NEAR EAST UNIVERSITY
INSTITUTE OF GRADUATE STUDIES
DEPARTMENT OF INTERNATIONAL LAW

THE PLACE OF INTERNATIONAL TREATIES IN THE PROCESS OF NIGERIAN LEGAL SYSTEM REFORMS AND DEVELOPMENT: THEORIZATION OF INCOPORATION/SUBJUGATION

PhD THESIS

Bello USMAN ALIYU

Nicosia

June, 2023

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PhD THESIS

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Approval

We certify that we have read the thesis submitted by "Bello Usman Aliyu" titled **"The Place of International Treaties in the Process of Nigerian Legal Systems Reforms and Development: Theorization of Incorporation/subjugation** and that in our combined opinion it is fully adequate, in scope and in quality, as a thesis for the degree of PhD of International Law.

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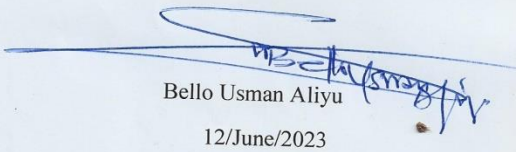
I hereby declare that all information, analysis and results in this thesis have been collected and presented according to the academic rules and ethical guidelines of Institute of Graduate Studies, Near East University. I also declare that as required by these rules and conduct, I have fully cited and referenced information and data that are not original to this study.



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Soyut

Nijerya Hukuk Sistemi Reformları ve Gelişimi Sürecinde Uluslararası Antlaşmaların Yeri: Birleşme/Boyun Kuramsallaştırması

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Federal Nijerya Cumhuriyeti (Nijerya), çoğu teamül hukuku devleti gibi, Uluslararası hukuka yaklaşımında "İkici" düşünce okuluna bağlıdır. Bu nedenle, Nijerya ile Uluslararası hukukun diğer konuları arasında geçerli bir şekilde akdedilmiş olan Uluslararası anlaşmalar, bu nedenle yasal müdahale (Evcilleştirme/Birleşme) olmaksızın Nijerya yasalarının bir parçası veya bağlayıcı hale gelmez. Antlaşmalar, Nijerya'nın iç yasalarının önemli bir kaynağını oluşturur ve ülkeye sözleşmesel anlamda bazı bağlayıcı sorumluluklar verir, ancak, Nijerya'da 'düalist' bir devlet olarak yürürlüğe girmeden önce uluslararası antlaşmaların iç hukuka uygun hale getirilmesi gerekliliği, düzeni sağlamak için kullanılan bir araç gibi görünmektedir. Onaylanmış ancak üzerinde durulmamış anlaşmalarda yer alan yükümlülüklerden kaçınmak ve bu, bu tür anlaşmaların Nijerya hukuk sisteminin gelişiminde oynadığı rolü olumsuz yönde etkiler. Nijerya yasaları hiyerarşisinde hem evcilleştirilmiş hem de evcilleştirilmemiş anlaşmaların konumu üzerine çalışmalar yürütülürken, şu gibi bazı ilgili soruların üzerini örttüler: Nijerya'nın uzlaşmayla imzaladığı anlaşmalar neden onaylanmalıdır? Uluslararası anlaşmaların içeriklerinin yaptırım sağlama yetenekleri neden sınırlıdır? Nijerya'nın uluslararası anlaşmaları kötü uygulamalarının ardındaki başlıca nedenler nelerdir? Nijerya yükümlülük altına girmeden anlaşma yükümlülüklerini ne zaman ve nasıl ihlal edebilir? İçerik ve bağlamsal analize tabi tutulan hem birincil hem de ikincil veri kaynaklarına dayanan çalışma, literatürdeki boşluğu doldurmak amacıyla bu tür cevaplanmamış soruları incelemek için nitel ve doktrinsel araştırma yöntemlerini kullanır. Çalışma, uluslararası anlaşmaların dahil edilmesinin Nijerya'nın iç yasalarının uluslararası hukukun üstünlüğüne tabi kılınmasına yol açıp açmadığını belirlemek için hem analitik hem de ampirik araştırma tasarımlarını kullanıyor. Çalışma, uluslararası anlaşmaların Nijerya yargı ve hukuk sistemi reformları ve gelişimi süreçlerinde bazı önemli roller oynadığı sonucuna varmaktadır.

Anahtar Kelimeler: - Kalkınma, Şirketleşme, Uluslararası Antlaşmalar, Nijerya Hukuk Sistemi, Reformlar, Boyun Eğme.

Abstract

The Place of International Treaties in the Process of Nigerian Legal System Reforms and Development: Theorization of Incorporation/Subjugation

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June, 2023

The Federal Republic of Nigeria (Nigeria) like most common law states, adheres to the "Dualist" school of thoughts in its approach to International law. Thus, International treaties which were concluded validly between Nigeria and other subjects of International law do not by that virtue become binding or part of Nigerian laws without legislative intervention (Domestication/Incorporation). Treaties constitute a major source of Nigeria's domestic laws and confer on the country some binding responsibilities in a contractual sense, however, the requirement for domestication of international treaties before becoming enforceable in Nigeria as a 'dualist' state appears to be a tool used in order to avoid obligations contained in ratified but undomesticated treaties, and this impacts negatively on the role that such treaties play in the development of Nigerian legal system. While studies have been conducted on the position of both domesticated and undomesticated treaties in the hierarchy of Nigerian laws, they have glossed over some pertinent questions such as: why must treaties which Nigeria consensually entered be ratified? Why are the contents of international treaties limited in their ability to achieve enforcements? What are the major reasons behind the poor implementations of international treaties by Nigeria? When and how can Nigeria breach its treaty obligations without incurring liabilities? Relying on both primary and secondary sources of data subjected to content and contextual analysis, the study uses qualitative and doctrinal research methods to examine such unanswered questions with a view to bridging the gap existing therein the literature. The study uses both analytical and empirical research designs to as well determine whether incorporation of international treaties leads to the subjugation of Nigeria's domestic laws to the supremacy of international law. The study concludes that international treaties play some significant roles in the processes of Nigerian judicial and legal systems reforms and development

***Key Words*: -** Development, Incorporation, International Treaties, Nigerian Legal System, Reforms, Subjugation.

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THE PLACE OF INTERNATIONAL TREATIES IN THE PROCESS OF NIGERIAN LEGAL SYSTEM REFORMS AND DEVELOPMENT: THEORIZATION OF INCOPORATION/SUBJUGATION

1.1 Introduction

Being the Federal Republic of Nigeria (Nigeria) a party to the Convention on the Law of Treaties,[1]it has right from independence signed numerous international instruments such as treaties and conventions in the pursuit of its policies relating to foreign relations. And the power to enter and sign such instruments is located within the jurisdiction of the executive arm of the Federal Government by the Constitution.[2]Thus, Olutoyin[3] quoted Nwabueze[4] to have observed that; as the Head of the Federal Government, the President is recognized as the head of state, making all of his legally required international acts including the signing of international treaties, the proclamation of wars, and the reception of diplomats on official business to be considered acts of his state.

However, the Constitution has without prejudice to the above provision provides that: 'No international treaty entered and signed by the President should be binding on the federation or have legal effects before the municipal courts until it is so domesticated through the legislative intervention of the National Assembly'.[5]In its relation with international law, Nigeria is a dualist state, thus the provisions contained in international treaties to which the country is a signatory do not by that virtue become part of the local laws, except after being expressly domesticated and incorporated into the local legislations.

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[1] The Vienna Convention on the Law of Treaties 1969
[2] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[3] See, B. I. Olutuyin, 'Treaty-Making and its Application under Nigerian Law: "The Journey So Far" (2014) IJBMI
[4] B. O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell, London 1985) pg 25
[5] See, Section 12 (1) (2) and (3) of the constitution (n 2)

These powers given to the National Assembly are some of the roles played by the legislative arm in the country's foreign policies and its relations with international law.

International treaties play vital roles in the developmental processes of Nigerian judicial and legal systems, and this is underscoring the interdependence between Nigerian municipal laws and international law. As it is going to be examined and concluded in the coming chapters of this study, domesticated international treaties have already become part of the Nigerian Jurisprudence. Thus, international treaties have not only become part of Nigerian legal system, but they equally fill in some loopholes and gaps therein the system. The African Charter for instance, which was domesticated in 1983 by the national assembly provided the basis for the enforcement of human and peoples' rights and also retained some provisions of chapter 11of the former 1979 Constitution.[6]

Civilized nations impliedly accept full obligations contained therein an international treaty whenever they negotiate and agree to the contents thereof. Lack of domestication or incorporation will not be accepted under international law as an excuse in the event of failure to meet obligations by states, as that is always considered to be an indication and evidence of bad faith. Thus, the requirement for domestication of international treaties before they are complied with by Nigeria which adheres to the 'dualist' school appears arguably to be a tool used in order to avoid obligations contained in ratified but undomesticated treaties. And this impacts negatively on the role that international treaties play in the development of both international and the nation's domestic laws

Nigerian Courts hold the rebuttable presumption that international law as one of the sources of Nigerian law is meant to be part of nation's domestic laws, thus becoming an aid not only for judicial interpretation but also for reforms and development. Nigerian courts as will later be shown in many judicial decisions do rely on both domesticated and undomesticated international treaties to interpret statutes, thereby expanding the horizon and scopes of Nigerian legal system. Thus, a country that signs an international treaty is

[6] Retained as Chapter II of the Constitution of the Federal Republic of Nigeria 1979 (as amended).

obliged to act in all possible ways for achieving the objectives of the treaty until either the treaty is suspended or terminated based on the terms contained therein.

Omorege, observed that 'Nigeria has concluded and signed numerous international instruments many of which impose on the country some obligations relating to different issues'.[7]Many of these instruments are however left legally ineffective due to lack of domestication by the National Assembly though they are of outmost importance to the country, these has been attributed by some scholars to '…lack of interest and lackadaisical attitudes of the Legislatures towards domestication of international instruments despite being ratified by the Executive'.[8]In another view the Legislatures' lack of interest towards the incorporation of international treaties into the Nigerian municipal laws has been attributed to '…some conflicting and political interests among the Legislatures and other political elites in the country'.[9] This was however blamed by the Legislatures to the lateness in referral of the international instruments to the National Assembly by the Executive Arm for incorporation and sometimes due to other factors such as politicization of matters affecting national interest and interference with the duties and responsibilities of the National Assembly.

Accordingly, matters relating to for instance the Child Rights Act (CRA) which was enacted in 2003 proved nearly impossible to be incorporated and subsequently failed to scale the huddles of domestication before the National Assembly because of religious and cultural considerations despite being Nigeria a party and signatory to the 1989 Convention on the rights of the child.[10]Terms such as who a "Child" is and the designated "age" of a child in the Convention were used as grounds to raise and advance arguments leading to scuttling the smooth processes of domesticating the Act.[11] In the predominantly

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[7] E. B. Omorege, 'Implementation of Treaties in Nigeria: Constitutional Provisions, Federalism Imperative and the Subsidiary Principle' (2015) A paper delivered at the International Conference on Public Policy Association, held on 1- 4 July (2015). Milan, Italy under the auspices of the International Public Policy Association (IPPA).

[8] W. O. Alli, 'Nigeria's National Assembly and Foreign Policy in a Changing Domestic and External Environment'(2014) 6 NJLA (1) 25, 26.

[9] O. Akanle, 'Legislative Inputs and Good Governance in Nigeria 1999-2009' (Lagos 2011).

[10] Convention on the Rights of the Child 1989.

[11] A child is defined in the Convention to mean a human being who is below (18) years of age, contrary to the position under Islamic Law operational in the Northern part of the Country.

Muslims North of the Country, the Bill was perceived as Anti-*Shariah*[12] intended to be used in imposing foreign values thereon as they relate to marriageable age of a child which under Islamic Law is thirteen (13) years and fall under residual legislative powers.[13]

1.2 Literature Review

Many scholars have both at national and international level, devoted large portions of their works to the topic of this study, and have made the topic of this study the focus of their various scholarly works. This study will benefit from the analysis on the topic by these eminent authors and scholars. Some of these notable Scholars at the national level include: Dunmoye, Njoku and Alubo[14]who opine that: The National Assembly is just as important as the administration in the process of negotiating a treaty through the Ministry of Foreign Affairs. Making treaties using the National Assembly's incorporation and domestication powers is one of the key responsibilities outlined in the Constitution. Thus, the National Assembly is empowered to approve or disapprove an international treaty signed and ratified by the executive arm of the Government. Additionally, '…the National Assembly through its legislative intervention incorporates and domesticates those treaties into the countries' municipal laws'.[15]

As pointed earlier Nigeria is a dualist state, impliedly the provisions of international treaties wherein the country is a signatory must be domesticated and incorporated by the National Assembly before they can become part of the local legislations. Thus, the Constitution[16] provides in section 12 (1), (2), and (3) that:

> 1). 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

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[12] Islamic law based on commandments enshrined there in the holy Qur'an, and the teachings of the Holy Prophet applicable to Muslims which is in operation throughout the northern part of Nigeria.
[13] E. B. Omorege (n 7).
[14] Dunmoye R. A, Njoku P and Alubo O, *The National Assembly: Pillars of Democracy* (Eds) (Abuja 2007) The National Secretariat of Nigerian Legislatures, National Assembly.
[15] Ibid.
[16] Constitution (n 2).

> 2). The 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, and
>
> 3). A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

O.V.C Okene, postulates that: 'It is clear from the above constitutional provisions that the fact that international treaties are ratified by the Executive does not mean that the same treaties are binding on the country neither are they having any legal effect before the Nigerian Courts'.[17]Okeke, opines that:- 'An international treaty entered by Nigeria will not have the force of law until expressly enacted into law, incorporated and domesticated by an act of the National Assembly'.[18]The Supreme Court affirmed this position of the law in *Abacha v Fawehinmi*, where it decided thus: 'An international treaty entered between Nigeria and any other Country shall not have the force of law until same having been enacted into law by an act of the National Assembly'.[19] Hence, 'an International treaty enacted and domesticated through the act of the National Assembly (such as the African Charter)[20] shall have the force of law and thus binding like all other municipal laws before Nigerian Courts'.[21]

In *Ogugu v The State*,[22] it was unanimously held by the Supreme Court that: 'The African Charter on Human and Peoples' Rights, "which was a regional treaty promulgated as a law in 1983 by the National Assembly", has become part of Nigerian municipal laws'. However, the 1999 Constitution just like the defunct Constitutions before it did not

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[17] O. V. C.Okene, 'Bringing Rights Home: The Status of International Legal Instruments in Nigerian Domestic Law' (1999) http://www.researchgate.net/publication/274273703. Accessed on the 2nd day of November 2020.
[18] C. N. Okeke, 'International Law in the Nigerian Legal System'(1997) WILJ 26 (2) 311, 356.
[19] [2000] 6 NWLR pt 660 pg 228.

[20] See The African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act 1983.
[21] Emolonye U, *Proportionality and Best Interests; Calibrating the Twin Pillars of Child Justice in Nigeria* (2014) a Doctoral Thesis presented for public examination by due permission of the faculty of law University of Helsinki in Porthania Hall IV on 28November 2014, Helsinki.
[22] [1994] 9 SC, NWLR pt 366 pg 47.

sufficiently provide answers to the questions of the position of domesticated international treaties among the other sources of Nigerian domestic laws. Thus, this constitutional loophole is arguably part of the factors responsible for the controversies surrounding the place of domesticated international treaties in the hierarchy of Nigerian laws.

From many judicial precedence to be cited in chapter four (4) of this study, it's very clear that undomesticated international treaties though having no force of law in the Nigerian legal system, yet a viable domestic Nigerian legal system could not have been entrenched completely without having recourse to the roles they play. Firstly, undomesticated international treaties have a persuasive non binding authority before the Nigerian courts, hence, domestic courts more often rely on such treaties as guides and aids when interpreting municipal laws. Though not of binding authority, yet the courts invoke those treaties as guides to interpret status. For instance, in *Abacha* case[23] the English case of *Higgs & Anor v MNS &Ors*, was referred to by the Supreme Court, where it was held by the Privy Council that: 'Undomesticated treaties might have an indirect effect upon the construction of statues'.[24]A similar decision was taken in *Dow v AG*, by the Court of Appeal of Botswana.[25]

Similarly, Ogundare, JSC held that: 'A treaty will not be binding on Nigeria after ratification until incorporated into Nigerian domestic laws by an Act of the National Assembly, it therefore has no force of law or become binding and enforceable by the Nigerian Courts'.[26]For example, there is no evidence before Nigerian courts that the International Labor Organization (ILO) Convention has been domesticated by the National Assembly. And as it remains so, it cannot possibly be applied by the Nigerian courts for it has no force of law. Thus, Coomassi JSC observed that: when a treaty is made into a law by the National Assembly, as happened with the African Charter, which was incorporated into Nigerian municipal (i.e. domestic) law by the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria

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[23] *Abacha* (n 19).
[24] [2000] 2 AC. 228; The Times, December 232, 1999.
[25] [1999] BLR 23.
[26] In *Abacha* (n 19).

(1990) it becomes enforceable and must be complied with by Nigerian courts just like all other laws that fall under their judicial authority. [27]

The above views of the learned senior Nigerian jurists influenced many leading academics and politicians' conclusions that Nigeria is using such judicial decisions to shield itself from some international treaty obligations. Thus, a ranking member of the lower Chamber of the National Assembly and former Chairman Committee on Treaties and Protocols of the House of Representative,[28] lamented that: The National Assembly had to write to the Executive to request that it send treaties to it for domestication because it is impossible for it to accurately indicate how many treaties Nigeria has signed. In order to avoid fulfilling its commitments under such accords, the Nigerian Government did not domesticate them. According to Nwabueze, these developments in Nigerian diplomacy are distressing because they give the impression that Nigeria is acting dishonestly when dealing with its foreign partners.

Additionally, these unfortunate conducts of the Nigerian Government resulting in the non-domestication of international treaties are clogging the wheels of Nigeria's legal system development, hence a literature review on Nigeria's case law conducted at the course of this research (discussed in chapter five here in) points to the Nigeria's dualist nature in its approach to international law. It points to Nigeria's usage of the status of undomesticated international treaties to not only maintain its sovereignty and shield itself from its obligations under such international instruments, but also to reaffirm the supremacy of its domestic laws over 'any other law' as enshrined in chapter 1 of the 1999 constitution which provides that: 'This constitution is supreme over any law in Nigeria and any other law which is inconsistent to this constitution shall to the extent of such inconsistency be null and void'.

The *Bakassi* Peninsula ruling by the International Court of Justice (ICJ), the Nigeria and South Africa Extradition Treaty, and the Nigeria and South Africa Criminal Matters Mutual Legal Assistance Treaty are among the treaty-related issues that the National

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[27] In *MHWUN v Minister of Health and Productivity and Others* [2005] 17 NWLR 953 pg156.
[28] Dayo Bush-Alebiosu.

Assembly debated and passed laws on between 1999 and 2003, according to O. Alli. Dunmoye claims that Nigeria has also signed the following international agreements since the start of the current democratic regime: "The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Distribution'.[29]Other examples include the Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Prohibition Convention, the African Union Treaty on the Establishment of International Criminal Courts, the United Nations Convention Against Transnational Organized Crimes, and many more..

