THE APPLICATION OF INTERNATIONAL LAW IN NIGERIA AND THE FAÇADE OF DUALISM*

Abstract

Section 12 (1) of the Amended Constitution of the Federal Republic of Nigeria 1999 (the 1999 Constitution) provides that no treaty shall have force of law in Nigeria unless it has been enacted into a law of the National Assembly. This provision has been interpreted by the Supreme Court and scholars, alike, to mean that treaties are only applicable in Nigeria if they are enacted into law by the National Assembly. This interpretation gives the impression that Nigeria is a dualist State. This article however argues that, dualism is a façade that ignores the reality of: jus cogens norms that are domestically applicable despite or in spite of national law, customary international law that forms part of national law without being specifically incorporated, self-executing treaties and restriction imposed by international law on national (such as the incapacity of municipal law to vitiate international obligations). In this sense, the article maintains that the generalised position that undomesticated treaties are not applicable in Nigeria misses the point that treaties sometimes codify customary international law. The position also misses the point that treaty provisions may later become, or form part of, customary international law. In another vein, the article examines provisions of the constitution which, allow the operation of self-executing treaties in Nigeria. So, while dualism may represent reality in many cases, it is a mirage in some other instances. The article suggests policy and legal recommendations for a more coherent application of international law in Nigeria.

Key Words: International law, Municipal law, Supreme Court of Nigeria, 1999 Constitution, Treaty, Customary International Law, Dualism, Monism, *Jus cogens*, Self-executing Treaties, Nigeria.

1 Introduction

The Amended Constitution of the Federal Republic of Nigeria 1999 (Amended 1999 Constitution),[1] requires that no treaty shall have force of law in Nigeria except to the extent to which such a treaty has been enacted into law by the National Assembly. This is a classic demonstration of dualist legal traditions which profess that national and international law operate separately. In this tradition, it is taken that international law can only operate in domestic matters after a domestic process has brought international law into the national legal order. Monism, on the other hand, recognises the simultaneous existence of national and international law within the national legal order.

This first part of the article introduces and gives and overview of the subject matter of discussion. The second part highlights the distinction between monism and dualism. The third part demonstrates how dualism is intended by the Amended 1999 Constitution. The fourth part examines the points of intersection of domestic and international law. Here, the article argues that contrary to the separation professed by dualism, national and international law have points of intersection that are not created by national law. At some of these points of intersection, international law operates to determine the legitimacy, validity and effectiveness of national law. The article discusses three of such areas of intersection.

[1] Amended Constitution of the Federal Republic of Nigeria 1999 (Amended 1999 Constitution section 12(1).

First, the article demonstrates how some *jus cogens* norms of international law can operate within the national legal order without being brought into the national legal order by a process of national law. Second, the article highlights the nature of customary international law as such that allows its operation in national legal orders without being expressly enacted into national law. Thirdly, the article examines rules of international law that delimit the capacity of national law in relation to treaty obligations. These three areas demonstrate that international law can function in the national legal order without being incorporated through a domestic process.
In the specific context of the limits to Nigerian dualism, it is pointed out that, certain *jus cogens* norms of international law are directly applicable in Nigeria whether or not the said norms are enacted into law by the National Assembly. These norms create rights and obligations for citizens, residents and all persons in Nigeria. For example, the *jus cogens* norms prohibiting slavery and war crimes such as attacks on civilians during armed conflict are applicable to all persons in Nigeria even if there is no national law relating to the said norms.

Furthermore, it is demonstrated that general rules of customary international law are applicable in Nigeria without being enacted into law by the National Assembly. These rules of customary international law may be codified into treaties. Similarly, treaty rules may crystallise into customary international law. Whatever the case, customary international law is part of Nigerian law and has been applied by the Supreme Court of Nigeria. So, where, customary international law is codified into treaties or crystallised from treaties, the provisions will be applicable in Nigeria. There lies another chink in the armour of dualism in Nigeria. Again, it is submitted that self-executing treaties will operate in Nigeria even without being expressly enacted into Nigerian law. It is shown that the notion of self-executing treaties is recognised by the Amended 1999 Constitution and the constitutional provision relating to self-executing treaties is made notwithstanding the provision for domestication of treaties through National Assembly enactments.

Next, it is argued that a State cannot rely on its own internal law to avoid an international obligation. Nigeria, therefore, cannot rely on the Amended 1999 Constitution to avoid an international obligation. This restrictive power of international law on national is submitted as another highlight of how dualism is a façade. Incidentally, the International Court of Justice as had occasion to refuse the argument that Nigeria's constitution is so important that neighbouring countries should have notice of it.

