.

³⁰ Ike Ekweremadu, ‘The Politics of Constitutional Review in a Multi-Ethnic Society’, A Public Lecture of the Faculty of Law, Nnamdi Azikiwe University, Awka delivered at the University Auditorium on 19 October 2015 by Senator Dr Ike Ekweremadu, the Deputy President of the 8th Senate of the Federal Republic of Nigeria, p.10.

³¹ The Constitution of the Federal Republic of Nigeria 1963, s. 74.

³² See the Inaugural Lecture of Professor Akin Oyeboode, at 40, available at <<http://www.unilag.edu.ng/opendocnew.php?docname=17825&doctype=doc>> (last accessed 14 October 2015).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ According to Akin Oleyode ‘the advantage of this method is that it enables the courts to confront the treaty itself, albeit in the form of an enabling statute, thereby reducing the likelihood of their being hamstrung in the process of interpreting the treaty by the so-called ambiguity rule as well as other restrictive or exclusionary common law rules of statutory interpretation.’ *Ibid.* p. 41.

domesticated treaties do not only fill the gaps in the Nigerian legal system, but also expand its frontiers. For example, the African Charter which the First National Assembly domesticated in 1983³⁶ did not only make justiciable some provisions of Chapter II of the defunct 1979 Constitution (retained as Chapter II of the 1999 Constitution) that were hitherto nonjusticiable, but also constitutes the legal basis for the enforcement of ‘peoples’ rights’ in Nigerian court since neither the 1999 Constitution nor any other law in force in Nigeria makes provision for the enforcement of peoples’ rights.

It is very clear from the language of section 12 (1) of the 1999 Constitution that undomesticated treaties have no force of law in Nigeria, yet they play very crucial role in the entronement of a viable domestic legal system in Nigeria. In the first instance, undomesticated treaties, like other sources of international law, constitute persuasive authority for Nigerian courts. Hence, domestic courts frequently invoke undomesticated treaties as guides, or aids, in the interpretation of domestic laws.³⁷ They are invoked not because they are binding upon the courts, but because they constitute useful guide in the onerous task of interpreting statutes.³⁸ For example, the Supreme Court in the Abacha’s case made reference to the English case of *Higgs & Anor. V. Minister of National Security & Ors*,³⁹ where the Privy Council held that, ‘they [undomesticated treaties] might have an indirect effect upon the construction of statutes.’⁴⁰ Also, in the case of *Dow v. AG*⁴¹ Botswana’s Court of Appeal held that, even though treaties and conventions do not confer enforceable rights on individual within the state until the Parliament gives them the force of law, they could still be used as aids to interpretation.⁴² Nigerian Court could even have recourse to treaties which are yet to be ratified by the Federal Government as aids in interpretation of statutes. This is so because once any country signs a treaty, it is obligated under international law to refrain from any act which could defeat the object or purpose of the treaty until it formally revokes its signature.⁴³ Wayne Sandholtz specifically identified Nigeria as one of the countries where domestic courts may invoke treaties as persuasive authority even before it ratifies them.⁴⁴ Similarly, domestic courts of most countries including Nigeria adopt the presumption that domestic laws are intended to conform to the international law.⁴⁵ In fact, it was on the basis of this presumption that the Supreme Court held in *Abacha v. Fawehinmi*⁴⁶ that, any conflict between the African Charter and other domestic laws shall be resolved in favour of the former. The Court, in particular, held that ‘if there is a conflict between it [the Act] and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.’⁴⁷ However,

³⁶ African Charter on Human and peoples’ Rights (Ratification and Enforcement) Act 1983 (now Cap A9, LFN, 2004).

³⁷ See M I, Anushiem and E A, Oji, ‘Termination of Contract Employment and the Applicability of international Labour Standards on the Unfair Dismissal in Nigeria’, p. 173, available at <https://www.academia.edu/17914845/TERMINATION_OF_CONTRACTS_OF_EMPLOYMENT_AND_THE_APPLICABILITY_OF_INTERNATIONAL_LABOUR_ORGANISATION_STANDARDS_ON_UNFAIR_DISMISSAL_IN_NIGERIA> (last accessed 20 November 2017).