O. Alli, further observed that: 'One of the major shortcomings of the Nigerian National Assembly is their inability to be domesticating international treaties in good time',[30] hence the notion that the Legislatures are depicting lack of interest in ensuring the speedy domestication of international treaties despite the strategic importance of such treaties to the country's foreign relations and the overall development of its legal and judicial systems. However, Akanle argued that: 'The Legislatures lack of interest in the speedy domestication of international treaties is as a result of their selfish and pecuniary interests'.[31]He further opines that: 'If the legislators handled other vital responsibilities with the same level of relative ease, speed, and dedication as they handle personal benefits, the nation would have benefited more. Akanle's position stands in stark contrast to that of the legislatures, which in 2014 claimed the following in a "Senate Order Paper":

> The issue of late domestication and incorporation of international treaties are partly as a result of the failure of the Executive Arm in submitting and laying before the National Assembly of International Instruments such as Treaties, Protocols and Conventions which the country entered and concluded and largely due to the issue of Supremacy between international law and local legislations

[29] Dunmoye (n 14) pg 9.
[30] Alli (n 8) pg 101.
[31] O. Akanle (n 9) pg 8.

The Legislatures' argument is strengthened by the views of Bugaje,[32]Mudashiru,[33]Enang[34] and Zakari[35]the trio of who argued that:

> Non-incorporation and domestication of international treaties are as a result of the dualist position of the country, visa-vis the issue of supremacy between international law and local legislations as it relates to the place and hierarchy of such international treaties in the Nigerian legal system and of course the lackadaisical attitudes and reluctance of the executive arm of the Government in submitting ratified international treaties to the National Assembly for the necessary legislative intervention.

Accordingly, to the duo of Bugaje[36] and Mudashiru[37]'The Legislatures are not consulted or included by the Executives in the processes of concluding international treaties'. Thus, Bugaje opines that: 'Lack of synergy between the two Arms of the Government has contributed immensely to poor implementation of international treaties by the country'.[38]

A major instance of lack of synergy between the two arms of the government in the processes of incorporating international treaties can be seen in respect of the agreement referred to as "The Green Tree Agreement" (GTA) which was concluded between Nigeria and the Republic of Cameroon (Cameroon) in order to implement the decision of the ICJ settling the dispute between the two neighbors on *Bakassi* Peninsula, the National Assembly received the documents only some few months to the days the documents were supposed to be signed into law. As a result of an ongoing rift between the Executives and the Legislatures at the time, it was never deemed necessary and important by the Executive

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[32] Interview with U. Bugaje, formerly a chairman House Committee on Foreign Affairs. Interview held on 2 December 2021 Abuja, Nigeria.
[33] Interview with H. Mudassiru, Member, House Committee on Foreign Affairs 2003-2007. Interview held on the 16 December 2021 Abuja, Nigeria.
[34] Interview with I. Enang, Member House Committee on Foreign Affairs 2003-2007. Interview held on 11 January 2023 Abuja, Nigeria.
[35] Interview with M. A. Zakari, clerk of the House of Representative's Committee on Foreign Affairs 2003-2007. Interview held on 15-28 November 2022 Abuja, Nigeria.
[36] Bugaje (n 33).
[37] Mudassiru (n 34).
[38] See again Bugaje (n 33).

to carry the Legislatures along or seek for their opinions and inputs before ratifying the documents, an action which the Legislatures deemed unconstitutional and declined to domesticate and incorporate the documents, thus making it legally ineffective.

Throwing his weight behind the above position of the Legislatures, Enang argued that:

> Even if the documents of the Green Tree Agreement (GTA) were laid before the Legislatures expediently, they could not have legislatively acted thereon because rather than being a legislative proposal or a treaty bill, the Executives were only informing the Legislatures through the GTA of the decision of the International Court of Justice which cannot be converted into a treaty.[39]

Supporting Enang's argument, Egba[40] and Sondangi[41] submitted that: 'The GTA is just a mere document signifying Nigeria's consent to the ICJ's jurisdiction in adjudicating upon the matter but not in any way a treaty between the two countries'.

Other scholars at the national level whose works are found to be relevant and useful to the conduct of this research include; C. E. Okeke.[42]M.I. Anushiem,[43]C.A.Okenwa,[44]M.I Anushiem and E.A. Orji,[45]A. Enabulele and B. Bazuaye,[46]B. I. Olutoyin,[47]and B. Atilola.[48]

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[39] Enang (n 35).
[40] Interview with V. N. Egba Member, Senate Committee on Foreign Affairs 1999-2007. Interview held on 10 February 2022, Abuja, Nigeria.
[41]Interview with A. Sodangi, Member, House of Representative Committee on Foreign Affairs 1999-2007. Interview held on the 10 November 2022, Abuja, Nigeria.
[42] Okeke C. E, 'The Implementation of treaties in Nigeria' (Awka, Nigeria 2016).
[43] Anushiem M. I, 'The Implementation of Treaties in the Nigerian Laws
[44] Okenwa C. O, 'Has the Controversy between the Superiority of International law and Municipal Law been resolved in theory and practiced?' (2015) JLPG 35.
[45]Anushiem M. I and Orji E.A, 'Termination of Contract of Employment and the Applicability of International Labor Standard on the Unfair Dismissal in Nigeria' (2017) Nigeria.
[46] Enabulele A and Bazuaye B, *Teachings on Basic Topics in Public International Law* (Ambik Press, Nigeria 2014).
[47] Olutoyin B. I, 'Treaty-Making and its Application in Nigerian Law' (2014).
[48] Atilola B, 'National Industrial Court and Jurisdiction over Labor Matters under the Third Alteration Act (2015)'.

Equally the works of International scholars such as Dr. M.N. Shaw is found to be very much relevant, guiding and useful and will be consulted and utilized in the conduct of this research. Dr. Shaw, opined that: As international law develops and spreads, questions about the state's place in the international system and the connection between its own international legal system and the norms and principles that govern the entire international community start to surface. [49]

Dr. Shaw further discussed the various theories dealing with the relationship between international and domestic laws. He discussed in details the dualists' theory where the positivists jurists considered the two systems of legal order to be two deferent systems independent of each other, and that domestic law has supremacy over international law. He further discussed the monists theory where most naturalists jurists argue and hold the view that both laws are one and interdependent, and that in case of conflict between the two, the international law supersedes.

Equally, the work of L. Raymond,[50] though not strictly on the topic of this study is however found to be very much useful and thus consulted.

Dr. Walid Abdulrahman, a Professor of International Law worked extensively on the relationship between Domestic Law and International Law. His work on the topic of this study has contributed immensely to the development of international law and will thus be utilized. In his work 'The relationship between public international law and national law' submitted to 'The private site for legal research and studies' he discussed widely on the relationship between the two systems of law, wherein he opined and submitted that:

> The survey of the attitude of adopted by various countries of the common law and civil law traditions leads to the conclusions that most countries accept the operation of customary rules within their own jurisdiction, provided there is no conflict with existing laws. Thus if there is a conflict,

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[49] Shaw M. N, *International Law* (6th edn, CUP 2008).
[50] Raymond L, *Universal Jurisdiction; International and Municipal Legal Perspective* (OUP 2007)

national law is supreme. Some countries allow international law to prevail over national law at all time

Other notable scholars whose works are found to be equally relevant, useful and helpful to the conduct of this study include: A. Aust,[51]H. Jackson,[52] R. A. M. Fitzmaurice and O. Elias,[53] F. F. and J. Klabbers[54]and D. I. Shelton.[55]

1.3 Statement of the Problem and Purpose/Aims of the Study

The main goal of this study is to investigate the role of international treaties in the development and reform of the Nigerian legal system, their hierarchy within the Nigerian legal system, the effects of the Third Amendment Act 2010 on the recognition and enforcement of international treaties in Nigeria, and whether or not these treaties have precedence over domestic laws in Nigeria. It is as well the objective of this study to examine the attitude of the Nigerian legal and judicial systems towards the recognition and enforcement of international legal instruments. The study will also seek to find out the role of Nigeria's National Assembly in treaty implementation and reasons behind the poor implementation of international treaties in Nigeria. These issues and the related challenges thereto form the crux of this study.

One of the major problems of international law is lack of enforcement, and the existence of many schools of thoughts as to which between the grand norms (domestic legislations) and the mandatory norms which all nations must adhere to should prevail in the event of conflict. The study will explore such conflicting areas within the Nigerian legal system with a view to providing ways of filling that gap and providing solutions in order to maintain a balance between the necessary need of preserving and enforcing the rules of

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[51] Aust A, *Modern Treaty Law and Practice* (2nd edn, CUP 2007).
[52] Jackson H, *The Status of Treaties in Domestic Legal System; a policy analysis* (1992).
[53] Fitzmaurice R. A. M and Elias O, *Contemporary Issues in the Law of Treaty* (Utrecht, 2005).
[54] F. F. and Klabbers J, 'How to defeat a treaty's object and purpose pending entry into force; towards Manifest intent'(2001) VJTL.
[55] Shelton D. I, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasions* (OUP 2011).

international Law and refraining from invalidating or subjugating the Nigerian domestic laws.

It is as well the aim of the study to play a useful role in stimulating thoughts on the values, aims as well as the objectives of international law, while at the same time pointing out the shortcomings and defects in its relationship (as it relates to supremacy, and enforceability) with domestic laws that exist there in the system and making some meaningful suggestion as for the future.

1.4 Significance/Scope of the Study

Considering the various global challenges that are arising as a result of conflicts between international and domestic legal orders, the significance of this study cannot be overemphasized. The significance of this study cannot come at a better time if one considers and acknowledges the fact that the structures of these orders are fast changing in their interaction within the current globalization era.

The significance of this study can as well be appreciated when it's acknowledged that a more permanent paradigm for regulating the interaction between international law and domestic laws is called for, the result to be achieved by this study will therefore be a response to that call. Focusing on the interaction between these two legal orders, the study would be very much significant in resolving the conflict of interaction when addressing global phenomenal issues such as aviation agreements, human and peoples' rights, labor agreements, cross border pollution, flows of refugees, weapons proliferation, terrorism and piracy. This study would explore the ways through which international law through the aids of international instruments can address the capacity as well as the will of domestic authorities in responding to the above issues using specifically, those instruments such as treaties, conventions, protocols, etc at their sources.

The study would be very much useful to states' policy makers, international and municipal lawyers, judges, academicians, human rights activists, law students and of course the various United Nation's Institutions such as the ICJ, International Labor Organization (ILO) International Criminal Court (ICC) Non Governmental Organizations (NGOs) etc.

The study will also serve as a flip to the existing literature on the topic, in that it will not only help to boost the understanding of the Nigerian legal and judicial systems; visa-vis its attitudes towards international law, but it will also aid in appreciating the nature, scope as well as the shortcomings of international law in its interaction with the domestic laws of civilized nations.

The focus of this work will be restricted to researching how international treaties have influenced Nigeria's legal system's evolution and reforms, as well as where they stand in relation to other legal and judicial systems in Nigeria. This study will only analyze pertinent provisions of the Nigerian constitution, Nigerian case law, treaty law, the Vienna Convention on the law of Treaties, and some expert opinions as they pertain to the study's topic. However, the International Court of Justice's law report and other sources of international law will be included.

1.5 Research Questions

In developing the research questions for this thesis, the starting point was to look at the Nigerian legal system’s attitudes towards recognition, ratification and enforcement of international treaties, Nigerian National Assembly’s role in the implementation of international treaties, the requirement for domestication of treaties before recognition, the use of domesticated treaties by Nigerian courts as aids to interpretation of status, reasons behind the poor implementation of international treaties in Nigeria, relevance of international treaties in the development of Nigerian legal system, and the place of domesticated treaties in the hierarchy of laws in Nigeria. These hypotheses would be examined having in mind the assumption that the normative goal for the drafting of international treaties is to ensure that each party thereto intends to faithfully adhere to the content of the text of the treaty without prejudice to its municipal laws as they relate to its sovereignty. In this respect, the most important issues would be addressed and explored through the following questions:

1. What are the reasons behind the poor implementation of international treaties in Nigeria

2. What is the place of international treaties in the processes of Nigerian legal system reforms and development; as aids to interpretation and as customary international law
3. Whether the incorporation of international treaties may lead to the subjugation of Nigeria's domestic laws to the supremacy of international law
4. Whether the requirement for domestication of international treaties before enforcement constitute a shield against Nigeria's treaty obligations

1.6 Theoretical Framework of the Study

There are six (6) primary chapters in the study. The basic introduction is covered in Chapter One (1) which also discusses the literature review, the problem statement and study objectives, the study's significance and scope, the research questions, the theoretical framework, and the research methodology.

The second chapter (Chapter 2) discusses the definition, nature, legal scope and the modern theories of International Law

Chapter three (3) focuses on the meaning and nature of treaties, together with the formalities in treaty making, amendments, modifications, invalidity, termination, suspension, and the application of treaties

Chapter four (4) focuses on the Federal Government of Nigeria's exclusive treaty making powers, the role of the Nigeria's Legislatures in treaty implementation and the Nigeria's treaty-making procedures

Chapter five (5) addresses the status of international treaties under the Nigeria's domestic laws and their place in the processes of Nigeria's legal system reforms and development. Thus, international treaties both as aids to judicial interpretation and as customary international law are examined. Similarly, the questions as to whether the requirement for domestication of treaties before they are recognized and enforced by Nigerian courts constitute a shield against treaty obligations are examined in this chapter. In addition, the chapter analyses the position and effect of both domesticated and

undomesticated treaties in the hierarchy of Nigeria's domestic laws, as well as the effect of "Third Amendment" in the implementations of international treaties

The Study concludes in chapter six (6) with findings, and recommendations. Suggestions are equally made for further research on the area of the study for the development of Nigeria's legal system in particular and international law in general

1.7 Methodology

Law, from the point of view of Lawyers trained on a finer point of English law, is in a written form. These written laws may be in the nature of locally enacted or statutory laws and, other auxiliary legislations (municipal law) or international practices accepted by civilized nations as customs (international law). In this regard the research methodology of this work will be both doctrinal and empirical. Doctrinal method (black-letter law) is a research method that seeks to "systematize, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources".[56]In this method, law is viewed as a discipline which is self-contained, thus, the method uses law itself in order to answer research questions. Being the method a rule based and formal, it examines both the primary and secondary sources of law in a very systematic fashion, and then employs those sources in both legal reasoning and analysis.[57]Thus, the research method chosen will entail consulting those primary sources of law relevant to the topic of this research, for example, the Nigerian Constitution, The Nigerian Treaty Act, the Nigerian case law, the Vienna Convention on the Law of Treaties, etc.

The empirical method of the study will involve consulting some relevant secondary sources of both the Nigerian laws and the international law dealing with the subject of the study. Thus, the opinion of legal writers, and scholars, expressed in text books, articles, periodicals, newspapers, and magazines on the subject of the research will be consulted. Therefore, the empirical method of the research will entail consulting such secondary

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[56]McConville M and Wing Chui H, *Introduction and Overview* in M. McConville and H. Wing Chui (eds), *Research Methods for Law* (EUP 2007).

[57]Banakar R and Travers M, *Law, Sociology and Method* in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (HP 2005) 7.

sources of law. The library and internet sources will therefore serve as useful avenues where both the doctrinal and empirical methods of the study will be conducted.

This means that the bulk of this research will be done in the law Library. However where necessary, one on one discussion with scholars and lawyers knowledgeable in the area of this research will be resorted to in order to clarify some knotty points. Originality will be exhibited (where necessary) in making recommendations that will improve and encourage further research on the topic of this study.

Research Philosophy: The research philosophy of this study will be both qualitative and analytical; it will be qualitative in that some insights, thoughts, and opinions of legal experts on the various issues associated with the topic of the study would be examined. It will be analytical in that attempts would be made to establish a strong position that would help in realizing the set goals of achieving the objectives of the study.

Research Design: In this regard the research methodology of this study as pointed earlier is designed to be both doctrinal and empirical. The doctrinal method will entail consulting the primary sources of Nigerian laws as they relate to the topic of the study, as well as some sources on international law especially international treaties to which Nigeria is a party. While, the empirical method will be used to examine some Nigerian judicial decisions, and opinions of legal experts and scholars expressed in law reports, textbooks, researches, periodicals, journals and academic magazines on the topic of the study.

Furthermore, some degree of reliance will be placed on discussions with scholars, researchers, colleagues, Lawyers (both national and international) knowledgeable in the area of this study in order to add to the credibility as well as the reliability of the study.

Originality will be exhibited in the conduct of the study, and the rules of research ethics will be abided by in drawing conclusions and making recommendations, which would be made for further research on the subject of this study so that the area can further be developed for its contribution to knowledge generally and particularly, the attitudes of Nigerian legal system in its relation to International law.

CHAPTER II

NATURE AND MEANING OF INTERNATIONAL LAW

2.1 Introduction

Sovereign states not their citizens are the principal subjects of International law. International law defers with domestic laws, in that the former is concerned with the relationships existing between states, and other subjects such as international organizations and in many cases between individuals, while the later deal with the relationship between states' institutions and their respective citizens, and between individual citizens. International law is divided into public international law and private international law.[58]'While public international law is concerned with the core principles and rules as accepted by the civilized nations in relation to the applicable foreign laws or the roles of foreign courts, the later deals with the conflicts within the principles rules of international law',[59]thus, this study will focus on public international law as an adjunct legal order and a separate legal system as it covers relations between nation states in their dealing with each other through international instruments such as treaties and conventions.

There are some differences between the rules of international law and international practices such as salutes and compliments towards foreign warships' flags at sea, acts which are deemed as just courtesies and corresponding respects but not in any way binding legally. In that regards, international law is sometimes mistaken with international morality. International morality is purely ethical and may meet with international law at some points, while international law is a legal concept both in form and contents which cannot however be severed from ethical values.

2.2 Understanding the Nature and Meaning of International Law

In order to fully comprehend the nature of international law, one must critically look at the features of its legal system. Thus, a question can rightly be raised at the quality of its legal

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[58] Shaw (n 49) pg 2.
[59] Cheshire C and North P, *Private International Law* (1st edn, London 1999).

system in this regard, because in each dispute under international law, every opposing side will try to legally justify its actions or inactions, and there is no binding international system or an independent institution capable of determining those issues with finality as obtainable under municipal laws, where a legislative body exists for enacting laws which are interpreted by an independent, competent and consistent judicial system and enforced by an institutionalized executive system. Thus, 'without executive, legislative, and judicial arms, it will be difficult if not impossible to understand or talk about legal order'.[60]

'There is no legislature for creation of laws under international law, however resolutions can be made by the General Assembly (UNGA) but without binding force'.[61] There is no court system, 'Cases can be decided by the ICJ in Hague only when the parties to the dispute consent and submit to its jurisdiction. Even under such circumstances there is no enforcement mechanism to ensure compliance with the decisions made thereon'.[62] The only UN's body having such enforcement powers usually has its decisions vetoed by the permanent members.[63] It is therefore submitted that, with the absence of institutions for making and interpreting of laws or for the enforcement of sanctions against parties for breaching such laws, then the concept of legal order as international law is only illusionary.

Analogies between municipal and international legal systems form the basis for the opinion above when the two legal systems are compared. 'Contrary to what is obtainable under municipal laws, a unified and enforceable punitive system is missing under international legal order',[64] though in some situations nations can legally employ the use of force as a self defense mechanism. Thus, 'The UNSC can impose punitive measures such as sanctions to curtail a perceived acts considered to be threatening the global peace, breaching peace or aggressive acts generally'.[65] The said punitive measures may be

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[60] Dias R, *Jurisprudence* (5th edn, London 1985).
[61] See, article 17 (1) of the UN Charter.
[62] See, also article 36 of the status of the ICJ.