Following the examination of the limits to dualism, especially in Nigeria, the fifth part of the article made policy and legal recommendations for navigating through the façade of dualism. Finally, the sixth part of the article concludes with some parting thoughts. Throughout the article, the domestic law of a country is variously described as municipal law, national law and internal law. The discussions and recommendations relate to treaties in force for Nigeria and they are submitted in the philosophical context of "doctrinal constructivism which aims at a systematic exposition of the law,"[2] as against "critical positivism openly engages in teleological interpretation and allows room for non-legal considerations to inform interpretation and construction of the law." [3]

1.1 Monism and Dualism

[2] I Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *European Journal of International Law* . 2012, pp.1143.
[3] i*bid.*

Monism and dualism are two approaches to relating municipal and international law. The two approaches hold different views of how international law exists and functions within national legal systems.

1.1.1 Monism

Monism stipulates that international and municipal law co-exist in the national legal order. In monist legal orders "the State's legal system is considered to include international treaties without the need for separate, domestic-level action."[4] In this regard, the legal principles, rules and norms in a national system include those of domestic law alongside those derived from international law. In the monist school, the basic position is that national and international law harmoniously coexist in the national legal order.[5]

Some proponents of monism posit that there is a hierarchical arrangement of law involving international and municipal laws within the same legal system. Some in this school of thought posit that international law is superior to national law while others oppose this view. The monist view that international is superior to domestic law requires that international law will prevail in any conflict with domestic law, including domestic law of a constitutional character.[6]

Naturally, the opponents accept the concept of hierarchical arrangement of national and international laws in the same legal system. Their point of departure is in their view that national law is superior to international law.[7] What remains constant in the monist approach is that international law is deemed to be "automatically incorporated into each nation's legal system."[8]

Other proponents of monism argue that domestic and international law are interwoven in such a manner that there is no hierarchical relationship between the two. The idea is that there is a universal order where domestic and international elements "penetrate each other"[9]Argument has been made that international law should invalidate inconsistent national law.[10] This is brought to the fore in Cassese's 'moderate monism'[11]

1.1.2 Dualism

In the dualist legal order, a treaty can have domestic legal effect only where steps prescribed by national law are taken to deliberately infuse the treaty into domestic law. So, for "international

[4] J E. Lord and M A Stein, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' 83 *Washington Law Review* 449.

[5] R R. Ludwikowski, 'Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy' 9 *Cardozo Journal of International & Comparative Law* , 2001,pp.253-296 at 256.

[6] C A Bradley, 'Breard, Our Dualist Constitution, and the International Conception' 51 *Stanford law Review,* (1999) p.529.

[7] Rett R. Ludwikowski (n 6).

[8] C A Bradley, 'Breard, Our Dualist Constitution, and the International Conception' (1999) 51 S*tanford law Review 529.*

[9] Rett R. Ludwikowski (n 6).

[10] A Cassese, 'Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?', *Realising Utopia, the Future of International Law* (Oxford University Press 2012) p187.

[11] F Francioni, 'From Utopia to Disenchantment: The Ill Fate of "Moderate Monism" in the ICJ Judgment on The Jurisdictional Immunities of the State' (2102) 23 E*uropean Journal of International Law* 1125-1132 at 1126.

law to be applicable in the national legal order, it must be received through domestic legislative measures."[12] These domestic measures transform international law into national law. [13]

Dualism opposes monism. The Dualists maintain that international and municipal have a separate and parallel existence. To the dualists, municipal law regulates the relationship between persons and entities within the territory of the State while international regulates the relationships of members of the international community which includes States and intergovernmental organisations.[14]

Thus, from the dualist view "international and domestic law are distinct, each nation determines for itself when and to what extent international law is incorporated into its legal system and the status of international law is determined by domestic law."[15] In the dualists' world, domestic law determines the applicability of international law.[16]

The dualist position is well summarised by Oppenheim as follows:

> "…Neither can International Law per se create or invalidate Municipal Law, nor can Municipal Law per se create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches-but separate branches--of the tree of law. Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become *ipso facto* rules of Municipal Law."[17]

In all, dualism does not recognise that, norms and rules of international law can operate directly in the domestic legal system. Rather than operate directly, the norms and rules must be transformed or incorporated into the national legal order before they can confer rights and obligations on persons or entities within the territory of a sovereign State. The next part of this article highlights constitutional dualism in Nigeria.

2 Dualism in the Nigerian Constitutional Requirement for Domestication of Treaties

The Amended Constitution of the Federal Republic of Nigeria 1999, (the 1999 Constitution) 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."[18]

About 20 years ago, this constitutional provision was considered by the Supreme Court of Nigeria in the case of *Abacha v Fawhinmi*.[19] In that case, the Respondent at the Supreme Court was Chief Gani Fawehinmi who was arrested without warrant at his Lagos residence on

[12] R F Oppong, 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa' 30 *Fordham International Law Journal*, 2006, pp. 296 at 298.

[13] ibi*d.*

[14] ibi*d.*

[15] Curtis A Bradley (n 7).