³⁸ W Sandholtz, ‘How Domestic Courts Use International Law’ *Fordham International Law Journal*, Vol. 38 , 2015, pp. 598-599, available at <http://fordhamilj.org/files/2015/04/FILY_Sandholtz_HowDomesticCourts.pdf> (last accessed 15 November 2015).

³⁹ [2000] 2 AC 228; *The Times*, December 23, 1999.

⁴⁰ *Ibid.*

⁴¹ (1999) BLR 233.

⁴² Culled from R F Opong, *Legal Aspects of Economic Integration in Africa* (2011 Cambridge University Press), p. 217.

⁴³ *Op cit*, (n.8), Art. 18 (a).

⁴⁴ W Sandholtz, *op cit*, (n. 38), p. 599.

⁴⁵ D L Shelton, *op cit*, (n. 22), pp. 18-19.

⁴⁶ *Op cit*, (n. 4) at 586.

⁴⁷ *Ibid.*

this presumption, which primarily applies in relation to undomesticated treaties, is rebuttable.⁴⁸ It is usually applicable where the domestic statute is manifestly ambiguous.⁴⁹ Similarly, there is also a doctrine of statutory interpretation which provides that domestic laws will, so far as possible, be interpreted by the courts to conform to treaty obligations.⁵⁰

Furthermore, undomesticated treaties also provide guidance to the National Assembly in the process of law-making even as it borrows a lot from them. Thus, it cannot be gainsaid that undomesticated treaties have influenced the enactment of a number of statutes in Nigeria both at the federal and state levels, especially in the area of human rights and humanitarian laws. For example, the enactment of Nigerian Child Rights Act⁵¹ and the Child Right Laws of various states were influenced by the United Nations Convention on the Rights of the Child (1989) and African Charter on the Right of the Child (1990). Similarly, the Violence Against Persons (Prohibition) Act, 2015, which prohibits female circumcision or genital mutilation and harmful widowhood practices, drew immensely from the 1979 Convention on the Elimination of All forms of Discrimination against Women. Also, treaties which have been ratified but not yet domesticated always arouse genuine expectations on the part of the citizenry that government officials would act in accordance with relevant treaties and this has given rise to the emerging doctrine of 'legitimate expectation'. While espousing this doctrine, the Privy Council held in the case of *Higgs & Anor. V. Minister of National Security & Ors*⁵² as follows:

Treaties formed no part of domestic law unless enacted by the legislature. Domestic Courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens' rights and duties in common law or statute law. They... might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty.⁵³

It is imperative to note that the above holding of the Privy Council was adopted by the Nigeria Supreme Court in the *Abacha's* case. Similarly, in the Australian case of *Minister of State for Immigration and Ethnic Affairs v Teoh*,⁵⁴ it was held that administrative decision makers must exercise their statutory discretion in conformity with the Convention on the Rights of the Child, an unincorporated treaty, because treaty ratification meant that individuals had a 'legitimate expectation' that government officials would act in accordance with the treaty.⁵⁵ This emerging doctrine does not only compel the executive arm of government to act in accordance with its treaty obligations but also put pressure on the legislature to do the needful since no responsible government would ignore a genuine expectation of the citizenry in a democratic dispensation where the ultimate power resides in the people.

However, notwithstanding the foregoing benefits of undomesticated treaties, the disadvantage of not enacting them into law upon ratification is highly detrimental. This is so because it debars citizens who already lack the juristic capacity to approach international court to enforce their rights under treaties

⁴⁸ *Collco Dealings Ltd v IRC*, [1962] AC 1 at 23.

⁴⁹ D Sloss, 'Domestic Application of Treaties', in D B Hollis, *The Oxford Guide to Treaties* (2012 Oxford University Press), P. 381.

⁵⁰ D L Shelton, 'International Law in Domestic Systems', in K B Brown and D V Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative* (2011 Springer Science & Business Media), p. 532.