[63] See, Bowett's *Law of International Institutions* Sands P and Klein D (edts) (45th edn, London 2001).
[64] See, Riesman W. M, *Sanctions and Enforcement in the future of International Legal Order* (New York, 1971).
[65] See, article 7 of the UN Charter.

'economic',[66]'military',[67] or 'diplomatic, economic and military'.[68]However, due to political and other differences among the five permanent members of the UN it has always been very difficult to employ and enforce such punitive actions against member states through the UN mechanisms. Thus, 'many at times member states resort to use of force as a self defense mechanism',[69]leading to the use of military actions to wade up aggressions and in some situations intimidate, subdue or coerce other members. Self help procedure is not only regarded as primitive but also unacceptable and unlawful under municipal laws, thus resorting to self help is left within the purview of the governing authorities rather than individual citizens.

Force may be used by member states in self defense, when threatened with aggression, and actions may be taken in order to respond to actions considered illegal. In such situations, scholars such as M. Barking unanimously posited that:

> The decision to take action and the proportionality of such actions is within the discretions of the states concerned, and there exist no authority to determine whether such actions are legal or otherwise, safe for the decision of the ICJ which is also subject to acceptance by the parties involved[70]

Thus, it remains a herculean task to describe the legal nature of international law due to its lack of systematic and comprehensive mode of enforcing sanctions.

It will be wrong to consider the member states' right of self defense as a sanction under international law, because that will amount to misunderstanding sanctions' role within the international legal system, hence self defense and reprisal are at the instance and convenience of the member states not at the instance of the system itself. It should therefore not be forgotten that the purpose of international law is to among other purposes prevent the violent use of force against member states through prohibition, and this leads to the

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[66] See, also the UNSC's Resolution 221 against The Republic of North Korea.
[67] See, the UNSC's Resolution of June 251950 against The Republic of Iraq.
[68] See, also, the UNSC's Resolutions 661 and 678, 1990 against The Republic of Iraq.
[69] See Boett D. W, *Self Defense in International Law* (Manchester 1958).
[70] Barking M, *Law without sanctions* (New Haven 1967).

argument that the more force is controlled in international society, the less legal international law becomes.

It is submitted therefore, that understanding the nature of international law, cannot be achieved by making references to its definition which is based on sanctions, its entire features must be studied with a view to seeking to discover if states as the principal subjects of international law are committed to submitting themselves to the jurisdiction of international legal order or otherwise. In this regard, it is my opinion that the answer to this question is negative, hence there is no such a system in existence called international law worthy of being compared with municipal law.

Therefore, international law consists just of some common features comprising of existing relationships and common principles created and recognized by the civilized nations themselves, the legal structure of which is characterized by the absence of enactments and enforcement, safe for the arbitrary sanctions imposed at the pleasure of the permanent members of the UN. Contrary to international law, the law is above individuals under municipal laws, and the laws are not created by the individuals but by designated institutions, but individual member states have a choice whether to obey or not the rules under international legal order, hence states are above the rules, and the existence of the law is between the member states and is a creation of the same. Thus, the states are the primary source of the law, and at the same time the main enforcers of all the accepted rules therein.[71]

Furthermore, international law is viewed by many as having been formulated primarily through international instruments such as treaties and conventions, which become binding on the signatories only after ratifications and in some cases domestication, thus becoming recognized ways of conducting states' affairs acceptable by the community of nations.

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[71] Some scholars like Rosanne refer to international law as "*a law of coordination*" instead of *international law* (Dordrecht 1984) pg. 2.

It is vehemently argued that, international law consists of optional rules from which member states can choose to submit themselves to or reject. This argument is based on the facts that it is the states that create, and sign treaties, and may recognize only some parts thereof to be legally binding or not. Though it is widely believed that member states do not observe or strictly obey the rules of international law, the position is deferent in reality because compared to municipal laws violations are minimal and very rare. In the same vein, violations such as armed attacks, piracy and racial discriminations are always brought to limelight and generally condemned and rejected. And as crimes such as murder, rape, robbery under municipal orders do not render a municipal legal system ineffective, so also lack of respect for international rules by the member states do not destroy the system but only point to it weakness and short comings. And though there are gross violations among the member states, many provisions of the rules are still adhered to and respected by civilized nations.

2.3 Examining the Legal Scope of International Law

Being a product of its environment, international law develops according to the prevailing notions of international relations and must progress harmoniously with the current realities in order to survive. Nevertheless, tensions continue to rise between the existing norms and the ever change seeking forces therein the system. Determining how and when some newly emerged behavioral standards and fresh lives' realities should be co-opted into the current framework remains the major setback of international law, curing these setbacks ensures that the relevance of the law is maintained and the entire system immune from unnecessary disruptions.

Reoccurring changes such as the emergence of nuclear weapons, extremism, radicalism, international terrorism, piracy, etc, are momentously reverberating globally and thereby impacting on the international order. These factors lead to the current state of uneasiness among nations, with each nation desiring to seek and acquire nuclear armament. The technological ability in mining the oceans, the questions of who the beneficiaries of oceans exploitations should be is another example of new trends of challenges facing the system. While nations and other subjects of international law are now struggling constantly to deal on one hand with this newly emerged phenomenon, they are on the other hand trying

to retain their scarred sovereignty and maintain respect for human rights. 'Many such examples exist on how current changes and modern developments necessitate the reevaluation, reanalyzing, and reappraising the rules and structures of international law'. [72]

International law has expanded today and spread its involvement from its original sphere of peace preservation, to issues like the regulation of space expeditions and division of the ocean floor, from human rights protection to international financial system management. The expansion is so immense as to have embraced all aspect and spheres of the ever changing interests of contemporary lives globally.

The needs and features of the current international political system remains the factor determining the composition of international law. The existence of more than one entity in a given system will necessarily demand for some conceptions on how best to act in dealing with one another on the basis of peaceful co-existence or belligerence. These approaches have been adopted by international law and it has generally but with few considered exceptions eschewed the ideas of permanent belligerence,[73]this is so as nations while supreme internally, desires to externally maintain their sovereignty and must at the same time take into cognizance the rights of others. A state must therefore recognize and accept the rights of other states, this is a necessity and unavoidable in a current interdependent world where nations need one another. Thus, the emergence of a system regulating and defining such accepted rights and the corresponding obligations.

The above phenomenon leads to the articulation of some kind of global legal order though unsophisticated, weak and disorderly. Hence, the aspirations, desires, and opinions originating from other cultures and civilizations are increasingly playing various roles in the global evolution of juridical thoughts as a result of the weakening of international law's Eurocentric features.

'International law is a reflection of global politics and some basic features which are state-oriented and due to the passage of time, nations have become the primary

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[72] Shaw (n 49) pg 43.
[73] This approach has been adopted by international law since the 17th century.

repositories of peoples' organized hopes and aspirations, these hopes could either be for protection or for more expansive aims'.[74] Such values were enshrined through a system created by independent nations that enjoy equality both in sovereignty and in procession of statehoods' attributes. Some of the notable examples here include respect for territorial integrity, equal voting rights at the UNGA etc. Despite these however, tensions still remains in today's global politics due to some factors such as human rights concerns, in-adequate and un-equaled economic relations and cyber and nuclear forces. The balancing of power and meaningful policies by nations at both regional and international levels are among the necessary frameworks for both international law and political conditions (domestic) to operate. Thus, it is of outmost importance to realize and acknowledge that laws are necessary for nations in seeking and achieving specified goals and objectives, these might be economic, security, diplomatic, ideological advancement or survival goals.

The expansion of international law has however not just been horizontal to have embraced the newly established states,[75] the scope of the extension includes to all subject of international law such as international organizations, groups, and individuals. New fields covering issues such as human rights, outer space explorations, international trade, international terrorism, global warming and problems of environmental protection have now been covered by international law.

The focus and concern of international law upon sovereign states can be attributed to the growth of positivism which was at its peak in the nineteenth century. Sovereign nations were then the only subjects of international law been contrasted with the status of individuals and non-independent nations as object of international law. Laws were created only by those sovereign nations, and presumption of restrictions upon their independence was not possible. However, 'the emergence of new theories and approaches to international relations and the subsequent but gradual sophistication of positivism have extended the

[74] Shaw (n 49) pg 45.
[75] Which were established at the end of World War 11.

level of roles that could be played by entities like international organizations, individuals, and multinational corporations which are all non-state entities'.[76]

It has been recognized for long that, individuals citizens are subject of international law and as such were to benefit as a matter of right from all what international law could offer, however, it is only of recent that their ability to drive such benefits by acting directly without necessarily relying on their nations became a reality. The setting up of 'the Nuremberg and Tokyo Tribunals' by Allied forces after their victory at the end of WW11 was a crucial segment of those processes, charges of crimes against peace, peaceful co-existence, and humanity were thus filed against individuals, with many found guilty and appropriate punishments meted accordingly. 'This was as a result of the international law's recognition of the doctrine of individual responsibility as against the usual states' interpositions'.[77] This process was to be reinforced later in 1998 and in the mid 1990 with the establishment of the ICC and War Crimes Tribunals for Yugoslavia and Rwanda (WCTYR) respectively.

Additionally, the establishment of the Genocide Convention[78] paved the way for punishing individuals found guilty by the ICT and domestic courts. Another part of this process was the international law's concern with human and peoples' rights, and this has increased the roles played by individuals in this regard. To strengthen this, the UN has through the adoption of Universal Declaration of Human Rights (UDHR) in 1948 listed some basic rights comprising both social and political ones. Though it was only meant to be nonbinding guidelines, but it has however increased the level of roles of individuals in international law. Similarly, in 1950 and 1966 there were the establishments and signings of The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF) and International Covenant for Human Rights (ICHR) respectively. However, these were binding on the signatories, with adequate supervisory bodies established to ensure for effective functioning.

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[76] Shaw (n 49) pg 46.
[77] Ibid, at 47.
[78] The Genocide Convention 1948.

Corporate Organizations and individuals within the EU were similarly conferred with the rights to appeal the decisions of the Union institutions to the ECJ, and this may not be a bar preventing individuals from appearing before some international tribunals. This subject has nevertheless generated so many controversies among scholars, with many of the Soviet era writers denying the legality of individuals under international law as to be having rights as distinct and separate from duties and obligations, this is but an indication of the trend away from the exclusivity of nations. The rise of intergovernmental institutions such as international organizations like the UN has together with its concern in the protection of individual human rights points to the striking characteristics of modern international law.

Furthermore, it will be difficult to understand and appreciate international law in the present era if no reference is made to the rise and diplomatic dominance and influences of such intergovernmental institutions like the UN. Membership of the UN is made up of the vast majority of states[79]and this is of course a very important and significant political factor playing a crucial role in international cooperation, diplomatic relations, and the establishment and creation of norms. Conferring the UNSC with executive status having powers to adopt certain resolutions that are binding on member states is not only diplomatically significant but unique in international relations' history. Additionally, International organizations such as the UN are now recognized and accepted as having legal personality and a perpetual succession distinct and separate from that of its members.

In 1949 the UN was pronounced and considered by the ICJ as a subject of international law capable of enforcing its rights by bringing international claims.[80]This ruling is a persuasive precedence applicable in cases involving international institutions such as the Food and Agricultural Organizations (FAO), WHO, ILO, etc, which are having judicial features of their own. Thus, states primarily still remain the subjects of international law, non state entities such as the North Atlantic Treaty Organization (NATO), WHO and ILO have now joint them and their importance and influence will

[79] The UN is now made up of 195 members.
[80] In an advisory opinion, the ICJ held that an international claim by the UN could be brought against the State of Israel for the assassination of Count Bernadotte (who was an official of the UN).

continue to grow with time. It is instructive to at this stage note the growth and expansion of regional organizations such as the NATO, AU and the Organization of American States (OAS) some of which were created for either military or security reasons, or for the expression of regional and cultural identities.

Another international institution in a class of its own is the EU which 'with a range of common institutions based in Brussels has gone so far in terms of economic coordination and standardization'.[81]The developing sophistication of international law has largely been contributed to by such regional organizations' insertion of regional legal sub-systems based on international law's universal framework and the resultant rules stemming there from, which are binding upon all members to the exclusion of non member states.

International law has now covered wide range of topics, and this expansion has been going hand in hand with the resultant growths in unanticipated difficulties together with race in membership leading to proliferation within the system in the number of participants, Shaw 2008. Thus, international law is currently not only concerned with such issues like territories, jurisdictions, peace, etc, it's now concerned as mentioned earlier with the specialized problems that are endemic in our contemporary society. Issues such as global warming, international terrorism, piracy, extremism, matters of financial development covered by international economic law, human rights, space exploration, oceans and seabed exploitation, etc, are now among the main concern of international law.

Globalization has now shifted the focus of international law to health regulations, communications controls and bureaucratic processes within the system of international institutions. This is viewed by many as a spillover and a reflection of globalization, a terminology used to refer to the global yearning for interdependence, the foundation of which should be based on communications controls, economic and culture and operating distinctively, independently and separately from national norms. Additionally, globalization stimulates pressures of human and peoples' rights, democracy, and ideological disputes relating to the relationship between environmental protection and global warming on one hand and free trade on the other, both of which are seen to be a

[81] Shaw (n 49) pg 48.

redirection and a shift of focus from the original concern on states' jurisdictions or territorial sovereignty.

It is instructive to note from the above, that, international law continues to expand its scope, issues such as health, finance, economy and which hitherto were regarded as matters of social concerns are now covered as explained earlier by the rules of international law. International law's expansion into what was previously an exclusive domain of sovereign nations has led to conflict between international and domestic norms and overlapping of areas to be regulated by the two orders. The resultant effect of this conflict is seen in the problems associated with the applicability of domestic laws before international courts or tribunals and the tussles over supremacy of the two orders before domestic legal systems.

2.4 The Theories of Monism and Dualism

Individual nations' approach to international treaties determines its relationship with international law and the way and manner the treaty it has entered into and signed will be affected by its domestic laws. A state's constitution usually spelt out the basic principles guiding its domestic laws' relationship with international law and the roles to be played in treaty-making by all the arms of government and its relevant institutions. The significance of this is that, treaty-making processes are made in a transparent and inclusive manner where all the different arms of government are carried along. Thus, all the arms of government are involved in negotiations, ratification, and the subsequent signing of the content therein of the draft agreements. In this regards therefore, international law's relation with domestic laws is determined by the "Monists" or "Dualists" theoretical approaches.

The duo of domestic and international laws are considered by "Monists" as interdependent and forming part of a single legal order,[82]erasing any thought and blocking

[82] Brownlie I, *Principles of Public International Law,* (OUP 1990) and Okeke C. N, 'The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?" (2008) 43 IL 193, 209, and Okene O. V. C 'Bringing Rights Home: "The Status of International Legal Instruments in Nigerian Domestic Law" (2009) http//www.researchgate.net/publication/274273703. Accessed on the 22June 2021.

suggestions regarding the existence of a hierarchy between international and municipal laws. International law is from the Monists' perspectives regarded as superior over and above domestic laws, thus should be applicable and enforceable directly within the domestic legal order. The extreme implication of this is that, there should have been no need for the implementation of domestic legislations because the rules of international law would thus become applicable instead of the municipal laws. Impliedly therefore, domestic laws which are inconsistent with the rules of international law either directly or by necessary implication will be regarded as being against norms founded on natural law, thus in applicable. 'To attain its supremacy, international law, must according to the "Monists" be domesticated and municipalized through the processes of incorporation thereby becoming not only supreme over domestic laws but binding as well'.[83]

Furthermore, the Dualists' argument that "the supremacy of international law will lead to the subjugation of municipal laws and erode the sovereignty of nations and lessen parliamentary roles" is rejected by Monists as being vague, unrealistic and unnecessary. Additionally, the practice of monism will not temper with the parliamentary role of ratifying, or checking the excesses of the executive arm of the government. I submit that, this argument is rather weak because 'under monism, parliaments are stripped of the power to scrutinize international instruments such as treaties and conventions from municipal point of view and perspectives'.[84]

On the other hand is the doctrine of 'Dualism' advanced and championed by the positivist school of thoughts, and which is based on the belief and the theory that the two legal orders are separate and independent of each other, each with its separate sphere of operation. The argument of this doctrine is that, to submit to the supremacy of international law, domestic laws will be eliminating the sovereignty of nations; hence, domestic laws as a matter necessity must not be subjected to international law. To this doctrine, 'The rules of international law should not be upheld as being superior over and above domestic laws, because if states are truly sovereign then they should have the right to uphold their basic

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[83] Mwagiru M, 'From Dualism to Monism: "The Structure of Revolution in Kenya's Constitutional Treaty Practice" (2011) 3 JLTEA 144,155.
[84] Ibid, at pg 155.

tenets as enshrined in their respective constitutions and should thus be at liberty to decide how their foreign relations and policies should be governed by international norms'.[85] These rights should also include the right to decide which international instrument should be incorporated into their domestic legal systems. The applicability of international law should therefore be determined by its conformity with domestic legal order sanctioned through municipal legislative or parliamentary interventions such as incorporation or domestication. Thus, 'The transformed or incorporated international law can now be applied domestically for the benefits of individual citizens'.[86]

Accordingly, 'International instruments such as treaties and conventions do not become binding on states unless and until after having been transformed into domestic legal system through the processes of incorporation or domestication'.[87]The process referred herein is termed as "transformation", which requires the legislative arm of the government which is constitutionally saddled with the responsibilities of making laws to first of all transform such international instruments into domestic laws, thereby clothing same municipally into becoming part of the nation's legal system.

Additionally, there are fears among the exponents of dualism that if the monists doctrine is adopted the law making powers of the legislative arm of the government as enshrined instates' constitution would be taken away. Thus, the automatic application of international law into domestic settings without legislative intervention does not only defeat the doctrine of separation of powers but it equally amounted to subjugating state's sovereignty to international norms.[88] However, this fear is viewed to be of no basis, since the rules of international law do not mandate nations to adopt the mentioned strategies of international instruments domestication, thus, the approaches chosen depend and remain the prerogative of the ratifying states.[89] The only noticeable distinction here is whether

[85] See again, Mwagiru (n 83).
[86] See, Bangamwabo (2008) pg167.
[87] Mwagiru (n 83) at pg146.
[88] Ibid at pg 149.
[89] Bangamwabo (n 87) pg 109.

each state has structured its policies on treaty-making in a constitutional form based on its constitutional law or whether its policies on treaties are merely informal.[90]

The emergence of the two doctrines in more than a century ago, has led many prominent international lawyers to make the above discussed controversies between the two theories the central themes and focus of their studies. However, the doctrine of "Dualism" came much later. As discussed in the preceding paragraphs, this approach was founded on the theory and prepositions that international and municipal laws are separate, distinct and independent systems that have their operations centered on different spectrums and covered different spheres in a designated ambit. Thus, while international law regulates the behaviors of sovereign nations and the relationships among them, municipal laws on the other hand regulate the relationships among individuals and their relations with their nations via states' institutions. Viewed as separate and independent legal orders, it is safe to submit that, to determine the respective conditions for their validity, and duration recourse has to be made to municipal laws. [91]

Thus, while the supremacy of international law is accepted by dualism at the international sphere, the supremacy of municipal law is maintained at the domestic level. Hence, none of the two legal orders can be regarded as being superior to the other. Additionally, the application of the rules of international law before domestic courts is dependent upon their conformity with the rules of domestic laws of the states before which courts the applications are made or as being part of those municipal laws after transformations, and or incorporation and not because of the superiority of the former to the later.