[16] D Sloss, 'Non-Self-Executing Treaties: Exposing a Constitutional Fallacy' (2002) 36 U.C. *Davis L. Rev*. pp.1-81 at 10.

[17] M McDougal, 'The Impact of International Law Upon National Law: A Policy Oriented Perspective' (1959) 4 *South Dakota Law Review* 25-91.

[18] Section 12(1) 'Constitution of the Federal Republic of Nigeria'.

[19] *Abacha v Fawehinmi* [2000] 6 NWLR Part 660 p 228.

Tuesday, January 30th, 1996 at about 6 a.m., by 6 men who identified themselves as operatives of the State Security Service (SSS) and the Nigerian Police Force. The Respondent (who was the Applicant at the Federal High Court and Appellant at the Court of Appeal) was taken away to the Lagos office of the SSS at where he was detained. He was later transported to Bauchi State where he was detained at the Bauchi prisons. He was not informed of, nor charged with, any offence.

Dissatisfied with the arrest and detention, he applied through his counsel, to the Lagos Division of the Federal High Court, for the enforcement of his fundamental human rights. He sought to sets of reliefs from the court. In the first set, he requested the Court to declare that his arrest and detention was illegal and contrary to the Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPR Act). The second set of reliefs, sought as an alternative to the first, requested the Court to issue an order of mandamus compelling the respondents to arraign him before a properly constituted Court or Tribunal as required by Article 7 of the ACHPR Act.

The Appellants (who were Defendants at the Federal High Court and Respondents at the Court of Appeal), raised a preliminary objection to the jurisdiction of the Court. In allowing the preliminary objection and striking out the Appellant's case, the Court decided that the Inspector-General of Police had power to detain a person by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 as amended by the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1994. In specific reference to the ACHPR Act, the Court decided that any of the provisions of the African Charter on Human and peoples' Rights which was inconsistent with the Constitution (Suspension and Modification) Decree No. 107 of 1993 was void to the extent of its inconsistency.

The Court held in addition that, "the African Charter on Human and Peoples' Rights has no legs to stand on its own under the Nigerian law. It cannot be enforced as a distinct law. As such, it is subject to our domestic law and ouster decree."[20]The matter was taken to the Court of Appeal which partly allowed the appeal and remitted the case to the Federal High Court for trial in respect of detention of the Respondent on days that were not covered by any detention order. In arriving at this conclusion, the Court of Appeal held that the learned trial judge was right in coming to the conclusion that the Inspector-General of Police was "empowered to issue a detention Order under the provisions of Decree No. 2 of 1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of section 4 of Decree No. 2 of 1984 as amended and Decree No. 11 of 1994, the jurisdiction of the court is ousted to entertain the appellant's case."[21]

With specific reference to the ACHPR Act, the Court of Appeal held that "it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 11 of 1994 cannot affect its operation in Nigeria." It held further that the provision of the ACHPR Act "are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military Government is not legally permitted" [22] to legislate its way out of its international obligations.

[20] *Abacha v Fawehinmi* [2000] 6 NWLR Part 660 at page 286.
[21] *Abacha v Fawehinmi supra* at page 287 para B.
[22] *Abacha v Fawehinmi supra* at page 287 para D.

On appeal, the Supreme Court, among other things, considered the ACHPR Act in the light of section 12 (1) of the 1979 Constitution of the Federal Republic of Nigeria which is reproduced verbatim in section 12 (1) of the 1999 Constitution. The said section of the 1979 Constitution provided 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."[23]

Among others, the Supreme Court held that "before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts" [24] The Supreme Court quoted with approval, the decision of the Privy Council in *Higgs & Anor. V. Minister of National Security & Ors,*[25] where it was held that:

> "In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. 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 citizen' right and duties in common or statute law. They might have an indirect effect upon the construction of statues or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty."

The Supreme Court further held that where, a treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the ACHPR Act, the treaty becomes binding and our Courts must give effect to it like all other laws falling within the judicial power of the Courts. Since the ACHPR Act was a part of the laws of Nigeria, the Supreme Court held that "like all other laws the Courts must uphold it."

On the question of hierarchy, the Supreme Court held that the ACHPR is not superior to the Constitution, nor can its international flavour prevent the National Assembly, from removing it from the body of Nigerian municipal laws by simply repealing the ACHPR Act. The Supreme Court further held that the validity of another statute is not necessarily affected by the mere fact that it violates the African Charter or any other treaty. However, if there is a conflict between the ACHPR Act and another statue, its provisions will prevail over those of that other statue for the reason that it is presumed that the legislature does not intend to breach an international obligation. This is probably what was meant in *Oshevire v British Caledonian Airways,*[26] where the Court of Appeal held that any domestic legislation in conflict with international conventions is void.