⁵¹ Cap. C50, LFN, 2004.

⁵² *Op cit*, n. 39.

⁵³ As quoted in *Abacha v. Fawehinmi*, *op cit*, (n. 4) at 585.

⁵⁴ (1995) 128 ALR 353.

⁵⁵ D Sloss, *op cit*, (n. 49) at 372.

from approaching domestic courts to enforce the same. This is a clear case of double jeopardy. This state of affairs would not only encourage states to renege on their treaty obligations, but will also encourage them to trample upon the human rights of their citizens. For example, the Greentree Agreement, which stipulates the modalities for withdrawal and transfer of authority in the then disputed Bakassi Peninsula from Nigeria to Cameroon, has not been domesticated by Nigeria nearly ten years after it came into force,⁵⁶ even though it is the only legal framework for the protection of the rights of Nigerian nationals residing in Bakassi Peninsula. This simply means that Nigerian Government cannot be held accountable by the affected citizens for failure to comply with the Greentree Agreement.

6. The Place of Domesticated Treaties in the Hierarchy of Laws in Nigeria

The 1999 Constitution leaves no one in doubt that once a treaty is enacted into law by the National Assembly it forms part of the Nigerian legal system. In fact, this issue had long been settled before the promulgation of the 1999 Constitution. Hence, in the case of *Ogugu v State*⁵⁷, the Supreme Court held that African Charter on Human and Peoples' Rights, a treaty which was enacted into law by the National Assembly in 1983, formed part of Nigerian domestic laws. However, like its predecessors, the 1999 Constitution did not address the question of the relationship between domesticated treaties and other sources of Nigerian laws.⁵⁸ This lacuna is responsible for the unresolved controversies surrounding the place of domesticated treaties in the hierarchy of laws in Nigeria. The initial attitude of Nigerian courts towards this question was that domesticated treaties retain their international flavour and character and therefore do not only stand in the class of their own, but also rank above other domestic laws within our legal system. Thus, in the case of *Chief J.E. Oshevire v British Caledonian Airways Limited*⁵⁹ the Court of Appeal held as follows:

An international treaty, like the Warsaw Convention in the instant case, is an expression of agreed, compromise principles by the contracting states and is generally autonomous of the domestic laws of 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 High Contracting Parties have submitted themselves to be bound by its provisions, which are therefore above domestic legislation. Thus, any domestic legislation in conflict with the convention is void.

The *Oshevire's case* was reinforced by the Court of Appeal in the case of *Fawehinmi v. Abacha*⁶⁰ where the Court held as follows:

The provisions of the Charter [African Charter on Human and Peoples' Rights] are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiya v. Anretiola*... It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to Decrees of the Federal Military Government... They are protected by the international law and the Federal Military government is not legally permitted to legislate out of its obligations.

⁵⁶ A Enabulele and B Bazuaye, *Teachings on Basic Topics in Public International Law* (2014 Ambik Press) , p. 93.

⁵⁷ [1994] 9 NWLR (Pt 366), p. 47.

⁵⁸ Like Nigerian Constitution, the Japanese Constitution also leaves the issue of the relationship between treaties and other domestic laws unresolved. See Art. 98. See generally D L Shelton, above at note 32 at 6.

⁵⁹ (1990) 7 NWLR (Pt. 163) 507 at 519-520.

⁶⁰(1996) 9 NWLR (Pt.475) 710 at 747.

The above decisions of the Court of Appeal generated heated debate among scholars and jurists for obvious reason. It is not in consonance with the law as laid down in the celebrated case of *Lakanmi v. Attorney General (Western State of Nigeria)*⁶¹, where the principle of supremacy of Decrees in Nigerian legal system was enunciated. Also, the decision purportedly placed African Charter on Human and Peoples' Rights above the Constitution contrary to the supremacy clause of the Constitution. Although those decisions were proactive judicial intervention aimed at curbing the excesses of the military during the dark years of military era, the Court of Appeal clearly overreached itself, because there must be a limit to judicial activism, else, it becomes judicial rascality.⁶² Notwithstanding the apparent flaw in the above decision, it continued to be the law and so was followed in a number of cases thereafter. For example, in the case of *Chima Ubani v. Director of State Security Services & Anor*⁶³, the Court of Appeal while referring to *Fawehinmi's case* reemphasized that the Africa Charter is superior to all Nigerian domestic legislation including military decrees and by implication, the Constitution.⁶⁴