In contrast to the above theory, the monist doctrine was founded on the unity and oneness of the two legal orders. To the Monists, the two legal orders are not only interdependent but are basically part of one and single legal order with the rules of international law being superior over and above the rules of municipal legal order. Thus, in the hierarchy of norms, international law sits at the apex. To the Monists therefore, the

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[90] See, Mwagiru (n 83) pg 76.
[91] Ibid, at pg 19.

rules of international law are applicable in municipal courts directly and distinctly as international law. It is therefore a right submission to postulate that a sovereign nation becomes a monist state if it automatically applies the rules of international law as part of its municipal law without the necessary requests for an express legislative intervention such as domestication and, or incorporation.

Furthermore, some proponents of monism are of the view that a domestic law which goes contrary to the rules of international law should to the extent of that contradiction be void. However, some prominent monists such as Kelson[92] hold that:

> A municipal law which is in contradiction with the rules of international law remains valid until annulled domestically, because though illegal at international level such domestic laws retain their validity domestically, after all, international law does not specifically or expressly provide any procedure for their annulment.

Nigerian scholars and Jurists view the above discussed theories from "Positivist" perspectives. Thus, the two approaches are considered in Nigerian legal spheres as representing two different views on how international law relates with Nigerian legal and judicial systems and how the foreign policy of the country is shaped.

The Monists as earlier discussed held the view that there are in existence some kinds of hierarchical arrangements of norms involving the duo of international and domestic legal systems operating within a single legal order. Many proponent of this theory postulate, that there is a coexisting relation within the same national legal order between international and domestic laws. Thus, according to them, 'nations' legal systems are made up of treaties, conventions, and international protocols without the necessity for a domestic legislative intervention'. Hence, domestic values, norms, principles, and basic rules consist of those that were derived and sourced from international legal norms. By holding this view the Monists believe that: 'Superiority doctrine and position between the two legal orders

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[92] Kelson H, *General Theory of Law and the State* (Cambridge 1945) pg 124.

should be considered in favor of international law against domestic legal orders'. Thus, in the event of conflict between the two legal orders, '…international law shall prevail and shall have a superseding effect over and above domestic legal order notwithstanding the latter's constitutional character'. However, this position is vehemently rejected by the opponents of this theory, who are holding the view that: 'Though there is in existence such arrangements in terms of hierarchy between the two legal orders, yet the superiority position shifts to the direction of domestic laws due to the issues of sovereignty of nations which international law is designed not only to protect but to also preserve'

To many proponents of this theory, there are strong grounds to hold the view that: 'The two legal orders are so interdependent so much so that there is not in existence any hierarchical arrangement there in between the two, however there is the existence of a universal legal order that suggests a penetration between the two, thus making them interwoven and inseparable'. This argument is considered by some moderate Monists to be "weak", because 'It has despite considering the two legal orders to be inseparable, strongly ties the validity of domestic laws to their consistency with international law'.

Contrary to Monists' view, an international instrument such as a treaty or a convention can only have a legal effect domestically when it is concluded in accordance with the prescription of local legislations and its incorporation done within the stipulations of municipal laws. Thus, in Nigeria's setting such an instrument and all other international law instruments must be subjected to the "consistency test" enshrined in the constitution. Hence, international law is only applicable domestically through legislative interventions, thus with the blessing of legislative measures an international law is transformed into a municipal law.

> There is a parallel and separate existence between international and domestic laws, where international law is concerned with the county's relationship with other states and some subjects of international law on one

> hand and the domestic laws regulate the relationship between the states, citizens and various entities within its entity on the other.[93]

Additionally, "Dualism" views international and domestic laws as 'distinct, and separate, with each nation having the right to determining for itself how, when and to what extent should the rules of international law be incorporated into its domestic legal system thereby determining the status and position of such rules'. Thus, domestic laws determine the applicability or otherwise of the rules of international law.

The above position was well captured in the lead judgment of the Nigerian Supreme Court, where it held that:

> International law per se cannot create or invalidate Domestic laws, and Domestic laws per se cannot create or invalidate International Law unless through a legislative intervention. The two legal systems are in law and fact essentially two different legal systems having nothing in common but being branches separate from each other of a single tree germinating as a seed of law. It is however possible for the domestic laws of a given state to by either customary practices or statutorily incorporate the rules of international law into its domestic laws, thereby making the said rules part of its domestic laws with the same effect and validity before its domestic courts[94]

Dualist scholars therefore reject the opinion that:

> The international law rules automatically operate within municipal legal system without being transformed into domestic laws trough the processes of incorporation or domestication. Thus, the rules of international law can only operate and confer rights and corresponding obligations on citizens and entities within the state through legislative prescription.

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[93] Kelson H. (n 92) pg 126
[94] In *Abacha* (n 19).

Furthermore, the Nigerian apex court held that:

> Where an international treaty has by enactment become a law through domestication by the National Assembly,[95] such an international treaty has become binding, and must be given effect and be upheld by the domestic Courts like any other law on which the courts can exercise their judicial powers.

The concept of these two doctrines has however been viewed by this study as a misleading labels in its classification of different municipal approaches to the relationships between international instruments (such as treaties) and municipal laws. In the past, many literatures have advanced some arguments regarding the questions as to whether international treaties or conventions have through the processes of transformation become part of municipal orders, where by such treaties for instance were reenacted into municipal laws such that they become applicable as domestic laws instead of international law, or whether they can become applicable through domestication or incorporation, thereby retaining their features as rules of international law.

Furthermore, it is misleading in that, there was a tendency of assuming transformation as being a concept acceptable to the dualists, while domestication or, and incorporation on the other hand acceptable to the monists. The use of these terminologies has further worsened the misleading nature of these theories, thus the use of labels such as "moderately dualists", "radically dualist", "formally dualist", or "*defacto* monists", "moderately monists", "hybrid monists", "quasi-monists", has compounded the problems associated with understanding these theories. Hence, the analytical usage by the proponents of the dualists-monists terminologies in explaining the various constitutional approaches to the relationship between international and municipal legal orders has compromised the overall aims of the two theories, thus making the incessant usage of the terminologies questionable.

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[95] For example the domestication of African Charter on Human and Peoples' Right into Nigeria's domestic laws by the Nigerian National Assembly through the (ACHPR) Act.

Additionally, the use of terminologies such as "automatic-treaty-incorporation" and "non-automatic-treaty-incorporation" used in explaining the relationship between international treaties and municipal legal orders is not only misleading but confusing as well. While the former refers to a constitutional procedure where by certain categories of treaties are automatically incorporated into domestic laws of a state, the later refers to such procedures where by certain treaties require legislative intervention before being incorporated into the domestic laws. Being Nigeria a dualist state the later procedure applies in its application and enforcement of international instruments.[96]Yet, not every international instrument ratified by Nigeria requires ratification and or domestication by the legislatures before it can become enforceable, section 3 (1) (b) and (c) and section 3 (2) (b) and (c) of the treaty making Act[97] make some non-normative treaties enforceable in Nigeria without the necessary legislative interventions.

CHAPTER III

MEANING AND NATURE OF TREATIES

3.1 Introduction

Individual citizens may establish legal interests by signing of contracts, or agreements, through a designed system established for the purpose of transferring titles to properties, or through enacted legislations or judicial decisions. However, International law is by far more limited in this regard as far as the processes for the enactment or creation of new rules are concerned. Customs rely upon some measures of practices and conducts by states with

[96] See, the provisions of section (12) the Constitution (n 2).
[97] See, the Treaties (Making Procedure etc) Act, Laws of the Federation of Nigeria 2010.

the support of *opiniojuris* and the processes are evolving in nature and timely in acceptability except in treaty creation which under international norms involves a more direct and formal method of law creation.

Under international law, member states conduct most of their relations and affairs through the use of international instruments like treaties and conventions though in ways which are by far less sufficient and binding than the procedures involved in settling of disputes, or creation of rights and obligations under municipal laws. For example, nations can by means of treaties terminate wars, bring conflicts to an end, settle disputes, establish alliances, create organizations acquire or cede territories but when and only if they consent. Thus, international law evolves largely through the concept of treaties and how it operates between civilized nations.

3.2 Analyzing the Meaning and Nature of Treaties

An international agreement reached voluntarily by two or more parties is referred to as a treaty. Treaties may be drafted and signed by nations and other subjects of international law, but their main focus is on the relations between their constituent members. The International Convention on the Law of Treaties (ICLT), which was signed in 1969 and went into effect in 1980, and the Convention on Treaties between States and International Organizations (CTSI), which was signed in 1986, were both signed in 1969. However, emphasis was placed on the proper guidelines and standards that have arisen among the member states.

The Vienna Convention on the Law of Treaties, which fully reflected customary international law, provides a strong framework for this study's investigation of the nature and characteristics of international treaties. I see certain of the convention's provisions, like those governing substantial breaches, status interpretation, and fundamental changes in circumstances, as reflecting customary international law. Some of its articles, however, are principles that are only applicable to state parties.

The concept of treaties is premised on the presumption of ‘outmost good faith’, hence the principle that state parties are bound by the terms of treaties they have willfully entered into and that they are expected to perform and discharge their obligations in good

faith. Thus, the principle termed as *pacta sunt servanda* which arguably is the oldest principle in international law. Article 26 of the 1969Convention reaffirmed the principle, and emphasized the need for trust among state parties that they will abide by the terms of their agreement, otherwise there should be no need for states to conclude agreements which they are not sure that would be honored and respected.

Different names are used in reference to agreements between states, however 'treaty' remains the most widely and commonly used. Names such as act, protocols, charter, pact, and covenant are often used in expressing the same concept of treaty under international law. Each of those names used refers to an agreement between states concluded in written form under international law and the preferential use of one name over another is nothing more than a choice of term and does not in any way affect the context therein.

According to article 2[98] an international agreement concluded between states in writing and controlled by international law is referred to as a treaty in article 2 of the convention, regardless of whether it is comprised of a single instrument, two or more linked instruments, or another designation. From the wording of the above provision, agreements involving international organizations are excluded, and in the same vein agreements between member states being governed by domestic laws such as commercial agreements and economic pacts are not covered. Excluding such agreements by the convention does not signify invalidity or that they are not recognized as treaties rather they are not just within the ambit of the 1969 convention.

Indeed, Article 3of the convention reaffirms that: 'Agreements entered between subjects of international law, or between member states and other subjects of international law or unwritten international agreements do not by reason of not being included or covered by the convention become invalid or nonbinding'.

An international agreement does not need to take a specific form for it to be considered as a treaty, hence no specific requirements exist for a certain form under

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[98] Vienna Convention (n 1).

international law for the existence of an international treaty, however it must be shown that the parties thereto intend to create a legally binding relationship between them. Thus, agreements between member states for the expression of statements of mutually held principles, or the expression of support for a particular political cause are not considered as treaties for they are not intended to create a legal relationship, hence they establish non binding obligations. For example, most of the declarations by some member states expressing their support for a particular political cause or in solidarity to a particular diplomatic position may in so many instances only bear a political rather than legal significance, because such declarations are usually regarded as matters of policy by member states rather than matters of any legal consideration. It is therefore sacrosanct to examine carefully and take into consideration all the facts of the situation involved in a given agreement before determining whether the parties thereto intend to create a legal relationship.

There are numerous examples of non binding agreements, which include the 1975 Final Act of the Conference on Security and Co-operation in Europe. Though the conference was having all the features of a treaty, it was nevertheless considered to be just an expression of diplomatic stands and solidarity. Similarly, in the case of Anglo-Iranian Oil Co., the ICJ held that: 'There was no consensus as to whether an agreement based on concession between a state and a private company can be regarded as having constituted an agreement within the context of a treaty under international law'.

Under article 36 (2) of the statute of the ICJ 'the optional declarations in respect of its compulsory jurisdiction are considered to have been treaty provisions', similarly, declarations made through unilateral conducts of member states in respect of factual or legal situations may be having the effect of creating some legally binding obligations. Though, in this situation a treaty as such may not have been contemplated by the parties. No matter how perfect the agreement might be, it will still not be a treaty if the parties do not intend to create a legal relationship or legally binding obligations under international law, though the political effects of such agreement could still be of considerable significance.

Similarly, interests as expressed in Memoranda of Understanding (MoU), which though not legally binding as such, but are yet of enormous legal consequence. Additionally, non binding, informal, non treaty mechanisms are more often used in inter-state relationships partly because of their non binding status, flexibility, confidentiality, and speed when compared to treaties. They are easily amendable within a short period and may subject to any contrary provision be brought to an end by reasonable notice. Thus, the intention to create a legal relationship and thus a binding obligation is the striking deference between a treaty and other non binding informal instruments under international law.

The above issue was addressed by the ICJ in the case of *Qatar v Bahrain* in respect of minutes dated 25 December1990 which was signed by the Qatar and Bahrain with Saudi Arabia. The ICJ held that:

> Whether an agreement constituted a binding agreement would depend upon 'all its actual terms' and the circumstances in which it had been drawn up, and in the situation involved in the case, the Minutes were to be construed as an international agreement creating rights and obligations for the parties since on the facts they enumerated the commitments to which the parties had consented. [99]

Additionally, different provisions and clauses might be contained in a treaty, most of which do not create legal obligations.

Many international instruments were negotiated, signed, and ratified by Nigeria however less attention is being given to the incorporation and subsequent domestication of the same. Thus, a large number of such instruments remain inapplicable and unenforceable before Nigerian courts, thereby depriving individual citizens and other subjects of international law domiciled in the country the benefits derivable from the enforcement of such instruments. Because of the fact that less attention is given to the domestication of such treaties, many citizens and minority groups cannot enforce nor have their basic rights protected when violated. This defeats some aims of international law in protecting people's

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[99] See, the ICJ Reports 1994 pg. 115, 121;102 (ILR) pg. 1, 18

and human's rights before domestic courts through the enforcements of various signed and ratified international instruments.

Treaties are simply referred to as international agreements. Thus, international treaties are consensual engagements agreed on by the subjects of international law in their relationships with one another with the necessary intention of being bound by the content therein the agreements under the rules of international law. International treaties therefore represent all such agreements negotiated consensually by states between themselves or between states and other subjects of international law. The word "treaty" is a generic term referring to instruments such as conventions, covenants, undertakings, protocols, charters, etc.

The most important consideration in describing a treaty is always not the designations or nomenclatures used, but the fact that the parties thereto are willful partners and have consensually reached a consensus ad-idem and have intended to create a legal relation between them in outmost good faith. This consideration and presumptions of acting in good faiths by parties to a treaty were strengthened by the age-long international law adage of *pacta-sunt-servanda,*[100] which is reiterated in the Convention on the law of Treaties.[101]Additionally, 'A domestic laws' provision cannot be relied upon by a party as a justification for failure to perform its treaty obligations'.[102] A state party cannot therefore adduce its own domestic legislations against another state party in an effort at evading or shielding itself from treaty obligations it consensually accepted under international law. Furthermore, a state party is not entitled to unilaterally withdraw from a treaty it has willfully negotiated and entered and to which it has bound itself without the free consent of the other parties.

3.3 Formalities in Treaty-Making

[100] Literally meaning that, states and other subjects of international law are duty bound in carrying out their obligations contained in a treaty in good faith.
[101] See, article 26 of the Convention (n 1).
[102] Ibid.

A treaty may be entered into, made or concluded by member states in virtually any chosen manner agreed to by them. Thus, no specific form, manner, shape or procedure are required on how treaties should be formulated or who and how signed. All these depend upon the choices, desires and intentions of the parties thereto. A treaty could as well be concluded as between member states, or institutions of a government, depending on the desires of the parties concerned. Thus, many treaties are entered into as between governmental heads, while minor economic pacts and trading agreements are drafted as between governmental institutions or departments.

Under municipal laws, the powers to make treaties on behalf of the state depend on the constitution and domestic rules of individual states and those powers defers from one member state to another. For instance, treaty-making powers in Nigeria are vested by the constitution in the executive, similarly such powers are the prerogatives of the Queen and the President in the United Kingdom (UK) and United States (USA) respectively. Though in the case of Nigeria a legislative intervention in the form of incorporation and domestication is necessary[103] and in the USA, the President must seek and obtain the advice and consent of the Senate's and the concurrence of two-thirds of the Senators. Such internal matters remain within the purview of municipal laws to the exclusion of International law.

Despite the above position of international law on the internal procedure of states in relation to how and by whom a treaty is signed under municipal laws, yet certain acceptable rules and standards do apply in the formation of international instruments such as treaties and conventions. Member states under international law possess the legal capacity to make agreements as 'artificial persons', and not as identifiable natural persons, certain basic principles have been formulated to ensure that the natural persons representing member states are indeed empowered so to represent them in both the processes of the treaty creation, conclusion and signing. By virtue of article 7 of the Convention 'Before being accepted to be representing their respective states such persons must be accompanied with evidence of "full powers" of representation'.[104] Evidence of

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[103] See section 12 of the constitution (n 2).

[104] The Vienna Convention (n 1).

‘Full powers’ are documents certifying that the persons in question are indeed mandated by competent authorities of the state concerned. Thus, the parties involved are assured by the Convention that they are indeed dealing with the right persons competent to act on behalf of the states concerned.

However, some people are excused from presenting such evidence of their "full powers" by virtue of their position. These exempted individuals include the heads of states and their foreign ministers, as well as the ambassadors and heads of diplomatic missions who are tasked with carrying out all acts related to the completion and acceptance of the treaties' text. Thus, in *Bosnia v Serbia* the ICJ held while ruling on the preliminary objections raised in jurisdiction phase of the Genocide Convention that: ‘According to international law, there is no doubt that every head of state is presumed to be able to act on behalf of the state in its international relations’.

Though it’s submitted earlier that there are no formal procedures or a particular form which treaties must take before becoming effective’, nevertheless it is a vital factor to show that the state parties to the treaty b have given their consent thereto. Hence, states are only bound by their willful acts. Thus, in all agreements with the exception of international conferences, adoption of the text of the agreements can only become effective after all the parties thereto have expressed their consents in so doing. Provisions of a treaty are in this sense like a contractual relation, the terms of the agreement will be invalidated and thus nonbinding in the absence of a free and genuine consent from all parties involved. State parties can express or signify their consent to an agreement in various ways. Accordingly, article 11provides that: ‘Consent could be expressed by way of exchange of an instrument, signature, acceptance, approval, ratification, or any other means so agreed by the parties’.[105]

As provided in article 12, ‘A signature affixed to the text of an agreement in a defined and agreed circumstances signifies consent of the state concerned’, such circumstances include instances where it is provided in the text of the agreement that signatures signify consent or that the signatures of the states’ representatives shall have the

[105] Ibid.

effect of a consent or that signature shall from the contents of the representatives' 'full powers' have the effect of consent.