The Supreme Court, in *Abacha v Fawehinmi,* also relied on the case of *Chae Chin Ping v. United States,*[27] where it was held that treaties are of no higher dignity than acts of Congress, and may be modified or repealed by Congress. Whether such modification or repeal is wise or just is not a judicial question. Although section 12(1) of the Amended 1999 Constitution deals with treaties between Nigeria and other States, its purport extends to treaties between Nigeria and International Organisations.

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[23] Section 12(1) 1979 'Constitution of the Federal Republic of Nigeria' (n 19).
[24] *Abacha v Fawehinmi* [2000] 6 NWLR Part 660.
[25] *Higgs & Anor. V. Minister of National Security & Ors.* The Times of December 23, 1999.
[26] (1990) 7 NWLR part 163, 519-520.
[27] *Chae Chin Ping v. United States 130 US. 181.*

The position advanced by section 12 (1) of the Amended 1999 Constitution is similar to what obtains in some other, apparently, dualist countries. The Supreme Court of the United Kingdom (House of Lords) stated, in the case of *Maclaine Watson v Department of Trade and Industry*, that "… a treaty is not part of English law unless and until it has been incorporated into the law by legislation."[28] The position in the United Kingdom is given by Malcom Shaw as follows:

> The Crown in the UK retains the right to sign and ratify international agreements, but is unable to legislate directly. Before a treaty can become part of English law, an Act of Parliament is essential."[29] "

3 Intersections of International and Municipal Law that Diminish Dualism

In the dualist legal tradition, it is taken that international and municipal law operate at different planes. As a result, it is professed that, international law requires the permission of national law before it can confer rights and obligations within the State. Under the Amended 1999 Constitution, permission to have domestic effect is conferred by the National Assembly through the enactment treaties into Nigerian law.

Contrary to the dualists' position, international and municipal law sometimes intersect without the permission of national law. Indeed, the intersection may occur regardless of, or despite, the express interdicting demand of national law. Dualism is diminished at every point where international law operates in, or on, the national legal order without being brought in by national law. The diminishing effect is strongest at points where international law limits national law by invalidating or delegitimizing certain species of national law. This article now looks at three areas where international law intersects with national law in a manner that diminishes dualism so much that dualism becomes nothing more than a façade.

3.1 *Jus Cogens* Norms that Restrain the Ambit of National Legislation

In international law, j*us cogens* norms are those from which no derogation is allowed.[30] A norm of *jus cogens* only becomes inoperable if it is changed by another norm of *jus cogens*. "A rule does not become *jus cogens* until the international community as a whole recognises it as a rule that permits no derogation."[31] *Jus cogens* norms include the prohibition of serious violations of international humanitarian law (war crimes),[32] genocide, slavery and torture.[33]Although these

[28] [1989] 3 All ER 523, 544–5; 81 ILR, p. 701. See also *Littrell* v. *USA (No. 2)* [1995] 1WLR 82. But see R. Y. Jennings, 'An International Lawyer Takes Stock', 39 *ICLQ*, 1990, pp. 513, 523–6.

[29] M N Shaw, *International Law* (6th edn, Cambridge University Press 2009) p 149.

[30] For an insight to the development of the concept of *jus cogens* and its relationship with natural law and positivism, see G M Danilenko, 'International *Jus Cogens:* Issues of Law-Making' (1991) 2 *Eur. J. Int'l L.* 42-65.

[31] E Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15 *Eur J Int Law* 97-121 at 110.

[32] A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 *Eur J Int Law* 59-88 at 67.

[33] The insinuation is frequently made that the use of 'waterboarding' by agents of the Government of USA indicates that the USA does not recognise the prohibition of torture. In reality, US courts have recognised the *jus cogens* status of the prohibition of torture. See the cases of *Siderman de Blake v. Republic of Argentina,* 965 F. 2d 699 (9th Cir. 1992) Cert. Denied, *Republic of Argentina v. De Blake,* 507 U.S. 1017,123L. Ed. 2d 444,
113 S. Ct. 1812 (1993); *Committee of U.S. Citizens Living in Nicaragua v. Reagan,* 859 F. 2d 929, 949 (D.C. Cir. 1988); Xuncax et al. v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah,* 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9th Cir. 1992) Cert. Denied, Marcos

norms arise from international law, they can operate to override state sovereignty.[34] In the case of *Prosecutor v Anto Furundzija*,[35] the International Criminal Tribunal for former Yugoslavia (ICTY), among other things, considered the effect of the *jus cogens* nature of the prohibition of torture and held that:

> "The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture."[36]

So, if for example, the Nigerian National Assembly in the exercise of Nigerian sovereignty makes a law that is contrary to the norms of *jus cogens* that prohibit war crimes, genocide and slavery, such a law of the National Assembly would be delegitimised by its violation of the *jus cogens* norm.[37] The procedural validity of the process by which the law is made would not make the law legitimate, so long as it violates *jus cogens* norms.