The Supreme Court had the opportunity to correct this erroneous precedents set by the Court of Appeal when the *Fawehinmi's case* came on appeal before it. Thus, in his lead judgment in *Abacha v. Fawehinmi*,⁶⁵ Ogundare J.S.C.(as he then was) held that it was erroneous on the part of the Court of Appeal to have held that African Charter on Human and Peoples' Rights was superior to the Constitution. Mohammed J.S.C. (as he then was) also observed in the same judgment that the elevation of the African Charter on Human and Peoples' Rights above the Constitution by the Court of Appeal amounted to 'a violation of the provisions of the supremacy of our Constitution.'⁶⁶ With this, the issue of superiority of the Constitution over domesticated treaties was finally resolved.

However, the question of the relationship between domesticated treaties and other domestic statutes has continued to generate controversies, even though Ogundare specifically observed in said *Abacha's case* that 'the Charter possesses a greater vigour and strength than any other domestic statute.'⁶⁷ In fact, he was very specific that 'if there is a conflict between it and another statute, its provisions shall prevail over those of that other statute.'⁶⁸ Although this has continued to be the law not having been overruled, it is our humble view that there is no legal basis for elevating domesticated treaties above other domestic legislation. This is so because a domesticated treaty does not operate in Nigeria by the force of international law but by virtue of the statute enacted to implement it. Hence, Akin Oyeboode rightly noted that "it is the statute enacted to implement a treaty that normally serves as a source of law and not the treaty per se."⁶⁹ Moreover, there is nothing in section 12(1) of the Constitution or in any other law in force in Nigeria which suggests that a domesticated treaty supersedes other domestic statutes.⁷⁰ It was against this backdrop that Enabulele and Bazuaye warned that:

⁶¹ (1971) 1 U.I.L.R. 201 at 221.

⁶² *Ardo v. Nyako & Ors* (2014) LPELR-22878(SC) at 43.

⁶³ (1999) LPELR-11177(CA).

⁶⁴ *Ibid*, p. 26. See also the unreported case of *Comptroller of Prisons & 2 Ors. v. Dr. Femi Adekanye*, CA/L/27/90 delivered on 15 June 1999.

⁶⁵ *Op cit*, (n. 4), p. 856.

⁶⁶ *Op cit*, (n.32), p. 598.

⁶⁷ *Ibid*, p. 586.

⁶⁸ *Ibid*. Similar decisions were given in the Ghanaian case of *New Patriotic Party (N.P.P) v. I.G.P [1993-94] 2 GLR 459* and Botswana case of *AG of Botswana v. Unity Dow* (1998) HRLRA 1.

⁶⁹ *Op cit*, (n. 45), p. 40.

⁷⁰ This may be juxtaposed with what obtains in South Africa whose Constitution specifically provides that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' See the Constitution of South African, 1996, sec. 233.

Nigerian court must as of necessity apply themselves to the fact that a peculiar constitutional provision as section 12 (1) does not lend itself to varieties. Its interpretation must be located within its peculiarity irrespective of undesired consequences it may bring about. It is by no means an error of draftsmanship that the drafters of the Constitution did not insert in section 12 (1) that incorporated treaties 'take primacy over other enactments'. Had the drafters intended that result, they would have been so careful to so provide. This is even so as the provision survived the repealed 1979 Nigeria Constitution and has so far survived the two amendments to the extant 1999 Constitution.⁷¹

It is also imperative to note that Achike J.S.C. (as he then was) in his dissenting opinion in the said *Abacha's case* strongly opposed the view that domesticated treaties are superior to other domestic statutes. According to him:

The general rule is that a treaty which has been incorporated into the body of the domestic laws ranks at par with the domestic laws. It is rather startling that a law passed to give effect to a treaty should stand on a 'higher pedestal' above all other domestic laws, without more in the absence of any express provision in the law that incorporated the treaty into the domestic law.⁷²

A review of literature on this subject matter indicates that many authors and scholars including the present authors prefer Achike's dissenting opinion to Ogundare's lead judgment because of the cogency and coherency of its *ratio decidendi*.⁷³ It is therefore, submitted that the rules regulating the relationship between statutory laws shall apply with equal force in the relationship between treaty-implementing statutes and other statutes. The general rule is that where two statutes are inconsistent, the later in time shall prevail.⁷⁴ Hence, according to Shelton 'states with common law system generally rank treaties as equivalent of domestic legislation meaning that the later in time prevails in case of conflict.'⁷⁵ Similarly, a treaty-implementing statute which regulates specific matter, should override an ordinary statute by virtue of the principle of *lex specialis derogat generali*.⁷⁶ Conversely, an ordinary statute which regulates a specific matter should supersede a treaty-implementing statute.

7. Causes of Poor Implementation of Treaties in Nigeria

Poor implementation of treaties is a common phenomenon in common law countries. This is because of their adherence to the dualist doctrine which demands that treaties shall not form part of domestic laws unless they are specifically enacted into laws by the legislature. As observed earlier, this doctrine does not apply in Nigeria solely on the strength of its common law origin, but especially because of section 12 (1) of the 1999 Constitution, which provides that no treaty which Nigeria is a party to shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. However, the National Assembly has, over the years shown little interest and commitment in discharging this all-important constitutional task and this is chiefly responsible for the poor

⁷¹ A Enabulele and B Bazuaye, *op cit*, (n. 56) at 92.

⁷² *Op. cit.* (n. 4), p. 613.

⁷³ See B I Olutoyin, 'Treaty Making and Its Application under Nigerian Law: The Journey So Far', *International Journal of Business and Management Invention*, Vol. 3, 2014, p.17; A Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?', *African Journal of International and Comparative Law*. Vol. 17, 2009, p. 336

⁷⁴ *Akintokun v LPDC* (2014) LPELR-22941 at 62.

⁷⁵ D L Shelton, *op cit*, (n. 22), p. 5.

⁷⁶ *Lex specialis derogat generali* is a legal maxim which means that specific law prevails over general law in the event of conflict.

implementation of treaties in Nigeria. As a matter of fact, out of about 400 treaties⁷⁷ which Nigeria is a party to, only 10 have been dully domesticated by the National Assembly.⁷⁸

The National Assembly has, however, tried to heap all the blame for poor implementation of treaties in Nigeria on the Executive, in particular on the Ministries, Departments and Agencies (MDAs). Thus, in a motion adopted by the House of Representatives on May 7, 2013, the House requested all MDAs as a matter of urgent national importance to commence the domestication process of all treaties entered into by Nigeria.⁷⁹ The National Assembly was able to engage in this blame game because both the Constitution and the Treaties Act⁸⁰ are silent on how the treaty-implementation bills should be brought before the chambers of the National Assembly for domestication, that is, whether they should be introduced by the relevant Committees of the National Assembly or by the relevant MDAs. The Constitution and the Treaties Act should therefore, be urgently amended to fill this gap. It is submitted that the relevant MDAs should be under obligation to lay before the floor of the Senate and the House of Representatives any treaty which Nigeria is a party to not later than thirty days after its ratification for domestication.