Although Consent through ratification is arguably the most widely used among of the numerous methods adopted in practice, nevertheless consent by signature still retains some significance, partly due to the fact that it is more easier and speedy, because to insist on ratifying treaties before becoming binding involves some bureaucratic processes which will result in burdening the administrative machinery of state authorities and cause unnecessary delays. It will therefore be more expeditious to take advantage of the provision made for expressing consents by way of signatures, especially when the treaties involved are the more routine and less politicized types. Expressing consents by means of a signature is usually a ceremonial affair, thus in the more import international agreements, the head of governments formally affix their signatures in organized and well publicized ceremonies. In a much similar way, the authorized states' representatives affix their signatures at special closing sessions, especially if the agreements are reached at multilateral conventions.

However, in a situation where the treaty needs to be subjected to executive approval by way of ratification, signing the text of the treaty will only amount to formalities meaning no more than an acceptable text as agreed by the states' representatives to be forwarded to their respective governments where the final decisions will be made accepting or rejecting the text of the treaty in question. However, signature does have some implied meaning in that it suggests in such situations that pending ratification, and approval, the parties involved shall be refraining from conducts that are likely to negate the objects and purposes of the agreement until such time when their final stand on the text of the treaty are unambiguously and expressly communicated.

Exchange of instrument can also be used in expressing or giving consent. Accordingly, the convention in article 13 provides that:

> The consent of a state party can be expressed by the exchange of instrument and such states will be bound by that exchange especially if it is provided in the text of the treaty or it is established by the instrument that such

> exchange shall have that effect or that the parties thereto have agreed that consent is given when the instrument is exchanged between them.

A state party's consent can as well be inferred through ratification, if the device of the ratification is executed by competent states' authorities. The device of ratification is aimed at ensuring that the states' representatives do not act in *ultra viase*, thus exceeding his powers or acting beyond the instructions of his principal in respect of making or drafting the text of the treaty in question. Originally, ratification was within the functions of the sovereign, however it has now been made a constitutional matter. In Nigeria for instance, section 12of the constitution provides that: 'A treaty becomes effective only after it is ratified by the President with the consent and approval of the National Assembly'.

The idea of waiting for a treaty to be ratified before becoming a binding document has two main advantages. Firstly, it allows for consultations and consideration immediately after the negotiation processes are completed. Secondly, it encourages greater participation in that the public might be consulted by the governing authorities for their input before the final draft is eventually signed. Thus, the public will have an opportunity to express their opinion and make a meaningful contribution which may guide the state in either ratifying or rejecting the text of the treaty in question.

There is no unified rules in respect of treaty ratification, the rules defer from one state to another. In Nigeria for example, ratification has to be made by the executive before the draft text is sent to the National Assembly for incorporation and subsequent domestication, anything short of this renders the document invalid. Similar situation is obtainable in the UK, where though the powers to ratify treaties are vested in the crown, treaties that might likely effect changes to the domestic laws, or incurring further financial burdens to the state, must be submitted to the parliament before ratification. Thus, in the UK such treaties which are subject to ratification must within twenty one days to the day of the ratification be laid before the parliament. Therefore, it's an internal affair how a state applies its domestic rules in effecting ratification of treaties it enters with other member states.

As provided in Article 14, 'Ratification expresses consent of the state parties to be obliged by an agreement where it is so provided therein',[106] it will therefore be presumed always that the states parties have agreed that ratification should always be required. Thus, the states' representatives sign treaties subject to subsequent ratification, and the states' intention that their representatives should sign treaties the effect of which will be subject to ratification always appears in the 'full powers' of its representative or would be clearly expressed during negotiations. However, the controversy is that which treaty needs to be subjected to ratification after it is signed by representatives? Within this framework, it is my submission that ratification will always become necessary if it is within the contemplation of the state parties to the agreement, and this seems to be the position of Nigeria and the UK. To this position, many scholars suggest that ratification is necessary except in situations where a contrary intention is clearly revealed by the text of the treaty in question.

However in bilateral treaties, ratification is accomplished through the exchange of the requisite instruments, but the procedure in multilateral treaties is that a party will collect ratifications from all the involved states, informing all the parties of the development. It has now become more acceptable that the UN's Secretary General will in such instances be acting as the depositary for such ratifications. Signature to a treaty may in some instances be declared subject to 'approval'. As provided in articles 11 and 14 (2) 'The different terms used bear similarity to ratification and same provisions apply'. Such differences in terminology are not in any way having any significance, legal or otherwise, they are only referring to a simpler kind of ratification.

Accession is another way through which consent can be expressed. According to Shaw, "This is the typical process by which a state becomes party to a treaty it has not signed, either because the treaty provides that signature is restricted to certain states, and it is not one of those states, or because a specific deadline for signature has passed."'.[107]It is enshrined in article 15 that.

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[106] Vienna Convention (n 1).
[107] Shaw (n 49) pg 913.

> Consent by accession becomes possible only where it is so provide by the treaty or in situations where the state parties involved in the negotiation of the treaty were agreed upon or where it is subsequently agreed that accession should be used to express consent as regards the party state in question.

In some very important multilateral treaties it is often declared that party states or, in some cases, other stake holders may decide to make accession to the agreement at a later time and possibly a different venue.

A state party may if satisfied with some part of an agreement and unsatisfied with other parts, wish to accept to be bound by that portion which it wishes to accept and refuses to be bound by the part it chooses to reject while expressing its consent to the entire agreement. This is referred and called a 'reservation to a treaty' and the convention defines it as: When a state signs, ratifies, accepts, approves, or accedes to a treaty, it makes a unilateral pronouncement, however stated or titled, that purports to exclude or change the legal effect of some of the treaty's terms in their application to that state..[108]

Shaw holds the opinion that 'By the device of excluding certain provisions, states may agree to be bound by a treaty which otherwise they might reject entirely'.[109]This may provide a lot of benefits when multilateral conventions are involved, by involving as many parties as desired to be involved in the agreement proposed. It can also be used as a means by which harmony can be encouraged between member states that are hitherto different in their economic, social and political backgrounds. Thus, the parties will despite the mentioned differences concentrate on some agreed, basic issues while accepting to disagree on others.

The ability of a state to express reservations to an international treaty serves as an example of the principle of state sovereignty, which allows a state to withhold its agreement to specific terms so that they do not become legally obligatory on it. However, allowing a

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[108]The Convention (n 1) article 2 thereof.
[109]Shaw (n 49) pg 910.

pact to become honeycombed with objections from various nations may potentially imperil such an endeavor. It might substantially undermine the agreements' very intent, resulting in some complex interactions between the states. Bilateral treaties are exempt from these issues because any objections to a proposed clause would necessitate renegotiation.

One party's refusal to recognize parts of the treaty's obligations renders a two-party agreement invalid. However, this is different from the situation with regard to multilateral treaties, where individual states may object to certain articles by declaring their intention to either omit them entirely or understand them in a particular way. Therefore, a reservation only has the effect of excluding the treaty provision it refers from the terms of the treaty that is currently in effect between the parties.

Reservation is different from other statements such as political statements or declarations that are interpretative in nature which are in respect of agreements that are not aimed at having the same legal effect as reservation. Thus, the parties involved intended no binding consequence from the text of the agreement in question. What the parties intend is purely a manifestation of political stand primarily intended to have internal effect which is not obligatory on the other parties involved.

3.3.1 Entry into force of Treaties

Depending on how and what the state parties decide, International treaties become operative as soon as they are consented to by the parties thereto, thus, in the absence of any contrary agreement a treaty becomes effective the moment a consent to be obliged by its contents is established. In many instances, international treaties specify and indicate certain and specific dates or periods they will take effect after ratification by the negotiating parties. In multilateral treaties or conventions, coming into effect is usually provided upon ratification by a fixed number of parties in order not to prejudice the context upon which they are negotiated. For example, it’s provided that the 1958 Geneva Convention[110] should come into force on the thirtieth day after the ratified instrument is deposited with the UNSG.

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[110] See, Geneva Convention on the High Seas 1958.

Similarly, the Treaties Convention[111] became effective thirty days after the thirty-fifth ratification, while the ICC's Rome Statute[112] takes effect after the sixty ratifications. Of course, in this context it's only the state parties that have ratified the treaty that would be bound even after the specified numbers of ratifications have been received. Thus, it will not bind other members who have merely signed it unless if it is provided that signature is in this particular circumstance a sufficient expression of consent to be bound. The convention[113] in article 80 provides that: 'International treaties should be deposited with the UN secretariat after coming into effect for registration, and subsequent publication'.[114]The results intended to be achieved by these provisions include 'bringing an end to the practice of "secret treaties", which was viewed by many as a contributing factor to the outbreak of world war one (WW 1), and to enable the UN register as comprehensive as possible all registered international treaties under the United Nations Treaty Series (UNTS)'.[115]

3.3.2 The Amendment and Modification of Treaties

Amendment and modification of international treaties are two different processes meant to achieve a single aim of revising a treaty, though they involved separate activities they are however meant to achieve same purposes which may be achieved or accomplished in different ways. While Amendment refers to 'The formal change through the alteration of provisions of a treaty, which affect all the negotiating parties to the particular treaty, modification on the other hand relates to variations of some terms as contained in the treaty as between only a certain negotiating parties'.[116]

Negotiating party to an international treaty may by an agreement amend the content therein if they so desire in so far as they will abide by the contents of the treaty as they relate to coming into effect, conclusion and other formalities as provided by the treaty convention or as may otherwise be provided by the treaty itself. Sometimes needs may

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[111] See, the Vienna Convention (n 1).
[112] See also, the Rome Statute of the International Criminal Court.
[113]The Vienna Convention (n 1).
[114] Article 102 of the UN charter provides similar provisions.
[115] Shaw (n 49) pg 926.
[116] Vienna Convention (n 1).

arise for the alteration of some provisions contained therein a particular treaty, in that regards the alterations must be effected in line with the original form taken by the treaty, this is in consonant with the basic principles of international relations relating to parties' legal rights and obligations, and in consideration for the state parties' consent and sovereignty. Thus, it's necessary to carefully interpret the various clauses in the agreement

Shaw, opined that: 'Oral and, or tacit agreements may be amended, provided they are unambiguously and clearly evidenced'.[117] As regards multilateral international treaties specific conditions may be laid down in effecting amendments. Article 108of the United Nations Charter for example, provides that: 'For amendments to come into effect it must be adopted and ratified by two-third of the member states, the five permanent members of the UNSC included'. In a situations where there are no specific procedures laid down for amendment, some negotiating members may oppose the proposed amendment. To avoid this scenario the convention provides that:- 'All negotiating parties must be notified of the proposed amendments for them to participate in arriving at a decision concerning the actions to be taken in drafting both the proposals and the conclusion thereon'.[118]

All the negotiating parties to a treaty have equal rights to participate in the amendment processes, however the proposed amendment would subject to any contrary provision contained therein the treaty not bind the other parties who though part of the original agreement opt not to participate in the new processes. A party becoming a member to a treaty after the coming into effect of amendments would be bound thereto the amended version except a party not bound by the amendments in which case such party would only be bound by the un-amended treaty.

Agreement may be changed by two or more parties to a multilateral treaty in any way they may decide between themselves quite irrespective of amendments made by the other parties. This process is referred to as modification, and is only possible if provided for by the agreement in question and subject to the fact that it has not in any way affected the rights and obligations of the other members. However, it is not possible where the

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[117] Shaw (n 49) pg 931.
[118] The Vienna Convention (n 1).

alteration may likely alter the desires which the members intended to achieve or where it renders the object of the treaty incompatible with the purposes of the whole agreement. A treaty can as well be modified by the terms of a subsequent agreement or when a subsequent *jus cogen* rule is established.

3.3.3 The invalidation, suspension, and termination of international treaties

3.3.3.1 Invalidation of treaties

A party to an international agreement such as a treaty, convention or a charter cannot use "the non compliance" with its constitutional provision or any of its domestic laws as an excuse in shielding itself from its obligations as contained therein the agreement. The validity or otherwise of an international agreement concluded on behalf of a state by for example a Head of a Government in breach of some domestic constitutional limitations has for long been a topic of academic arguments among scholars. According to the convention in its article 46 (1) 'The validity of such agreement may not necessarily be affected by such breach or non conformity with the domestic law'.

The convention provides that: Unless the violation was obvious and involved a rule of its internal law of fundamental importance, a State may not claim that its expression of consent to be bound by a treaty was invalid because it violated a provision of its internal law regarding competence to conclude treaties. [119]

Generally, violation will be viewed and considered manifest if and when it is 'objectively evident' to any state party whose conducts in the matter is in outmost good faith and in line with common practice within the ambit of international law. In a situation for example:

> Where such Head of a government or any person representing a state party's authority to consent to the text of an agreement is dependent upon some clear limitations or restrictions that have been disregarded, the state party so represented will still be obliged to accept that consent except in a

[119] Vienna Convention (n 1) article 46 (1).

> situation where it is evidently clear that the other parties knew that the representative was acting outside his authorities as regards the limitations and restrictions upon his authorities before that consent was expressed.[120]

Equally, 'Persons authorized to represent a state (who are referred to by the application of this provision) party are defined to include heads of government of sovereign states, ministers of foreign affairs and other persons who posses full authorizations'.[121]

Similar question came up for determination before the ICJ in a matter between Nigeria and Cameroon Republic. It was the argument of Nigeria that 'The 1975*Maroua* Declaration between the two West African neighbors was invalid because "it did not comply with the provisions of the Nigerian constitution". In its ruling, the ICJ held that:

> The representative of Nigeria who in the instant issue was its President had consensually signed declaration and the arguments that 'he has crossed a clear constitutional restriction as regards to his capacity' would not be held as being 'manifest' except if it can be proved that the said limitation has been properly and adequately publicized.

Thus, heads of government of sovereign states are considered and assumed to be the representatives of their states for among other functions the duties of negotiating and concluding international agreements. The ICJ further held that: 'There is no overarching legal requirement for states to stay informed about legislative and constitutional changes in other states that are or may become significant for these nations' international relations..

Furthermore, it is worthy of being equally noted here that, it is one of the cardinal principles of international law that 'a state party cannot be allowed to use its domestic laws' provisions as an excuse or a shield when it fails in carrying out its international obligations'.[122]Contrary to the position under the law of contract at domestic level where a mistake invalidates agreements, an error may not necessarily invalidate agreements under

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[120] Shaw (n 49) pg 130.
[121] Vienna Convention (n 1) article 7.
[122] Vienna Convention (n 1) article 27.

international law. Due to the distinctive features of states and the numerical strength of persons involved in negotiating and concluding international agreements, unilateral or mutual errors are usually uncommon. To this end, the convention provides that:

> An error can only be invoked by a state party to a treaty as a factor invalidating its consent only in such situations where it can be shown that the error relates to some factual instances which were assumed by it to have existed at the time of concluding the treaty, and the errors were essentially the basis which lead it to consent to the text of the treaty.[123]

However, such a state cannot invoke the error to invalidate its consent to be bound by the treaty if it's clear to all the parties there to the treaty that the error was known or was ought to have been known by the state in question.

The ICJ has in many instances made similar comments and observations pointing to the above restrictive approach. For example, the ICJ rejected the argument put forward by Thailand in the Temple case that: 'Due to an error which it regarded as basic concerning a given map it was obliged or bound by it earlier consents thereto'. The court further held that:

> The plea that there was a basic error at a time of giving a consent to the text of a treaty cannot be upheld as being a vitiating element, if it is shown that such an error was as a result of the contributory conducts of the party advancing it, or that such an error should have been foreseen and avoided by any reasonable state party acting in good faith or that there were prevailing circumstances putting the concerned party on notice of a possibility of such an error.

The court observed that: 'It was unreasonable to put forward such a plausible claim by Thailand if the features, experiences and qualifications of its representatives and other persons involved in examining the said map are put into consideration'.

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[123] Ibid, article 48.

In a much similar way, a state's consent to be bound can be invalidated if it is shown that such consent was obtained through a fraudulent conducts of any of the negotiating state parties. The concerned state party may rely on such fraud in invoking article 49 to invalidate its consent to be so bound. Furthermore, if it can be shown that the representatives of a state party were directly or by necessary implications corrupted by another negotiating state for the purposes of obtaining its consent to be bound, that corruption has by the provision of article 50'vitiated the agreement', thus the consent to be bound stands invalidated.

Another act regarded as an important and strong vitiating element under the law of treaties is coercion. Where it is proved that, the representatives of a negotiating state party were either directly or indirectly intimidated, pressured, or threatened into consenting to be bound by a treaty, such a consent is according to article 51'a nullity, and of no legal effect'. The problem of consent obtained by the application of coercion against the state itself is a slightly different one. The rules of international law did not consider the use of force or threats as grounds for treaties' invalidation until after the establishment of the League of Nations. This was attributed by many as 'being the result or consequences of the absence of international customary rules against the use of force by and against member states'.

However, after conclusion and the subsequent signing of the Covenant of the League and the Kellogg-Briand Pact[124] prohibiting the use of force or resort to war in settling international conflicts, the resorting to war or the use of force by or against member state was declared illegal under international law. Subsequently it was made clearly obvious that any coercive actions by member nations were denounced and made illegal by international law after the Nuremberg Principles and the UN Charter were adopted shortly after the end of World War II. As a result, the UN Charter states that "All members shall refrain in their international relations from using the threat or actual use of force against

[124] In 1919 and 1928 respectively

the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.[125]

International treaties concluded through the influence of a member state's coercive conducts are therefore regarded as invalid. Accordingly, the Convention[126]According to this clause, a treaty is void if it was reached through the threat or use of force, which is against the principles of international law inherent in the UN Charter. several member states, mostly communist countries and some third world countries, could agree on the meaning and effect of article 52 at the conference that preceded the adoption of the Vienna Convention, their argument was that: 'From all intent and purposes coercion should in addition to threat, intimidation, or the use of force include and comprise both political and economic pressures'. This argument has not yet been settled by either any decision of the ICJ or the International Law Commission (ILC)however it was noted by the ILC that: 'The nature of states' conducts that could be defined or described as coercion should be allowed to be determined through the interpretation of the appropriate and relevant provisions of the UN's Charter'. Though a firm stand could not be arrived at during the conference regarding the scope to be covered by the definition of coercion, however a declaration was issued by member states where Economic, Military, or Political Coercions were totally prohibited in the negotiation and conclusion of international treaties.

Thus, the exercise of any of the mentioned coercive measures in the procurement of treaty formation was condemned by member states. The convention did not specifically include these mentioned points, thus leaving a loophole leading to academic speculations and arguments as to whether the use of pressures being it economic or political in securing a member state's consent to be bound is in contravention of international law or not, though prevailing circumstances peculiar to each case could be used as a determining factor.

It is widely considered by international law experts that: 'apart from the use of such coercive conducts like threats or the use of force, there are various ways through which weaker nations can be induced by stronger ones in securing consent to be bound', such

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[125] See, The UN's Charter, article 2.
[126] See, The Vienna Convention (n 1) article 52.

influences are broadened under international relations to include mild or subtle expressions of rejection, disagreement or displeasure. Thus, different circumstances will be determined by their own peculiar situations, as such it will not only be misleading but equally unreasonable to assume or suggest that under international law all kinds of diplomatic pressures are coercive and thus, illegal. Padilla Nervo, a Judge of the ICJ observed and held in the Fisheries Jurisdiction case that: There are moral and political constraints that cannot be established through so-called documented evidence, but which are undeniably there. These factors have historically led to treaties and conventions that were purported to be freely concluded and bound by the *pacta-sunt-servanda* concept.