Ordinarily, in the dualist legal tradition, Nigerian law relating to war crimes, genocide, torture, slavery etc should operate domestically. International norms relating to the same issues should only operate within the national legal order if incorporated, transposed or otherwise brought into the domestic realm through an Act of the National Assembly.

In reality, however, the *jus cogens* norms relating to the prohibition of war crimes, genocide, torture, slavery etc are operative within the Nigerian legal order, even in the absence of a national legislation relating to the said norms. What is more, any norm or enactment of Nigerian law that violates these *jus cogens* norms would be delegitimised, invalid and legally ineffective. Here the intersection of *jus cogens* norms with norms of Nigerian law highlights the limits of dualism. The *jus cogens* norms of international law used in this illustration will operate in Nigeria whether or not they are incorporated or transposed into Nigerian law.

Similarly, if Nigeria enters into a treaty with another State, but the treaty violates a norm of *jus cogens*, for example those mentioned above in relation to war crimes, genocide, slavery, and torture; such a treaty would be invalid to the extent of inconsistency with the *jus cogens* norms in issue. The fact that such a treaty has been domesticated pursuant to section 12(1) of the Amended 1999 Constitution would not make it valid. Here again, we see the façade of dualism in the ineffectiveness of national legislation which seeks to domesticate an invalid treaty.

Nazi-Germany presents a real-life illustration. During the reign of German Nazis, there were domestic laws, that allowed the genocide, slavery and torture of some German citizens on account of their ancestry.[38] While these domestic laws might have been formally valid within the prevailing German municipal law, they were contrary to *jus cogens* norms of international law and were therefore illegitimate. Irrevocably, the type of *jus cogens* norms exemplified by war

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Manto v. Thajane, 508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993) cited in the case of Prosecutor v Anto Furundzija Case No. IT-95-17/1-T note 170

[34] C Chinkin, '*Jus Cogens*, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution Symposium: Post-ILC Debate on Fragmentation of International Law' (2006) 17 Finnish Y.B. Int'l L. 63-82 at 68.

[35] *Prosecutor v Anto Furundzija* Case No. IT-95-17/1-T.

[36] *Prosecutor v Anto Furundzija* Case No. IT-95-17/1-T para 155.

[37] Cf Erika de Wet (n 32).

[38] See list in Law No 1 from the Control Council for Germany (Berlin, 30 August 1945) available at http://www.cvce.eu/obj/law_no_1_from_the_control_council_for_germany_berlin_30_august_1945-en-9d0c13eb-88f0-4158-8c78-a544b48f0b61.html visited on 10/03/2020

crimes, genocide and slavery are such that impose obligations and rights on individuals. The individual citizen of the State has the international obligation not to participate in war crimes, torture, genocide and slavery. This international law obligation creates the right of the individual to refuse a command directing him/her to engage in the prohibited conduct of war crimes, genocide and slavery regardless of any contrary demand of municipal law.

3.2 Customary International Law Operating Within a Country's Territory

Unlike treaties which are usually in writing,[39] customary international law is largely unwritten because of the manner of its formation.[40] However, principles of customary international law are sometimes codified in treaties. It is also sometimes the case, that treaty provisions crystallise into customary international law. Generally, unlike treaties, principles of customary international law are not negotiated and formally agreed upon. Rather customary international law principles develop from the practice of States which practices are taken by States to be legally obligatory.

So, when principles and rules of customary international law evolve from the activities of States (State practice), such principles do not fall within the definition of treaty as contemplated by section 12 of the 1999 Constitution. In effect, there is no provision of the 1999 Constitution that requires the domestication of customary international law. The question then arises as to the applicability and status of customary international law in Nigeria.

In the case of *Abacha v Fawehinmi*, the Supreme Court relied on principles of customary international law which had been codified in the Vienna Convention on the Law of Treaties (VCLT) 1969. Nigeria deposited its instrument of ratification of the VCLT in 1969, however, unlike treaties such as the ACHPR and the VCDR, there is no law of the National Assembly that domesticates the VCLT. The non-domestication of the VCLT did not stop the Supreme Court from relying on its provisions. In particular, the Supreme Court per Achike JSC (as he then was) rejected the argument that a treaty is a "mere contract as understood under contract law."[41] Instead the Supreme Court relied on the definition of treaty in the VCLT and defined a treaty in the exact terms of the VCLT as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"[42]

In distinguishing a treaty from a mere contract, the Supreme Court drew a line between agreements between states which is subject to and governed by the national law of contract from an international agreement which is subject to and governed by the international law.[43] It can be surmised from the ILC commentaries that the definition of treaty in Article 2 of the VCLT is a definition grounded in customary international law. This being the case, the Supreme Court relied on a customary international law definition of treaty albeit embodied in the VCLT.