Another major cause of the poor implementation of treaties in Nigeria is the non-participation of the legislature during the negotiation of treaties. The National Assembly is always sidelined by the Executive in the negotiation of treaties because neither the Constitution nor the Treaties Act assigns any role to the National Assembly in respect of treaty-making in Nigeria. Usually, the National Assembly becomes aware of the existence of most treaties many years after their ratification or when they are brought before the National Assembly for domestication. It must however, be observed that non-consultation with the legislature in the treaty-making is a common practice in dualist countries, because of the fact that treaties are not incorporated into domestic laws without post-ratification approval of the legislature. This could be juxtaposed with what obtains in most monist countries where legislative approval is usually a pre-ratification issue. In the United States for example, no treaty can be ratified by the Presidency without the approval of at least two-thirds majority of the Senate.⁸¹

Granted that it may amount to a double legislative task if the National Assembly is allowed to participate in the treaty-making process in addition to its constitutional role of enacting treaties into domestic laws, yet it is very desirable that relevant Committees of the National Assembly are duly consulted during the negotiation of any treaty by the MDAs. This will not only engender wider consultations, but will also ensure that ratified treaties are easily domesticated. Interestingly, the National Assembly has started taken stpes to ensure that she is duly consulted during the negotiation of treaties. Thus, in 2012, a Bill for an Act to amend the Treaties Act to make consultations with the relevant Committees of the National Assembly a mandatory treaty- making procedure was introduced into the two chambers of the National Assembly. Unfortunately, this Bill was not passed into law before the Seventh National Assembly was wound up. It is hoped that the Eight National Assembly will revive this Bill because of its importance.

⁷⁷I A Yusuf 'Nigeria loses billions due to non-compliance with bilateral agreements', (3 November 2013), *The Nations*, available at <<http://thenationonlineeng.net/nigeria-loses-billions-due-non-compliance-bilateral-agreements/>> (last accessed).

⁷⁸ See the motion on the need for the domestication and ratification of all treaties and agreements entered into by the federation sponsored by Hon. Dayo Bush – Alebiosu and adopted by the House of Representative on May 7, 2013, available at <<http://www.nassnig.org/document/download/3222>> (last accessed 17 November 2015).

⁷⁹ *Ibid.*

⁸⁰ *Op. cit.* (n. 3), s. 3 (3).

⁸¹ See the U.S. Constitution, Art. II, s. 2.

Also, the poor implementation of treaties in Nigeria is partly attributable to the bureaucratic procedures of enacting them into law, especially those treaties relating to matters outside the Exclusive Legislative List. It shall be recalled that section 12(3) of the 1999 Constitution provides that a bill for an Act of the National Assembly for the purpose of implementing a treaty with respect to matters outside the Exclusive Legislative List shall not be enacted into law unless it is ratified by a majority of all the States Houses of Assembly in the Federation. Although this provision, as observed earlier is aimed at ensuring that State Assemblies have a say in the implementation of treaties that will affect state governments, it constitutes a reasonable clog in the wheel of the National Assembly in its task of domesticating treaties. This is so because securing ratification of a majority of all the 36 States Houses of Assembly in addition to a majority of the two Houses of the National Assembly is almost impossible.

Furthermore, poor documentation of treaties which Nigeria is a party to is equally responsible for the poor implementation of treaties in Nigeria. Of course, no treaty could be enacted into domestic law if no record is kept of its existence. Section 4 of the Treaties Act provides that the Federal Ministry of Justice shall be the depository of all treaties entered into between the Federation and any other country for record purposes. This section is complemented by section 5 which provides that the Federal Ministry of Justice shall prepare and maintain a register of all treaties which Nigeria is a party to. The Act also mandates the Federal Ministry of Justice to notify the Federal Government Printer of any new treaty ratified by Nigeria for the purpose of publication.⁸²

It is clear from the foregoing that adequate precautionary measures were put in place by the framers of the Treaties Act to ensure that proper records are kept of treaties which Nigeria is a party to. Unfortunately, the Federal Ministry of Justice whose responsibility it is to keep records of these treaties has not been diligently discharging this task. The revelation at the floor of the House of Representatives on May 7, 2013 that while the United Nations records showed that Nigeria has ratified about 400 treaties, the local records showed that Nigeria is a party to only 200 treaties eloquently expressed the level of poor documentation of Treaties by the Federal Ministry of Justice. However, the Federal Ministry of Justice may not be wholly responsible for the poor documentation of treaties in Nigeria, since the Federal Ministry can only keep records of treaties that were deposited with it by the relevant MDAs.⁸³ It is therefore, submitted that there should be a time frame within which the relevant MDAs must deposit to the Federal Ministry of Justice any treaty which Nigeria is a party to, preferably, not later than thirty days after its ratification.