It is worthy of being noted here that, the phrase used in the Charter '…in violation of the principles of international law…'was deliberately enshrined therein, in order to avoid its misconstructions as to be implying that article 52 applies only to member states of the UN rather than being a rule of universal application.

Jus Cogens norms are another element that invalidates a state's consent to be bound. A treaty is void if, at the time of its conclusion, it violates with a peremptory norm of general international law, according to the convention.[127]A peremptory norm of the rules of international law is defined for the purposes of the current convention as the general rules accepted and recognized by the community of civilized nations, from which the international community is not allowed or permitted to derogate, and the modification of which can only be made by a succeeding or subsequent acceptable rule of international law with similar features. According to the Convention, any existing treaty that conflicts with a newly established peremptory norm of general international law is null and void and terminates.[128]

'A treaty invalidated by any of the vitiating factors discussed above is going by the provision of the convention a nullity and of no legal effect'.[129]However, where a state party while relying on such an agreement performed some acts considered to have vitiated the

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[127] See, The Convention (n 1) article 53.
[128] Vienna Convention (n 1) article 54.
[129] Ibid, article 69.

treaty, the other parties may demand from any other the establishment of how the situations would have been if the other party has not performed such acts. Additionally, acts believed to have been performed by another party in outmost good faith prior to invoking the invalidity may not necessarily be deemed unlawful just because of the subsequent invalidation of the treaty.

The convention provides in article 71 that:

> In a situation where an agreement becomes void by virtue of article 53the state parties should remove as far as possible such outcomes that emanated from the performance of those acts which were done while relying on any specification that is in conflict with *jus cogens* rules, so that their mutual relations could be made to be in conformity with 'peremptory norms.

Furthermore, with coming into an end of a treaty under article 64, '…the state parties are discharged of their obligations in the performance of the agreement', however all the parties' rights, and obligations that were created in the course of executing the treaty before its termination still remain, in so far as such rights and obligations could thereafter be maintained in accordance with the provisions of the latest preemptory norms.

3.3.3.2 The termination of treaties

An international treaty can be brought to an end by the parties thereto in any way they have chosen through the treaty's provision or their mutual consent. Thus, parties may terminate an international treaty based on some specific provisions contained therein the treaty or in any manner consensually agreed upon by themselves. However, in a rare situations where there is no express provisions as to how a treaty should be terminated, or how the state parties may denounce their consent to be bound or withdraw, then the parties may if they have chosen to permit such possibilities or if it can be inferred from the text or

nature of the treaty denounce or withdraw in any such manner as they so desire. The United Nations Human Rights Committee (UNHRC) has in its general comments[130] noted that:

> No provision for termination, withdrawal or denunciation has been provided by the International Covenant on Civil and Political Rights on treaties entered into on the basis of the provisions of the Vienna Convention where the state parties had no intention of admitting such possibilities.

The Committee argued that: 'While 'First Optional Protocol' provisions as it relates to the individual state's rights of communications referred to denunciation, there are no clear or express provisions for states' rights to withdraw acceptance as it relates to interstate complaints'. The Committee equally submitted that: 'Being it an instrument which codifies universal human and peoples' rights could not in any way have been the kind of agreement that by its nature could imply a right of denunciation by states partiers'.

Another way by which an international treaty could be terminated is by fulfillment. Thus, a treaty may be terminated when the purposes and objectives for which it was concluded have been achieved. Additionally, a treaty may be terminated by expiration of time which is clearly provided in the text thereof the treaty. Thus, a treaty clearly limited in time terminates the moment the period provided in its provisions elapses. This position can be noted in the case of Rainbow Warrior, where the Tribunal decided that:

> The commencement date of the breach in the France-New Zealand, 1986 agreement with respect to the captured French agents accused of sinking the ship in question was the 22nd day of July 1986, running constantly for the whole three years period stipulated in the agreement within which the agents were in detention.

Accordingly, the stipulated period had since the 22 July 1989 elapsed, thus:

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[130] See, The United Nations Human Rights Committee (UNHRC)'s General Comment No. 26, 1997.

> France could not be held to have been in breach of the agreement under international law at the expiration of that date, this could not however have excused French from the liabilities it incurred as a result of its eelier breach of the obligations which were then in force as contained therein the agreement.

Just as in every mutual contractual agreement, parties' rights or obligations created while executing the treaty before its termination are not in any way affected by that termination.

3.4 Application of international treaties

The moment an international treaty comes into force, many questions are raised as to how in particular situations and instances do this treaty applies. Unless otherwise provided, the parties thereto the treaty would not be retroactively bound by acts, facts or other legal situations preceding the states' acceptance to be bound by the treaty. Going by the provision of article 29'…a treaty binds all parties thereto in respect of their whole territorial boundaries, unless where a contrary intention can either be established or inferred from the context thereof the treaty'. To this general rule there is however an exception, thus a state party may possibly specify a certain part of its territory to which the agreement may apply to the exclusion of other parts.

Additionally, 'An unregistered international treaty may not be invoked by state parties before any of the organs of the UN'.[131]On the issue of consecutive international treaties dealing with similar subjects, the convention in its article 30 provides that:

> The rights and obligations of states parties to subsequent treaties related to the same subject matter shall be resolved in line with the following articles, subject to article 103 of the United Nations Charter.
>
> a. The provisions of that other treaty take precedence where a treaty states that it is subject to or should not be construed as conflicting with an earlier or later treaty.

[131]The (UN) Charter, article 102.

b. The earlier treaty only applies to the extent that its provisions are compatible with those of the later treaty when all the parties to the earlier treaty are also parties to the later treaty and the earlier treaty is not terminated or suspended in operation under article 59.

c. When all of the parties to the older treaty are not party to the later treaty: The same rule as in paragraph 3 is applicable to states that are parties to both treaties (a); (b); and between states that are parties to both treaties and states that are only parties to one treaty, their rights and obligations are governed by the treaty to which both nations are parties.

d. Article 41, any question regarding the suspension or termination of a treaty's application under Article 60, and any issue regarding responsibility that may arise for a state as a result of the conclusion or application of a treaty, the provisions of which are incompatible with its obligations to another state under another treaty are all unaffected by paragraph

e. With the expansion of states, the number of treaties signed, and the added complexity of increased activity in the face of evidence to the contrary, the issue created by successive treaties is becoming more and more serious. Under customary law, a treaty would apply to all of a party's territory, including colonies. The rules as laid down in the above article are but a general guide, however, parties may expressly resolve their problems according to the terms they consensually agree on

CHAPTER IV

NIGERIA'S TRETY MAKING ROLE: WHO THE CAP FITS?

4. 1 Introduction

There are numerous ways through obligations are acquired under international law, one of which is by treaty where the parties thereto agree to a text contained in the treaty stipulating such obligations. Being a signatory to the said international treaty is evidence that the parties intend to be bound by the content there in. However, in some jurisdictions like Nigeria for instance, treaties have to be domesticated by the parties before the provisions of such treaties can be of any benefit to the citizenry. Section 12 of the 1999 Nigerian constitution (as amended) is one of such many instances.

International treaties are agreements concluded formally in written form among subjects of international law such as states in accordance to the rules of international law, these agreements can be concluded in one or more instruments through any chosen designation. Treaties constitute a major source of nations' domestic laws and confer binding responsibilities upon the parties in a contractual sense. It is always implied that nations accept full obligations contained therein whenever they conclude and agree to the contents of treaties. Lack of domestication will therefore not be an excuse in the event of failure to meet obligations, as such is always considered to be an indication and evidence of bad faith.

Thus, the requirements for domestications of an international treaty in states like Nigeria which adheres to the 'dualist' school appears to be a tool used in order to avoid obligations contained in ratified but undomesticated treaties. And this impacts negatively

on the role that international treaties play in the development of both international and domestic laws; hence it is viewed as the closest analogy to be offered by international law to legislations that constitute some ways through which agreements are concluded by states. This might bear some implications for domestic law in its dealing with states' institutions and citizens, and Nigeria being a member of the community of civilized nations and as a signatory to many international treaties, could not afford to lose its position as such by avoiding its obligations through the use of the requirement for domestication as a shield.[132]The said section of the Nigerian constitution will be examined by this work to find out whether it constitutes a shield against fulfillments of international obligations.

4. 2 Federal Government of Nigeria's Exclusive Treaty-Making Powers

Constitution remains the major source for determining how a state's domestic law interacts with international law. The extent to which citizens can employ the mechanisms of international law in enforcing their respective rights is determined by the interactions between the national legal system and the international law. It has been a standard principle of international law that states are competent to negotiate and conclude treaties in respect of matters that are considered to have fallen within their sovereignty. However identifying the departments that are saddled with the responsibilities of negotiation and concluding such treaties in Nigeria remains a herculean task. Thus, according to Prof. Ben Nwabueze,[133]'The procedural law dealing with capacity to enter into treaties is not well spelt out in the Nigerian constitution'. Treaty implementation is the only duty clearly assigned in the constitution, this is different from other jurisdictions such as UK and the USA where such duties are clearly assigned. In the USA the powers to conclude and make treaties are the prerogatives of the president who must sort and have both the advice and approval of the two third of the Senate, while the powers to make treaties in the UK falls within the prerogatives of the Her Majesty.

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[132] Section 12 of the Alteration Act, 2010 clearly provides that international treaties, no matter how beneficial they are to the nation, would not have the force of law after ratification until they are fully domesticated through the act of enactment by the National Assembly.

[133]Nwabueze (n 4) pg 67.

Being Nigeria a federal state, treaty making powers falls exclusively within the powers of the President as head of the federal government, Nwabueze[134] supported this position thus:

> The President, as the chief executive of the federal government, is designated head of state... As head of state, he represents the country in 'the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant international acts are considered to be acts of his State. It comprises in substance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. These powers are not conferred upon the President by the Constitution in explicit terms, but apparently upon the theory available at that the power is inherent in every independent, sovereign State, and is held on its behalf by its head

Nonetheless, there is need for the enactment of a comprehensive law that will clearly assign the duties to make treaties between Nigeria and other states, especially where matters such as security, aviation, human rights and labor are concerned, because the provisions as presently spelt out in the constitution are ambiguous. As noted by Nwabueze,[135]'It is not clear from the wordings of the constitution that between the President, the Chief of Defense Staff, or the Minister of Defense who will be responsible for making security treaties on behalf of the federal government'.

Nigeria operates federalism as a system of government, consisting of a central government and other federating units with powers devolved between the central and these federating units. The common features of this system of government are the autonomous political structures and semi independence enjoyed by the federating units through devolution of powers of governance. Thus, the constitution clearly and specifically divides

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[134]Ibid, at 69.
[135] Nwabueze (n 4) pg 69.

and shares the respective duties, powers, and administrative control between the central and the federating units.

Federalism was imposed on Nigeria since 1954 by its colonial Masters and since then the common features of federalism have in the form of legislative list been incorporated in all the successive constitutions. Thus, the two types of legislative lists[136] are contained in all the previous constitutions as amended in the present 1999 constitution, with each of these legislative lists spelling out the powers exclusively exercised by the federal government and those that are to be jointly exercised by both the federal and state governments. However, there is the doctrine of 'covering the field', which is a common law doctrine governing the concurrent Legislative List and other related but residual matters, such as matters that are not covered by the two Legislative Lists, thereby given rise to another list called residual legislative list, which deals with matters exclusively within the purview of states' houses of assembly.

Treaty-making powers are not placed under the exclusive legislative list by the 1999 constitution. Thus, arguably placing treaty making powers among residual matters in which both the federal and state governments can legislate. However, this is a wrong position, because traditionally treaty making powers are part of foreign and external affairs which are placed under exclusive legislative list by the constitution.

The tradition remains the same among most nations that are operating federal system of government. This position was rightly captured by Dinah Shelton when he pointed that 'In all federal states, foreign affairs, including issues relating to international law, are generally considered matters for the national government'.[137] The position is equally the same under the Vienna Convention on the Law of Treaties, thus: 'In all

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[136] There are two types of legislative lists, the exclusive and the concurrent legislative lists. While the exclusive legislative list spell out the powers to be exclusively exercised by the federal government, the concurrent legislative list spell out those powers to be exercised jointly between the federal and state governments.

[137]Shelton D. I, *International Law and Domestic Legal System: Incorporation, Transformation, and Persuasion* (OUP 2011) pg 21.

sovereign nations, it's only the central government that has the capacity to legally and validly enter into treaties'.

4.3 The Nigerian National Assembly's Role in the Implementation of International Treaties

National Assembly's role is both primary and exclusive in the domestication of treaties in Nigeria. The 1999 constitution has explicitly provided in section 12 (1) 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'. From the wordings of the above section the constitution has made it so unambiguous that 'the only legitimate arm of the government saddled with the responsibilities of implementing treaties in Nigeria is the National Assembly'. The reason for this position is very clear, thus: the only organ of government empowered by the provisions of the Constitution to make laws for the whole federation is the National Assembly. Therefore, allowing any arm of the government to have the force of law in making and implementing of treaties in the federation will amount to usurpation of the National Assembly's legislative powers.

It is therefore right to submit that, powers to make laws are exclusively the prerogative of the Legislatures and not of the Executives, additionally promulgation of laws cannot be done by the Executive through the signing and ratification of treaties. The National Assembly's powers to promulgate laws for the purpose of treaty implementation are extended beyond the Exclusive and Concurrent Legislative Lists to cover such matters under the Residual Legislative list. Hence, it is provided in section 12 (2) that: 'The 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'.[138] The provisions of this subsection specifically place the powers to enact laws for the whole of the Federation or any unit of the Federation in respect to matters under the

[138] Constitution (n 2).

Concurrent and residual legislative lists for the purpose of treaty implementation on the National Assembly.

However, it is my humble opinion that as regards matters included in the Concurrent Legislative List, the provisions of this subsection is just a mere repetition as the Constitution has in subsection (4) (a) of section 4 placed the powers to enact laws 'on matters under the Concurrent Legislative List on the National Assembly'. Thus, it would have been more appropriate if the provisions of section 12 (2) empowered the National Assembly to enact laws on matters that were not covered under the Exclusive and Concurrent Legislative List, as was the case under the 1963 Constitutions where the Parliaments were 'empowered to enact laws for the Federation or any part thereof on matters not covered under the Exclusive and Concurrent Legislative Lists for treaty making and implementation purposes'.

The procedure for incorporating international treaties into Nigerian domestic laws by the National Assembly is the same with the procedures involved in promulgating ordinary bills into laws. However, bills presented to the National Assembly for the purpose of treaty implementation on matters that are not covered by the Exclusive Legislative List shall not for that purpose be submitted for assent to the President. The reasons why the provisions are restricted to only bills covering matters not under the Exclusive Legislative List are not openly clear, because it is equally provided that a bill for an Act of the National Assembly for purposes of treaty implementation shall not be submitted to the President for assent, because such treaties must have been initially signed and ratified by the President as the head of the Executive arm of Government before being taken to the National Assembly for enactment.

Additionally, bills sponsored for legislative intervention the purposes of which is treaty implementations on such matters not covered under the Exclusive Legislative Lists should not be enacted into law before being ratified by majorities of the nations State Houses of Assembly. These measures are to ensure that the states' houses of Assembly, who are sharing exclusive legislative powers on matters within both concurrent and residual lists with the National Assembly, do play a role in treaties implementations especially those affect their respective states.

However, it's argued that, the above provision presents a clog in the National Assembly's wheel as it relates to treaties domestication, because it is such a herculean task to secure the ratification of a treaty by the generality of the nation's State Houses of Assembly. This makes it infeasible compared to securing a simple majority of States Assemblies in order to amend the Constitution. It is my submission that for such bills to be so easily passed into laws, this procedure should be watered down, example by requiring only the enactment into law by the National Assembly, with the states' Houses of Assembly coming into the scene only when the matters concern their respective states, in which case they should be required to ratify the relevant laws as its affects them.

This is exactly what was obtainable under the former 1963 Constitution which empowered the Parliament with the powers of enacting similar bills into Acts without the intervention of the Regional Assemblies, but with a proviso that the regional Governor must consent to its having effect before it became operative. However, looking at its provisions differently section 12 also appears to be a means by which the powers of the executives can be checked by the legislatures. By recognizing the powers of the Legislative arm of the Government to incorporate a treaty before same can be recognized as part of Nigerian laws, the constitution has empowered the legislatures 'to check and regulate the excesses of the Executives'. This is equally evident in the constitutional provisions which are serving as checks and balances between the three arms of the government, to wit; the impeachment powers of the legislature against the President, the veto powers of the President against some acts of the parliament, and the judicial powers of the Judiciary to interpret and declare as null or otherwise the actions of both the Executives and the Legislatures. Thus, the inferred intention of the draftsmen in section 12 was not in any way meant to serve as a shield against international obligations for Nigeria but a means of fostering harmonious working relationship between the two arms of the Government in order to protect the sovereignty of the Nation.

However, if the above position were to be correct then the necessary intendment envisaged by the drafters of section 12 has not been achieved, because still there is nothing like cooperation between the two arms in matters related to the application of international

treaties; *visa-vis*, the ratifications and domestications of international treaties. To buttress this observation, Honorable Dayo Bush-Alebiosu,[139] noted that:

> Number of international treaties that Nigeria has ratified cannot be ascertained with complete accuracy and absolute certainty by the National Assembly, and that the Executive has to constantly be written to by his committee for submission of ratified international treaties to be incorporation and such follow-up letters were usually ignored.

Thus, many international treaties were concluded by the Executive to the exclusion of the National Assembly, and these contravene the Nation's policy of transparency and due processes. Additionally, these has led to the non-domestication of numerous international treaties thereby preventing the citizens from enjoying the benefits utilizing the terms of such treaties in enforcing some rights such as Human rights which were based on those international instruments

It is submitted therefore, that though the Executive has the exclusive treaty making powers in Nigeria, such powers could only be exercised in conjunction with the legislatures as intended by the draftsmen in section 12 of the constitution. Hence, the Legislatures are not empowered by the constitution to commence domestication processes until the Executives arm initiates same, and all these would in the absence of synergy between the two arms become impossible.

Section 254 (C) (2) provides that: 'Notwithstanding anything to the contrary in this constitution' and the inference that can arguably be drawn is that the provision of section 12 (1) which deals with the international treaties implementation in Nigeria is totally suspended. The reason for this inference stems from many decisions of the Supreme Court where it was reported to have held that:-'When the phrase "notwithstanding" forms the commencement wordings of a section in any statutory provisions, it by implication suspends any contrary provision contained in the same statute that may be mentioned later'.

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[139]Interview with Dayo Bush-Alebiosu, ranking member and chairman of the Committee on Treaties and Protocols of the Nigerian House of Representatives. Abuja 16th December 2019.

In Nigeria 're-enactment' and 'reference' are the two methods by which international treaties could be domesticated. Accordingly, Akin Oyebode remarks that:

> Domestication by re-enactment is adopted when the implementing statute directly enacts specific provisions or the entire treaty usually in the form of a schedule to the statute. On the other hand, domestication by reference is the case where the implementing statute transforms a treaty into the domestic law merely by reference either specifically or generally [140]

Most times, the long and short titles or preambles of a status contains the reference to a treaty, however, it is worthy of being mentioned here that the most popular among the two ways through which a treaty is domesticated in Nigeria is by re-enactment. The reason being that it is more convenient for reference and it's much easier to have both the treaty and the statute implementing it contained in a single document, another reason is the consistency of this method with the constitutional wordings[141]

4.3.1 What are the Reasons for the Poor Implementation of International Treaties in Nigeria?

Powers to negotiate and conclude treaties on behalf of Nigeria are the prerogatives of the executive arm of the Federal Government of Nigeria,[142] while '…the powers to implement, incorporate or domesticate those treaties into the Nigerian legal system is vested in the Legislative arm'.[143] Thus, the executive arm of the government has since the coming into force of the Nigerian constitution been negotiating and concluding treaties, with the legislative arm on the other hand being left with the duties of implementing the treaties.