Another, and perhaps more obvious, indication that customary international law is applicable in Nigeria is the direct reliance on principles of customary international law by the Supreme Court in *Abacha v Fawehinmi*. The Supreme Court examined the idea of subject of

[39] An international agreement may be unwritten. Such an unwritten international agreement is ordinarily not governed by the VCLT. Nothing however stops the parties from agreeing to subject their agreement to the VCLT.

[40] In simple terms, customary international law is formed by the synthesis of state practice and *opinion juris*. See for example J Pearce, 'Customary International Law - Not Merely Fiction or Myth' (2003) 2003 *Austl. Int'l L.J. pp.*125-140.

[41] *Abacha v Fawehinmi* [2000] 6 NWLR Part 660 at page 340 para B.

[42] Vienna Convention on the Law of Treaties 1969, Article 2.

[43] See Commentary 6 on Article 2, International Law Commission Commentaries on the Law of Treaties, Yearbook of the International Law Commission, 1966, vol. II.

international law within the prism of customary international law and held that "under strict customary international law, individuals are not subjects of international law…"[44] Although the status of individuals in international law has evolved, what is most relevant to the present discussion of dualism is that the Supreme Court of Nigeria relied directly on customary international law in determining the rights and obligations of parties to a suit.

The manner in which the Supreme Court applied customary international law is not the same manner in which foreign law is applied. Ordinarily, foreign law is a matter of fact which must be proved. Therefore, in a conflict of laws situation, a party relying on foreign law would have to present evidence of its existence, for example a statute book, before it is applied by the Nigerian Courts. However, in *Abacha v Fawehinmi*, there was no requirement to present evidence of the existence of either customary international law in general or the specific principles of customary international law relied upon by the Supreme Court. Instead, the Supreme Court directly applied principles of customary international law in the same way the Court would have applied any other principle of any other aspect Nigerian law. This is, therefore, a basis to conclude that customary international law is applicable in Nigeria and forms part of the Nigerian legal order.

It is worth mentioning that legal systems of Commonwealth States have generally followed the approach of the United Kingdom where "customary international law is an integral part of national law."[45] In some Commonwealth States, customary international law is specifically incorporated in their Constitution while others do not specifically provide for customary international law.[46] In either event, the reality is that their national laws include customary international law. The inclusion of customary international law, as part of the laws of the land, goes to show that dualism is not as concrete as it may appear from afar. On detailed scrutiny, dualism is actually a façade.

3.3 Self-Executing Treaties

To borrow from the American tradition, "a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress."[47] On the other hand a non-self-executing treaty, "may not be enforced in the courts without prior legislative "implementation." [48] The operation of self-executing treaties diminishes the concept of dualism; at least to the extent that they may be domestically applied without any additional or enabling Act of the legislature.

In view of section 12 of the 1999 Constitution, the question arises as to whether the Nigerian legal order admits of self-executing treaties. The existence and effect of self-executing treaties is always a thorny issue for scholars and courts alike.[49] In Nigeria, prior to the year 2010, the position of self-executing treaties was a bit difficult to answer with constitutional authority. However, with the third alteration to the 1999 Constitution,[50] the National Industrial

[44] *Abacha v Fawehinmi* [2000] 6 NWLR Part 660 at page 314 para D.
[45] E Denza, 'The Relationship Between International and National Law', *International Law* (Oxford University Press, 2006) p 435.
[46] i*bid.*
[47] V C Manuel, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 Am. *J. Int'l. L*. 695-723 at 695.
[48] ib*id.*
[49] See C M Vázquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties', (2008) 122 *Harv L Rev* 599. Cf. David H. Moore, 'Law (Makers) of the Land: The Doctrine of Treaty Non-Self Execution' [2009] H*arv L Rev* 32.
[50] Section 5, Constitution of the Federal Republic of Nigeria (Third Alteration Act) 2010.

Court is empowered to exercise jurisdiction and power over matters involving labour or labour-related treaties. This is reflected in the Amended 1999 Constitution which stipulates that:

> "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."[51]

Section 254 C of the Amended 1999 Constitution expressly confirms the primacy of its provisions over any other constitutional provision that may conflict with it. This is achieved by using the phrase "*Notwithstanding anything to the contrary in this Constitution.*" Provisions of the constitution are intrinsically of equal strength. No provision is superior or inferior value to another.[52] This is, however, not to say a provision may not be expressly made subject to or notwithstanding another provision.[53] A statutory provision is made notwithstanding another where it is meant achieve its purpose by excluding the impinging or impeding effect of another provision. A provision is subject to another where it is restricted by that other provision.[54] Thus, notwithstanding section 12 of the Amended 1999 Constitution, the National Industrial Court may apply labour or labour-related treaties. These labour or labour-related treaties are therefore self-executing in Nigeria.

It may appear that section 12 of the Amended 1999 Constitution is not excluded by its section 254C since, the labour or labour-related treaties in operation are those *which Nigeria has ratified*. This brings us to the matter of whether treaty ratification is the same as passing legislation to give effect to a treaty.