8. Impact of the Third Alteration of the 1999 Constitution on the Implementation of Treaties in Nigeria

The 1999 Constitution has undergone three amendments since it came into force on May 29, 1999. Incidentally, all the amendments took place in 2010, although the third amendment, which is embodied in the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 (Third Alteration Act), came into force in 2011. This third amendment, among other things, re-established the National Industrial Court (the NIC), which was originally established by the National Industrial Court Act, 2006 (the NIC Act).⁸⁴ In essence, the Third Alteration Act is an incorporation of the NIC Act into the Constitution. Although the NIC Act specifically vested exclusive jurisdiction on the NIC in all civil causes and matters relating to labour, including among other things, trade unions and industrial relations, the exclusivity of its jurisdiction in labour matters and its place and status under Nigerian judicature

⁸²*Op cit*, (n. 4), s. 6.

⁸³*Ibid*, s. 4.

⁸⁴ National Industrial Court Act, 2006.

hitherto generated divided opinions among jurists. For example, in the case of *Oloruntoba - Ojo v Dopamu*⁸⁵, the Supreme Court held that the NIC does not have exclusive jurisdiction in all labour matters as provided in the NIC Act.⁸⁶ Similarly, in the case of *National Union of Electricity Employees v Bureau of Public Enterprise*,⁸⁷ the Supreme Court specifically stated that the NIC was an inferior court contrary to its Act which provides that it is a superior court of record ranking at par with the High Court.

It was in reaction to the foregoing decisions that the National Assembly took up the gauntlet to alter the 1999 Constitution in what ended up as the Third Alteration Act.⁸⁸ The jurisdiction of the NIC is provided for in section 254(C) of the 1999 Constitution as embodied in section 6 of the Third Alteration Act and it is substantially *in pari materia* with the jurisdiction of the NIC under section 7 of the NIC Act. However, subsection (2) of the said section 254 (C) is very revolutionary in that it indirectly introduced monist doctrine of automatic incorporation of treaties into Nigeria Legal system in labour related treaties. According to the subsection:

Notwithstanding anything to the contrary in this Constitution, the National Industrial Court 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, employment, workplace, industrial relations or matters connected therewith.⁸⁹

It is amply clear from the above provision that the NIC has automatic jurisdiction to apply any treaty relating to labour, employment, workplace, industrial relations or matters connected therewith once it is ratified by Nigeria. By introducing section 254 (C) (2) with the phrase “Notwithstanding anything to the contrary in this Constitution”, the application of section 12 (1) which ordinarily regulates the implementation of treaties in Nigeria seems to have been completely excluded. This is so because the Supreme Court has severally held that when the term “notwithstanding” is used in a section of a statute, it excludes an impinging or impeding effect of any other provisions of the statute so that the said section may fulfill itself.⁹⁰

Indeed, section 254(C) (2) of the 1999 Constitution seems to have opened a floodgate for the application of many international labour treaties, which Nigerian courts hitherto refrained from applying. In the light of this, the holding of the Supreme Court in *MHWUN v. Minister of Health & Productivity & Ors*⁹¹ that ‘in so far as the International Labour Organization Convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria’ may no longer hold water.⁹² It also means that the judicial authority of *Abacha v Fawehinmi*⁹³ on the question of domestic application of treaties may no

⁸⁵ (2008) 7 NWLR (Pt 1085) 1 at 30.

⁸⁶ *Op cit*, (n.84), s. 7(1).

⁸⁷ (2010) 7 NWLR (pt.1194) 538 at 571-572.

⁸⁸ *Speech by his Lordship, Hon. Justice B.A. Adejumo, ofr, President, National industrial Court of Nigeria, at the Inaugural Sitting of the Makurdi Division of the Court on the 4th Day of February, 2013 at Makurdi, Benue State, Nigeria, p.5, available at <http://nicn.gov.ng/events/president_speech.doc> (last accessed 16 November 2015).*

⁸⁹ *Op cit*, (n. 2), s. 254(C) (2).