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[140] In his inaugural lecture titled *"Akin Oyebode at 40"* (Lagos, 2016).

[141] The 1999 constitution provides in sec. 12 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'.

[142] These powers include those contained in the 'Exclusive Legislative' lists, such as matters relating to foreign and diplomatic relations, treaties included.

[143] See, sec. 12 of the constitution (n 2)

The National Assembly has in 2004 promulgated the Treaties (Making Procedure, Etc.) Act[144] 'in order to cover the inadequacies of the constitution as regards the provisions of procedures to be followed by the government in the negotiations, ratifications and the subsequent implementation of international treaties'. Unfortunately, the effort of the National Assembly in enacting the said Act seems to be in vain as the Act itself was found to be inadequate as it fails to for example specifically assign among the relevant federal governments' agencies their respective responsibilities in treaty conclusion and ratification, thus the various agencies were allowed to be competing among themselves in matters relating to treaties and other foreign policy formulations, with in some instances overlapping of responsibilities and absence of synergy.[145]

The usual practice in the country is for the executive arm to through the ministry of foreign affairs and in some situations with that of finance undertakes the negotiations and conclusions of treaties with other agencies such as ministerial departments as can be adduced from the provision of section 1 (2) of the Act.[146]Thus, the absence of a clear streamlining of duties among the various governmental agencies leads to delay and in some instances an outright failure in the implementation of ratified international treaties.

These procedural inadequacies[147] found in both the constitution and the Treaty Act have contributed to the poor implementation of treaties by Nigeria resulting into numerous setbacks in respect of the roles of international treaties in Nigeria's legal and judicial systems reforms and developments. Furthermore, the absence of clear and express provisions regarding treaty making procedures has contributed immensely to the Legislatures lack of knowledge of the existence of so many international treaties, thus leading to avoidable and unnecessary delays in the incorporation and subsequent domestication of such treaties into the Nigerian domestic laws.

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[144] CAP (20) Laws of the Federation of Nigeria 2010.
[145] The Act provides in section 1(2) that: 'Treaties may be negotiated and entered into for and on behalf of the Federation by any ministry, governmental agency, body or person'.
[146] See, again, Treaties (Making Procedure, Etc.) Act 2010.
[147]The absence of clear procedures to be followed in negotiation, conclusions and ratifications of treaties.

Improper documentations of treaties' instrument have also been noted as another reason for Nigeria's poor implementation of treaties. As previously discussed, the Federal Ministry of Justice headed by the Attorney General of the Federation (AGF) has been designated by the Act [148]as the repository where all international treaties concluded by Nigeria are kept and the register of such treaties prepared and maintained. The ministry is also saddled with the responsibilities of notifying and directing the relevant agency[149] to publish all such treaties as concluded by the federal government. However, due to lack of synergy between the various agencies of the government involved in these processes, such information is usually shrouded in secrecy and lost between the ministries of justice, foreign affairs and the legislative committee on foreign relations.

Some literatures observed that: 'The legislative arm of the government is in most cases not carried alone by the executive in the processes of treaty negotiation and conclusions, and this has also contributed to Nigeria's poor implementation of treaties'. The Executive always argue that: 'There is no any specific role provided in both the constitution and the Act for the involvement of the Legislatures in the processes of treaty negotiation and conclusions, except the role of domesticating such treaties after they are already concluded and ratified'. Thus, the Legislative Arm is only consulted and made aware of the existence of such treaties when their input is needed for the purposes of domestication. This lack of corporation between the two arms of the government increases their level of rivalry and intergovernmental friction, and subsequently lead to the lost of interest in carrying out the constitutional role assigned to the Legislatures.

Equally, the procedure for presentations of bills before the Legislatures for the purpose of treaties' implementation and eventual domestication has not been specified by either the Constitution or the Treaties Act. Hence, it remains unclear as to who among the various ministries, and the relevant Legislative committees should have the powers to sponsor such bills.

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[148]The Treaties (Making Procedure, Etc) Act (n 138).
[149] The relevant agency here is The National Security Printing and Minting Company.

International instruments of whatever nomenclature; conventions, protocols, treaties or charters are just some pieces of documents unless the purposes for which they are concluded are achieved. Thus, international treaties concluded but not ratified by parties thereto remain ineffective and as such of no value to the citizens of the party states. Deliberate and unexplained failure to ratify and domesticate international treaties by member state contradicts the old international relation's assumption that state parties do enter into treaties in good faith. Lack of good faith can be inferred from states parties' unwillingness to ratify or domesticate an agreement which it willfully negotiate and conclude for the benefit of its citizens. However, through the act of ratification, a state party has demonstrated its good faith, and the benefits of such treaties are felt by the citizens especially when they are domesticated as part of domestic laws of a concerned state.

Nigeria has for long been ratifying numerous international instruments relating to issues such as Human and Peoples' Rights, environment, defense, international trade, aviation, etc. However, most of these instruments remain 'ineffective and without the force of law before Nigerian courts 'because of their status as "undomesticated".[150] Thus, by virtue of being undomesticated, such treaties remain invalid and unenforceable, and as such cannot be relied upon by citizens in enforcing their rights before the Nigerian courts. Furthermore, no punitive measures can be taken against the state's institutions for violations of the contents of such treaties.

Many factors and wide range of issues are taken into consideration by nations when negotiating and concluding international treaties, these factors could be economic, security, diplomatic, political, etc. Thus, parties to a treaty, domesticate same after ratification based on their peculiar domestic and international interests. In this regard, Nigeria being the largest and biggest economy in Africa has played a significant role in negotiating and concluding many regional and international treaties. However the zeal with which it enters into such treaties is missing when it comes to domesticating them into its domestic laws. Thus, after so many years of ratifying many international treaties,

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[150]See, sec. 12 of the Constitution (n 2).

large numbers of such treaties are still undomesticated and as such ineffective and of no legal force domestically.

Of note and serious concern is for example, the non domestication of AU's Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Nigeria being the most populous African nations was an arrowhead in the negotiation and conclusion of this agreement in 2009 under the auspices of the AU, but unfortunately this treaty which was aimed at addressing problems associated with internal displacement of persons within the continent as a result of both natural and manmade disaster is yet to be domesticated by Nigeria nearly a decade after its ratification

Since its adoption in October, 2009 only 25 out of the 54 members have ratified the Convention. Equally, Nigeria after signing and ratifying the AU's Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa, has yet not domesticated the Convention, and as such the agreement has no legal effect before the Nigerian courts.

As is the case with many West African countries affected by violence caused by either Islamists' insurgency or farmers/herders clashes, Nigeria has a high level of internally displaced persons. The *Boko Haram* insurgency in the North East, Armed banditry in the Northwest, and the Militancy in the Niger Delta region has displaced millions of people in recent years. The National Emergency Management Agency has published in its annual report that '…about seven million people were affected by climate change and other global warming related disasters in 2012 two million one hundred of which were affected and displaced by violence'.[151]

It's quite worrisome that, despite various report and continued displacement of people affected by violence in Nigeria the Kampala Treaty on internally displace persons has not yet been domesticated by Nigeria and this is hindering all efforts at pushing for a legally empowered frame work for the reintegration, compensation and rehabilitation of internally displaced persons. There are numerous of such important international

[151] In its Annual Report 2019.

agreements ratified by the country but yet left undomesticated for reasons bordering on either politics, religious or other diplomatic considerations.

After signing about twenty three (23) international treaties falling within the scope of both International Humanitarian Law and International Criminal Law, it has ratified nineteen (19) and domesticated only two (2) with additional six (6) waiting as "Pending Bills" before the National Assembly.

Additionally, the country has ratified twelve (12) and domesticated only seven (7) out of the fourteen (14) international treaties relating to human and peoples' rights. Thus, the 2017 Torture Act, the 2015 (NAPTIP) Act, and the 2018 Persons with Disabilities Act were in this regard domesticated.

The country has under the Third Alteration Act,[152] ratified forty (40) out of ILO's one hundred and seventy eight (178) conventions, but domesticated only twenty six through the processes of "Domestication by Reference".

Similarly, the country has signed, ratified and domesticated Human and Peoples' Rights related international treaties in the following order:

1. Ratified twenty (20) and domesticated only two (2) of the twenty three (23) Environmental Treaties.
2. Ratified the whole of UNESCO treaties, but domesticated none thereof.
3. Ratified twenty six (26) of the sixty one (61) AU's Governance, Economic, Education, Trade, Human Rights, and Health Treaties, and domesticated only four (4)
4. Ratified ten (10) international treaties relating to Intellectual Property, but domesticated only three.

4.3.2 Some International Treaties Domesticated by Nigeria

[152] The Constitution (n 2).

Nigeria has not only ratified but equally domesticated the following international treaties, thus giving them the same position before local courts as domestically enacted Nigerian legislations

1) African Charter on Human and Peoples' Rights (Ratification of Enforcement) Act, Cap. A, Laws of the Federation of Nigeria, 2004

2) Agreement on the Avoidance of Double Taxation, Nigeria-Kingdom of Sweden (Domestication and Enforcement) Act, 2017

3) Avoidance of Double Taxation Agreement, Federal Republic of Nigeria-The Kingdom of Spain (Domestication and Enforcement) Act, 2018

4) Child Rights Act, 2003

5) Extradition Treaty, Government of Nigeria-Government of the Federal Republic of South Africa (Ratification and Enforcement) Act, 2005

6) Geneva Corrections Act Cap. G3 Laws of the Federation of Nigeria, 2004

7) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as amended (Ratification and Enforcement) Act, 2011

8) International Convention on Civil Liability for Oil Pollution Damage, (Ratification and Enforcement) Act, 2006

9) International Convention for the Prevention of Pollution from Ships 1973 and 1978Protocol (Ratification and Enforcement) Act, 2007

10) The International Convention for the Safety of life at sea No. 9 (Ratification and Enforcement) Act, 2004

11) Treaty to Establish the African Union (Ratification and Enforcement) Act, 2003

12) Treaty to Establish African Economic Community Relating to the Pan African Parliament (Accession and Jurisdiction) Act, 2005 as amended in 2016

13) Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of South Africa (Ratification and Enforcement) Act, 2006

14) Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and Other Resources in areas of the Exclusive Economic Zone of the two States (Ratification and Enforcement) Act, 2005

15) Treaty to Establish Rotterdam Convention on the Prior informed Consent Procedure for certain Hazardous chemicals and Pesticides in International Trade (Ratification and Enforcement) Act, 2005

16) Plant Variety Protection Act, 2021

17) Prohibition of Double Taxation (Federal Republic of Nigeria-Republic of South Korea (Domestication and Enforcement) Act, 2012

18) Transfer of Convicted offenders Enactment and Enforcement (Amendment) Act, 2013

19) United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act, 2005

4.4 Nigeria's Treaty-Making, Ratification, and Domestication Procedures

Under international law, all sovereign states are considered as being competent to negotiate and conclude treaties concerning issues falling within their sovereignty. However, in Nigeria it is such a herculean task to pinpoint with exactitude the branch saddled with the responsibilities of negotiating, concluding and ratifying international treaties, this is because treaty making capacity has not been documented either constitutionally, or procedurally. The only visible provision in the constitution is with regards to the procedure

for the implementation of international treaties, thus, for the purposes of implementation, the Treaties (Making Procedure, etc) Decree[153]has classified international treaties into the following broad categories:

1) Law-making international treaties affecting or modifying existing legislations of the National assembly's powers; they shall be enacted as laws
2) International agreements imposing financial, social and political obligations or which are having scientific or technological significance: they shall be ratified
3) International agreements dealing with mutual exchange of cultural or educational facilities need no ratification

The above mentioned decree has fallen short of providing a comprehensive legislation that specifically spells out the responsibilities of the three arms of the government in treaty making in respect of for example matters concerning security of the nation. Questions such as 'whether it is the responsibility of the President, the defense minister or the defense chiefs of staff to negotiate such treaties?' are left unanswered by the above decree or any other subsequent legislation in that regard. Treaty making powers are for example vested in the presidency and the Queen in both the USA[154]and UK

To make a provision for treaty-making procedure, an "Act" was in 1979 enacted into law by the National Assembly which laid down the procedures to be adopted in treaty making, the "Act" furthermore designated the ministry of justice '…as the sole depository for international treaties concluded between Nigeria and other subjects of international law'. The Act comprises of seven sections, making the procedure not only 'applicable but binding on the nation in its international relations as they relate to treaty making with other subjects of international law on matters contained in the exclusive legislative list'. The inference that can be drawn from this is that, treaty making powers reside with the

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[153] Decree number 16, 1926.
[154] In the USA the power is exercised but only with the advice, consent and concurrence of the two-third senate majority.

executive arm of the federal government, though questions such as whose duties is it to legislate on matters not under exclusive legislative list?, remain. Furthermore, the 'Act' appears to have opened a floodgate of many governmental institutions that may conclude an international treaty for and on behalf of the federal government.

It is therefore not clear who between the ministry of justice, ministry of foreign affairs, permanent sectaries thereof, or the Director General of the Diaspora Commission can for and on behalf of the federal government negotiate and conclude international treaties? This uncertainty may result into conflict of duties and of interests between various agencies of the government in trying to assume responsibilities in treaty-making

Accordingly, the known methods used by Nigeria in domestication of international treaties are 're-enactment' and 'reference' methods. Akin Oyebode's description of these two methods used by Nigeria in treaty domestication is worthy of being reproduced here, the learned Jurists opined that:

> Domestication by re-enactment is adopted when the implementing statute directly enacts specific provisions or the entire treaty usually in the form of a schedule to the statute. On the other hand, domestication by reference is the case where the implementing statute transforms a treaty into the domestic law merely by reference either specifically or generally.[155]

The most popular among the two methods described above is domestication by "re-enactment", the advanced argument for its preference is that it is more convenient for reference and as earlier pointed it's much easier to have both the treaty and the statute implementing it contained in a single document. Secondly, domestication by "re-enactment" is found to be more consistent with constitutional provisions.[156]

International agreements imposing obligations on Nigeria which for instance are political, financial, scientific, or social in nature, must be ratified, but for those dealing with

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[155]Akin Oyebode (n 140).
[156] See sec. 12 (n 2)

mutual exchange of facilities that are cultural or educational, may not necessarily be required to be ratified. However the lack of ratification will affect their enforceability before the courts. As discussed previously, an international treaty must not only be signed but must as well be ratified by the parties thereto before becoming binding unless where the contents specifically provide otherwise.

The federal ministry of justice as earlier mentioned, is the depository for all international instruments entered and concluded between Nigeria and other subjects of international law. However, many scholars such as Alli[157] have expressed their preference in making 'the office of the Secretary to the Government of the Federation (SGF) as the repository of international instruments over the office of the Attorney General of the Federation (AGF) just as it is obtainable in other jurisdictions and the UN where the UNSG's office operates as the repository of such instruments whenever the UN concludes treaty with states or other subjects of international organizations'. In this regards, the Federal Ministry of Justice prepares and maintains an official gazette containing the register of all international instruments to which Nigeria is a party, and the same ministry is saddled under the Freedom of Information Bill (FIB) with the responsibilities of giving notifications to the public of all concluded international treaties.

Constitutionally, there is a disparity between a domesticated treaty as being part of Nigerian laws and the binding nature of such treaties on Nigeria.[158]Amazingly, the Nigerian statutes are silent as to whose duty is it among the various executive institutions to negotiate for the nation such international instruments. Thus, the judiciary and to some extent the Academia are left with no option but to be drawing inferences from the available domestic legislations particularly the constitution.

Additionally, there is no specific procedure outlining or spelling the pattern to be adopted in the processes of incorporating or domesticating an international treaty, with the aim of appropriately placing same among other municipal laws, especially as regards to

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[157] Alli (n 8) pg 56.
[158] See sec. 12 (n 2) the said section appears to distinguish between a treaty as being an enforceable law in Nigeria, and Nigeria being obliged by the contents of the same treaty.

the hierarchy thereof. And this has lead to having a gap in the legal system leading to a lot of controversies and academic debates. The only reasonable conclusion that can be arrived at here is that, an international treaty can be incorporated into Nigerian laws through two broad ways, i.e. by reference or by re-enactment. The only judicial pronouncement which is close to providing an answer to these controversies is that of the Supreme Court in the case of *AGF v AG of Abia State*,[159] where in deciding who has the capacity to enter and conclude international treaties between the Federal Government and the various State Governments of the federation, it was decided by the court that: 'Nigeria as a sovereign state is a member of the international community, and in the exercise of its sovereignty, it from time to time enters into both bilateral and multilateral treaties'.

Furthermore, international relation and foreign policy formulation fall under the exclusive legislative lists, and resides exceptionally with federal government to the exclusion of the states components of the federation. Scholars argues that: 'It is necessary to exclude states and deny them treaty making powers in order to avoid conflict and discordance within the system as it relates to foreign policy formulation'. However, it is worthy of being noted here that, though the states of the federation are incompetent to enter into treaty on or for their behalf, yet they are empowered to participate and make inputs into treaty making when the contents there of the treaty relate to matters listed in or falling within the concurrent legislative list.[160]

4.4.1 Ratification under Section 12 of the Constitution

Domestication of international treaties through the processes prescribed in the constitution is sometimes misconstrued as "ratification",[161]thus, many literatures have wrongly submitted that an international treaty is not legally effective until same having been ratified by the federal Government of Nigeria.

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[159][2002] 16 WRNLR vol 1 at pg 75.

[160] Concurrent legislative list, refers to those matters which both the federal and state governments can legislate on, example of these are matters covering areas such as education, agriculture and health.

[161] The constitution (n 2) has in section 12 provides that: 'No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'.

The correct position of the law could be seen in *Abacha v Fawehinmi*,[162]where it was held that:

> International acts of accession, acceptance, approval or ratification, as provided in the Law of Treaties are construed to mean that "a state party has given its consent to be so bound by such an agreement". While domestication of international treaties refers to the legislative intervention in incorporating treaties into the domestic laws of a state party, on the other hand ratification refers to an act where by a state party executes an instrument by seeking the approval of its government and other enabling domestic laws to that effect.

Furthermore, an international treaty is considered to have been ratified by Nigeria if such instrument of ratification has been executed by the representatives of the federal Government and there has in addition been an exchange of the same instrument with the other state parties (incase of Bilateral Treaties) or where it has been lodged with the authority designated as repository of such treaties (in the case of multilateral treaties).

There is a wrong conception among the students of international law and beyond, that 'a ratified treaty has by virtue of that ratification become binding on the ratifying state parties'. However, the correct position is that, a ratified international treaty becomes binding on the ratifying state party only after it enters into force. Thus, according to the convention,'…an international treaty is considered to have entered into force in any manner and on any date as provided in its text or as may be agreed by the negotiating state parties'. Additionally, the coming into force of the treaty may be indicated by other acts such as, affixing of signatures, ratification by a specified number of parties, completion of certain compliance with parties' domestic laws, etc. Furthermore, in a situation where the treaty does not in its text provide a stipulation on when it comes into force, then it will be considered to have come into force the moment the parties thereto give their consent to be bound.