3.3.1 Ratification in Relation to Section 12 of the Amended 1999 Constitution

The process prescribed by section 12 of the 1999 Constitution is sometimes wrongly described as ratification. Based on this erroneous description of the section 12 process, it is wrongly argued that a treaty does not have force of law until it is ratified. As provided in the Vienna Convention on the Law of Treaties 1969 (cited with approval in *Abacha v Fawehinmi*), "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."[55]

The process of legislative incorporation of a treaty into the corpus of national law is a "purely domestic process."[56] Ratification on the other hand, is an international act that consists of "(1) the execution of an instrument of ratification by or on behalf of the State and (2) either its exchange for the instrument of ratification of the other State (bilateral treaty) or its lodging with the depositary of the treaty (multilateral treaty)"[57]

Therefore, two events need to coincide for a treaty to be ratified for Nigeria. First, the instrument of ratification has to be executed by or on behalf of Nigeria. Second, the instrument

[51] Section 254 C (2) Amended 1999 Constitution.
[52] *INEC v Musa* [2003] 3 NWLR part 806 p 72 at 201 paras A-B
[53] *NDIC v Okem Ent. Ltd* [2004] 10 NWLR Part 880 p 107 at 182 para H and 183 pare A-E
[54] *NDIC v Okem Ent. Ltd* [2004] 10 NWLR Part 880 p 107 at 182 para H and 183 pare A-E
[55] Vienna Convention on the Law of Treaties, Article 2(1) (b).
[56] A Anthony, *Handbook of International Law* (Cambridge University Press, 2001) p 60.
[57] *ibid.*

of ratification is exchanged with the other State (bilateral treaty) or it is lodged with the depositary of the treaty (multilateral treaty). Ratification is not the same as domestication.

The confusion relating to treaty ratification sometimes extends to the "misconception that once a treaty is ratified, it becomes legally binding on the ratifying State."[58] In reality, "ratification does not make a treaty binding on the State unless and until the treaty has entered into force for that State"[59] As stipulated by the Vienna Convention on the Law of Treaties, "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."[60] Ways in which a treaty may come into force include on a date specified by the treaty; on signature by both or all parties; on ratification by all parties; on ratification by a specified minimum number of States; on notification of completion of constitutional requirements etc.[61]

If the treaty does not contain provisions stipulating when it will come into force, the treaty will enter "into force as soon as consent to be bound by the treaty has been established for all the negotiating States."[62]

3.4 Incapacity of Municipal Law to Vitiate International Obligations

While dualism as intended by section 12 of the Amended 1999 Constitution works to separate municipal from international law, certain principles of treaty interpretation and application operate to render the separation ineffective. In the context of section 12 of the Amended 1999 Constitution, one of the most important of these principles came up in the Case concerning the Land and Maritime Boundary Between Cameroon and Nigeria. The case is widely known in Nigeria as the Bakassi case.

Nigeria and Cameroon are neighbours but had a longstanding dispute relating to boundaries including delineation of straddling villages.[63] Sometime in 1992, they submitted the dispute to the International Court of Justice (ICJ). The ICJ, among other things, considered the argument by Nigeria that the Maroua Declaration of 1975, which is a treaty entered into by the two States, was not valid. Nigeria assailed the validity of the treaty on the ground that it "was never approved by the Supreme Military Council in contravention of Nigeria's constitutional requirements."[64] In 1975, the Supreme Military Council was the Federal law-making body, just as the National Assembly is the Federal law-making body under the Amended 1999 Constitution.

The ICJ rejected the argument that the treaty in issue could be subject to Nigerian Constitutional law. The Court emphasised the provision of the VCLT that a state may not "invoke the provisions of its internal law as justification for its failure to perform a treaty."[65] In effect, Nigeria's 1975 constitutional demanded that obligations should not arise in relation to the Maroua Declaration. However, international law in the form of the VCLT and others negated the demands of Nigeria's constitutional law and confirmed the obligations that Nigeria had accepted by signing the Maroua Declaration.

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[58] i*bid.*
[59] ib*id.*
[60] Vienna Convention on the Law of Treaties, Article 24(1).
[61] A Anthony (n 56).
[62] Vienna Convention on the Law of Treaties, Article 24(2).
[63] G Oduntan, 'The Demarcation of Straddling Villages in Accordance with the International Court of Justice Jurisprudence: The Cameroon-Nigeria Experience' (2006) 5 *Chinese Journal of International Law* pp.79 - 114 at 83.
[64] *Cameroon v. Nigeria* (Case concerning the Land and Maritime Boundary Between Cameroon and Nigeria) (Judgment) (2002) page 109 available at https://www.icj-cij.org/en/case/94/judgments visited 12 March 2020.
[65] Vienna Convention on the Law of Treaties, 1969, Article 27.