⁹⁰ *N.D.I.C v Okem Ent. Ltd* (2004) 10 NWLR (Pt. 880) 107 at 182.

⁹¹ (2005) 17 NWLR (pt. 953)120 at 156.

⁹² B Atilola, ‘National Industrial Court and Jurisdiction over International Labour Treaties under the Third Alteration Act’, p.6, available at <<http://nicn.gov.ng/publications/NATIONAL%20INDUSTRIAL%20COURT%20AND%20JURISDICTION%20OVER%20INTERNATIONAL%20LABOUR%20TREATIES%20UNDER%20THE%20THIRD%20ALTERATION%20ACT.pdf>> (last accessed 18 November 2015).

⁹³ *Op cit*, (n. 4).

longer be a good law as far as international labour treaties are concerned.⁹⁴ This is so because section 254(C) (2) of the 1999 Constitution seems to have excluded the application of section 12(1) of the 1999 Constitution to international labour treaties.

9. Conclusion

As the world continues to transform into a global village, the gap between domestic law and international law is increasingly shrinking. This has not only diminished the relevance of dualist theory which emphasizes complete independent existence of domestic law and international law, but has also led to the growing trend in most dualist states under which domestic courts are gravitating towards applying undomesticated treaties without legislative intervention. This trend, which is largely powered by judicial activism is partly founded on the presumption that domestic laws are intended to conform to the relevant international law. Although this presumption forms part of the Nigerian legal system, Nigerian courts have always shied away from taking its advantage in dealing with cases involving undomesticated treaties.⁹⁵ This could be juxtaposed with what obtains in other African countries including Ghana,⁹⁶ Botswana,⁹⁷ Kenya,⁹⁸ and South Africa,⁹⁹ whose courts have repeatedly had recourse to undomesticated treaties while adjudicating on matters before them. It therefore, behoves Nigerian Courts to rise to the challenge and begin to apply this presumption in deserving cases especially now that the National Assembly has tactically thrown its weight behind it through the enactment of the Third Alteration Act,¹⁰⁰ which makes all labour-related treaties justiciable in Nigeria upon ratification, without further legislative intervention. While we commend this revolutionary move by the National Assembly to remove this generational barriers that have precluded Nigerian courts from enforcing most labour treaties, an outright repeal of section 12 of the 1999 Constitution is recommended so that every treaty to which Nigeria is a party shall be justiciable in Nigeria without any legislative intervention.

On the other hand, the Treaties Act, 2004 should be immediately amended to make consultations with the relevant Committees of the National Assembly a mandatory treaty-making procedure in Nigeria. The amendment should also make it mandatory for the MDAs to lay before the floor of the National Assembly any treaty to which Nigeria is a party to not later than thirty days after its ratification. In the same vein, MDAs should be under obligation to deposit to the Federal Ministry of Justice any treaty to which Nigeria is a party to for record purposes, not later than thirty days after its ratification. Finally, the phrase “on any matter on the Exclusive List” in section 1(1) of the Treaties Act should be deleted. This will not only go a long way in clearing the controversies surrounding the exclusivity of the treaty-making power of the Federal Government, but will also bring the Treaties Act in line with the provisions of the Constitution.

⁹⁴ See generally B Atilola, *op cit*, (n. 92).

⁹⁵ *MHWUN v. Minister of Health & Productivity & Ors*, *op cit*, (n.91) at 156.

⁹⁶ *New Patriotic Party v Inspector General of Police* (1993-994) 2GLR 459 at 466. See also *Delmas America Africa Line Inc. v Krisko Products Ghana Ltd* (2005) SCGLR, 75.

⁹⁷ *Dow v. AG* (1999) BLR, 233

⁹⁸ *Rono v Rono* (2005) KLR 538 at 550.

⁹⁹ *De Gree v. Webb* (2007) 5 SA 184

¹⁰⁰ *Op. cit.*, (n. 5).