International law provides that if a rule of internal law is objectively evident and of fundamental importance then its violation may invalidate the consent to be bound by a treaty.[66] It is, therefore, tempting to make the erroneous argument that section 12 (1) of the Amended 1999 Constitution is of fundamental importance and should be objectively evident to other States negotiating treaties with Nigeria. Nigeria's lawyers in the 'Bakkasi case' could not resist this temptation and argued that "States are normally expected to follow legislative and constitutional developments in neighbouring States which have an impact upon the inter-State relations of those States, and that few limits can be more important than those affecting the treaty-making power."[67]

With particular reference to Article 46 of the VCLT, it was argued on behalf of Nigeria that:

> "Cameroon, according to an objective test based upon the provisions of the Vienna Convention, either knew or, conducting itself in a normally prudent manner, should have known that the Head of State of Nigeria did not have the authority to make legally binding commitments without referring back to the Nigerian Government – at that time the Supreme Military Council - and that it should therefore have been "objectively evident" to Cameroon, within the meaning of Article 46, paragraph 2, of the Vienna Convention on the Law of Treaties."

This same argument can be made (erroneously) today by subsisting the Supreme Military Council with the National Assembly.

Disagreeing with the argument presented by Nigeria, the ICJ held that *inter alia* that:

> "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States."[68]

To the extent that international law disallows national law from avoiding treaty obligations, international law restrains national law in relation to the acquisition of treaty rights and obligations. The restrictive power of international law on national is another highlight of how dualism is a façade. If truly international law and national law operate in different realms and do not inter-relate within the national legal order, then international law would not have the capacity to restrict national law in relation to treaty obligations.

4. Policy and Legal Recommendations

Generation after generation of Nigerian lawyers have inculcated the position that unless enacted into law by the National Assembly, no treaty provision or rule of international law has legal effect in Nigeria. As demonstrated in part 4 above, this position does not reflect the reality in relation to *jus cogens* norms, customary international law and incapacity of municipal law to

[66] Vienna Convention on the Law of Treaties 1969, Article 46.

[67] *Cameroon v. Nigeria* (Case concerning the Land and Maritime Boundary Between Cameroon and Nigeria) (Judgment) (2002) page 427 para 258 available at https://www.icj-cij.org/en/case/94/judgments visited 12 March 2020.

[68] *Cameroon v. Nigeria* (Case concerning the Land and Maritime Boundary Between Cameroon and Nigeria) (Judgment) (2002) page 131 para 266 available at https://www.icj-cij.org/en/case/94/judgments visited 12 March 2020.

vitiate international obligations. It is, therefore, necessary to orientate students and practitioners that international obligations do not revolve around Nigerian constitutional law.

Although international obligations do not revolve around Nigerian constitutional law, agents representing Nigeria in treaty negotiations are at liberty to give life to relevant provisions of Nigerian constitutional law especially section 12(1) of the Amended 1999 Constitution. This can be done by expressly notifying negotiating parties of section 12(1) of the Amended 1999 Constitution and adapting the provisions into the terms of treaties entered into by Nigeria.

There are several treaties that have entered into force for Nigeria but have not been enacted into law by the National Assembly. This will limit the negotiating space of an agent of Nigeria who seeks to adopt the provisions of section 12(1) of the Amended 1999 Constitution into the terms of a treaty.

It is therefore necessary to, first, compile the full list of treaties in force for Nigeria. Second, the National Assembly needs to work with relevant stakeholders to enact relevant treaties into law. While the list of treaties may be drawn up from readily discoverable sources, such as the Federal Ministry of Justice, the list of customary international law rules applicable in Nigeria is not so readily made.

Nevertheless, it will be a great contribution to the administration of justice and coherent foreign policy to have a list of customary international law rules binding on Nigeria. The list would also create the platform for taking steps for reversing rules that are unsuitable to Nigeria or for taking steps to avoid further development of unfavourable rules.[69]

Clarity is one of the main hallmarks of good legislation. It is therefore necessary to clarify Section 254C of the Amended 199 Constitution by expressly listing the treaties it covers. In addition, the international standards, best practices etc that are applicable in the National Industrial Court should be listed and spelled out. Naturally, the list may be modified from time to time.

5. Conclusion

Certain provisions of international law are applicable in Nigeria even where they have not been enacted into law by the National Assembly. This indicates that dualism is a façade, at least in those areas where international law operates without being expressly brought in by national law. For reasons of foreign policy or otherwise, it is legitimate for a sovereign State to seek to achieve the kind of protection that can be engendered by provisions such as those contained in section 12(1) of the Amended 1999 Constitution. However, for such provisions, to have any impact on treaty obligations, they must be incorporated into the treaty negotiation and drafting processes.

[69] See generally the processes for formation of customary international law which can work in rule making and unmaking. A R Ferreira and others, 'Formation and Evidence of Customary International Law' 1 *United Nations Journal* , 2013,*p*p 182-201.