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[162]*Abacha* (n 19).

For the purposes of ratification, Nigeria's Treaties Making Procedure Act has categorized treaties into three broad categories, thus:

1) Treaties consisting of rules governing interstate cooperation and which are having the effects of changing or abrogating existing enactments
2) Treaties imposing obligations on Nigeria which are of political, diplomatic, or financial nature.
3) Treaties dealing with mutual exchange of cultural and educational facilities.[163]

Considering the provisions above, it is right to submit that, many multilateral treaties such as those relating to energy fall within the categories of treaties that must be ratified before being considered for domestication by the Nigerian National Assembly. Thus, all international treaties or conventions which set out certain rules and basic standards governing relationships between states or which affects the constitutional powers of the Legislatures are categorized among treaties requiring ratification.

As pointed in the preceding sub chapter above, delays and poor implementation of international treaties are attributable to among other factors the "dualist" nature of Nigerian foreign policies. Nigeria has for example signed over four hundred international treaties, but it is on record that not more than fifteen have been domesticated, and none among the domesticated has been a Bilateral Investment Treaty (BIT). Thus, heated arguments and controversies rage on among both scholars and lawyers as to the status of those treaties which are signed but still pending before the National Assembly for domestication. The poor implementation of those treaties due to the issue of non domestication, presents a major setback for the application of for example (BIT) and other Human Rights Protection related treaties. This view has been buttressed by the Nigerian courts in many judicial pronouncements, thus, in *Abacha v Fawehinmi*, the Supreme Court decided that: It is therefore manifest that no matter how beneficial to the country or the citizenry an

[163] See, Nigeria's Treaty (Making Procedure, etc) Act 2004 Laws of the Federation of Nigeria, section 3 (1) CAP T20.

international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into law of the country by the National Assembly'.

It was similarly held by the Nigerian Court of Appeal in the well celebrated case of *The Registered Trustees of the National Association of Community Health Practitioners of Nigeria v Medical and Health Workers Union of Nigeria* that: 'The enforceability of the provisions of the International Labor Organization's(ILO) Convention cannot have the force of law before the Nigerian Courts until same having been incorporated into Nigerian domestic laws by legislative intervention of the National Assembly'.[164]A similar decision was held by the court in *African Reinsurance Corporation v Abata Fantaye*[165]

Arguably, the domestication of BIT is not necessary for the purposes of investments, because there is in existence the International Arbitral Tribunals (IAT) to which Nigeria is a signatory, hence BIT require specific compliance with state parties' domestic legal requirements before becoming effective. Article 13 of the 2002 Nigeria-Spain BIT for example, provides thus: 'This Agreement shall enter into force on the date on which the Contracting Parties shall have notified each other that their respective constitutional formalities required for the entry into force of international agreements have been completed'

In a similar way, the Nigeria-Netherland 2005 BIT provides thus: 'This Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that the required constitutional procedures in their respective countries have been complied with' [166]

Additionally, some BIT have based on 'exhaustion of local remedies' principles provides that: 'Parties must utilize domestic courts in resolving their disputes before they can access International Investments Tribunal (IIT)'. However, this presents a legal challenge to an international investor in instituting an action against a host state party in a

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[164] Nigeria has signed and ratified the Convention, but has not up till this moment domesticated same.
[165][1986] 3, NWLR.
[166] See, article 15 (1) thereof.

situation where the BIT is not recognized as a legally binding document by the domestic courts. Furthermore, investors have in some instances been referred back by ITT to the host country's domestic courts especially in situations where the issues are related to absence and denial of justice. Thus, an investor must show that all his efforts in securing justice before the host state's domestic courts have proved abortive, and that he has gone through and exhausted all the legal processes before the host state's domestic courts.

Another pertinent question in relation to ratification of treaties under section 12 of the constitution is 'to what extent does the Nigerian constitution recognize self-executing treaties?' This question has been a source of debate between and among legal experts from both academia and the judiciary. Unfortunately, the issue remains the same until the year 2010 when the third alteration was effected in the 1999 constitution (as amended). Thus, the NIC was established and empowered to among others 'exercise absolute powers over all matters that are concerned with labor related international treaties'. Accordingly, the 1999 constitution provides 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 labor, employment, workplace, industrial relations or matters connected therewith

The 1999 Constitution as (amended)[167] provides expressly for its own 'supremacy over and above any other written laws' which may be in contradiction with its provisions. Thus, in expressing its supremacy, the constitution begins 'Notwithstanding anything to the contrary in this Constitution'. Notwithstanding the fact that some provisions are expressly or impliedly subjected to others, constitutional provisions as contained therein, are of equal stand in the eyes of Nigerian laws. Some constitutional provisions as enacted are promulgated despite the existence of similar statutory previsions if the former are meant to achieve particular purposes for which it was made, thereby negating the stumbling consequence of the later. Thus, the provisions of the former enactment are subject to those

[167] See, section 224 thereof.

of the later if its effects are restricted by those other provisions. Thus, labor related international treaties 'may validly be applied by the NIC in spite of the provisions contained therein section 12 of the 1999 constitution'. Therefore, the treaties applied by the NIC are in this respect considered as self executing treaties. Furthermore, section 254 does not seem to have negated the effect of section 12 of the 1999 constitution, because the effect of section 254 'bears on those international treaties which are labor related and ratified by Nigeria".

4.4. 2 Domestication under Section 12 of the constitution

By the combined requirement of the provisions of sections 12 (1)[168] and 3 (1, 2 and 3) of the Act,[169] 'The domestication of international treaties is both a constitutional and statutory requirement'. Thus, the Federal Government is saddled by the constitution with 'the exclusive responsibilities to exercise jurisdiction on matters listed in the Exclusive Legislative List contained in the 2nd schedule of the constitution'. These matters include: 'Those relating to Copyrights,[170] Custom and Excise Duties,[171] Trade Representations,[172] Export Duties,[173] Foreign Affairs,[174] Treaties Implementation,[175]Maritime and Shipping,[176] Patent and Trade Marks,[177] and Trade and Commerce between Nigeria and other Countries'.[178]

The constitution has in section 19 (d) described the Nigerian Foreign Policy Objectives as it relates to specifically International Treaties, as having been designed towards 'respecting the rules of international law, commitments to treaties obligations, and the settlement of international disputes through the processes of adjudications, arbitrations, conciliations, mediations and negotiations'. Additionally, the Federal Executive Council

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[168]The constitution (n 2).
[169] Treaty (Making Procedures, etc) Act 2004 Laws of the Federation of Nigeria.
[170] Ibid, item 13.
[171] Ibid, item 16.
[172] Ibid, item 20.
[173] Ibid, item 25.
[174] Ibid, item 26.
[175] Ibid, item 31.
[176] Ibid, item 36.
[177] Ibid, item 43.
[178] Ibid, item 62.

has on the 12th day of November 2019 adopted the 2017 National Policy on Justice, the Policy refers to among others: 'The country's unwavering commitment to its treaty obligations as already enshrined the constitution'.

As discussed in the preceding chapter, there are no specific provisions for treaty-making procedures in the 1999 constitution, however, powers to exercise jurisdiction in domesticating international treaties relating to issues and matters listed in the Exclusive Legislative List and incorporating same into the Nigeria's domestic laws is vested with the National Assembly. These powers are extended by section 12 (1) and (2) to matters not listed in the 'Exclusive Legislative List' such as those meant for the purposes of treaty implementations. Thus, the Executive Arm's powers in negotiating and concluding treaties for the country are drawn impliedly from its 'constitutional powers to promote Nigeria's objectives in foreign policies such as negotiating and concluding international agreements on trade, commerce and investments'. [179]

Conventionally, the acts of negotiations, conclusions, and the subsequent ratifications of international treaties in Nigeria are carried out by the Executive to the exclusion of the Legislatures who are constitutionally charged with the role of domestication after ratification, unless these processes are carried out, an international treaty will not have the force of law before domestic courts. The above position has been in practice since independence, because both the 1999 constitution and the Treaty (Making Procedure, Etc) Act did not provide any specific role for the legislatures in treaty-making except the role of domesticating same after ratification. Thus, the responsibility of making and domesticating international treaties in Nigeria as upheld by the Supreme Court in *AGF v AG of Abia State* is the prerogative of the Federal Government. Thus, the Court held:

> In the 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,

[179] See also, The Treaty (Making Procedures, etc) Act, 2004, section 1 (2).

> in the Government of the Federation to the exclusion of any other political component unit in the Federation. [180]

Additionally, the Treaty Act[181] recognizes only the Central Governments of a sovereign state as having the legitimacy to conclude treaties on behalf of such states.

As discussed above, the Legislatures are not specifically given any role by section 12 in international treaties ratification, except being involved in the act of domestication and or implementation. In this regard a distinction should be drawn here between domestication and ratification of a treaty. While ratification on one hand refers to 'those processes whereby a state party (Nigeria, in the instant case) signifies by either signature or by submitting its instruments of consent to be bound an international treaty',[182] domestication on the other means 'those processes through which a state party incorporates the content of a treaty it has validly entered into its domestic legislations, thus, giving it all the legal effects of its domestic enactments'.[183]The constitution refers only to implementation of treaties by the Legislatures when it states in its section 12, thus: 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. The intention of the drafters of section 12 made it even more clearly in their explanatory notes that: 'the role of the National Assembly as regards to treaty making is only the legislative act of domestication'. [184]

Due to the fact Nigeria is still operating the inherited UK system, the President can still ratify international treaties without legislative intervention just as in the UK where treaties can be ratified by the executive without parliamentary intervention. Thus, the UK's House of Lords stated this position in the case of *J.H. Rayners Ltd v Department of Trade*

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[180] [2002] 161, NWLR, 1.
[181] See, Vienna Convention (n 1) article 1 (a).
[182] See, specifically The Vienna Convention (n 1) article 1.
[183] This is the process referred to by sec. 12 of the constitution (n 2).
[184] See, also the Exclusive Legislative Lists, item 31 thereof.

and Industry,[185] thus: 'The Government (i.e. the executive) may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty'.

The above position was also reiterated on by the Privy Council in *Attorney General for Canada v Attorney General for Ontario*,[186] where the Council commented on the practice in the then UK's British Empire, thus:

> It will be essential to keep in mind the distinction between (1) formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, and requires legislative action. .. Parliament, no doubt, has a constitutional control over the Executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default

The provisions of the 1979 the Constitution in section 12 are the same to those in the amended 1999 constitution, and are the reflection of the inherited UK's position where the act of treaty making was considered as 'a purely executive responsibility requiring a subsequent implementation into the laws of the country by way of legislative enactments'. Nwabueze, differentiates the two acts and explains that: 'Treaty-making act and its subsequent implementation are two distinct functions, while the former is carried out by the executive, the later is carried out by the legislatures'. [187]

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[185] [1900] 2 AC 418 at 476.
[186] [1937] AC 326 at 347-348.
[187] Nwabueze (n 4) pg 255, 256.

The above practice is contrary to what is obtainable in other nations like the USA[188] and the Republic of Ghana (Ghana),[189] where it was specifically required by their respective constitutions that: 'The approval of the Senates majority is mandatory before an international treaty can be ratified by the executive'.

However, it should be pointed out here that, there is a possible exception to this practice even under the UK's system, which can arguably be applicable to Nigeria. Thus, when the international treaty in question relates to cession of a UK's territory, the position of many scholars is that: 'A parliamentary approval given by a statute is necessary'. Among such scholars was A. Mac Nair, who stated that: 'As a matter of strict law such international treaties do not require legislations'. He further opines that: 'As a matter of constitutional convention a series of modern precedents makes it extremely unlikely that in future any cession will take place without statutory authority'.[190]

In the categorization of treaty of cession, there is wide misconception about the Green Tree Agreement (GTA) as to whether after it was entered between Nigeria and Cameroon can be described and categorized as a treaty of cession? On its surface, it appears as such, but in reality it is anything but a treaty of cession. An international treaty can be categorized as of cession when a sovereign state by way of an agreement decide to voluntarily cede a part or a whole part of a territory that originally belong to it to another sovereign state. And this is in reality not what happened in the case of the GTA, as the territory in question, *Bakassi* Peninsula was not Nigeria's at the material time the treaty was concluded.[191]Thus, Nigeria had as per the ICJ's judgment 'no territory to cede' under the said agreement. The treaty was therefore an agreement for the confirmation of the delineation of the boundary between Nigeria and Cameroon in respect of *Bakassi* Peninsulas.

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[188] See, the constitution of the USA, article 11, section 2 thereof.
[189] See, also the constitution of the Republic of Ghana, section 75 thereof.
[190] Mcnairm A, *when do British laws involve Legislations?* Vol . 9 (British Year Book on International Law 1928) pg 59 at 63
[191] Land boundary case, *Nigeria v Cameroon* Application for intervention [2002] ICJ Judgment.

An opposite scenario from the above case can be instructive at this juncture, where in a border dispute case of *MaganbhaiIsharbhai v Union of India*[192] involving India and Pakistan an International Arbitration Tribunal held that: 'Certain villages hitherto believed to be in Indian territory were actually Pakistan's'. A suit was filed at the Supreme Court of India to challenge the validity of Indian Government's intention of giving effect to the arbitral award in ceding the territory in dispute to Pakistan. The Indian Supreme Court by majority decision decided that: 'Such was not by Indian Law amounting to ceding an Indian territory to a foreign power'. The Court in its decision as per the then Chief Judge of India, M. HidayatuLLAH, CJ held thus:

> The precedents of this Court are clear only on one point, namely, that no cession of Indian Territory can take place without a constitutional amendment... Must a boundary dispute and its settlement by an arbitral tribunal be put on the same footing? ... A settlement of a boundary dispute cannot, therefore, be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. It only seeks to reproduce a line, a statutable boundary and it is so fixed. The case is one in which each contending State ex facie is uncertain of its own rights and therefore consents to the appointment of arbitral machinery. Such a case is plainly distinguishable from a case of cession of territory known to be home territory

The above decision strengthens the argument that: 'The Nigeria-Cameroon Green Tree Agreement does not stand as an international treaty of cession', more so as the agreement in its article 1just states that: 'By virtue of the ICJ's decision Nigeria has recognized Cameroon's sovereignty over *Bakassi* Peninsulas'.

Nigeria's President, just as in the UK may as a matter of political courtesy put the Legislatures on notice that he intends to ratify a given treaty, but he is not legally obliged to notify them, and that cannot be interpreted to mean a request for the ratification of the treaty. Constitutionally, and as inherited from the UK's system the Nigerian Legislatures

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[192] [1970] 3 SCC 400.

'have no any constitutional role or competence in the processes of treaties' ratification'. As mentioned earlier, its role is as per section 12 restricted to 'domestication and implementation of treaties validly concluded, and ratified by the Executive'. To buttress this point further, Nwabueze,[193] states thus:

> The President, as the chief executive of the federal government, is designated head of state…As head of state, he represents the country in 'the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant international acts are considered to be acts of his State…It comprises in substance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace.' These powers are not conferred upon the President by the Constitution in explicit terms, apparently upon the theory that the power is inherent in every independent, sovereign State, and is held on its behalf by its head

4.4.3 Methods Used by Nigeria in the Implementation of Treaties

A) Wholesale Adoption Method

A domestic legislation meant to implement a treaty is under this method enacted to comprehensively incorporate the treaty in question into Nigeria's domestic laws, by this method the incorporated treaty is entirely annexed into local legislations. For example, the annexation of the African Charter on Human and Peoples Rights into the Laws of the Federation of Nigeria under Chapter A9, 2004 and the incorporation of the Geneva Convention for the Prohibition of Torture and Inhuman Treatments of Prisoners and other War Crimes into Chapter G3 Laws of the Federation of Nigeria 2004.

B) Incompatibility Test Method

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[193]Nwabueze (n 4) pg 254.

Under this method, legislation will be made to repeal all existing domestic enactments that are inconsistent either directly or by necessary implication with Nigeria's treaty obligations as contained in the text of the treaty in question.

For example, the 1945 Children and Young Persons Act having been adjudged to have been inconsistent and incompatible with the AU's Charter on the Rights and Welfare of the Child and the UN's Convention on the Rights of the Child was repealed by the 2003 Child Rights Act the duo of which were ratified by Nigeria.

C) Hybrid Method

This method is used for consequential amendments to existing local enactments, by accommodating fresh provisions from the text of the treaty in question. Thus, some provisions contained therein the treaty in question will be incorporated into the amended local enactments. For example, some provisions therein the UN's Convention on the Law of the Sea were co-opted into the amended 2019 Piracy and Other Maritime Offences Act. Thus, in the consequential amendment to the existing local legislations relating to maritime safety, some provisions of the (UNCLOS) were incorporated into the above 2019 Act.

D) Reference Method

Under this method, an international treaty is transformed into Nigeria's local legislations by making reference to the treaty in question in the implementing enactments' body, titles, preamble or schedules. Example of this can be found in the incorporation of the NIC Act into the 1999 constitution's 2010 Third Alteration Act, in reestablishing the NIC and promoting it to a superior court of record having exclusive jurisdiction to try labor related matters, the Act has in section 254 (c) (2) made specific references to 'the application of all international treaties relating to employment, industrial relations, and labor matters ratified by Nigeria'. The Act used "Reference" in conferring exclusive jurisdiction to the NIC to exclusively deal with such mentioned matters notwithstanding any contrary provision in the constitution. Additionally, "Reference" was made in the incorporation of the Plant Variety Treaty of 2001 relating to the Rights of farmers and Plant Breeders which Nigeria ratified in 2021 by the 2021 Plant Variety Protection Act.

It is worthy of being pointed out here that, the above NIC Act has by implication 'negated the effect of section 12 (1) of the 1999 constitution (as amended)'. This positioned is captured by the court in *NDIC v Okem Enterprises Limited*.[194]

E) Unique Corpus Law Method

This method uses regional or community laws applicable to member states to directly apply the provisions of treaties without having to comply with for example the requirements for legislative intervention in domestication of treaties as enshrined in section 12 (1) of the 1999 constitution (as amended). Thus, the Economic Community of West African States (ECOWAS)'s Community Regime provides that: 'All Acts passed by the Authority of Head of Governments are binding instruments and shall apply automatically on Member States'.

4.4.4 Nigeria's Instruments of Treaty-Making and Domestication

A) Constitution [195]

To maintain the sovereignty of Nigeria and the supremacy of its laws, the constitution provides in section 1(1) that:-'it is supreme and all other laws shall be valid only to the extent of their consistency with its provisions, and that the provisions of the constitution shall prevail over all other laws'.

As regard to the implementation of international treaties, the constitution provides in section 12 that:

> 1. No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

[194][2004] 10 NWLR pt 880 pg 107.
[195]The constitution (n 2).

2. The 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.

3. A bill for an Act of the National Assembly passed pursuant to the provisions of subsection 2 of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

B) Treaty (Making Procedure, Etc.) Act [196]

Under this Act, the procedures to be adopted for treaty negotiations, conclusions, ratifications and domestication are provided. Additionally, the Act designated the Ministry of Justice as depository of all treaties concluded between Nigeria and other subjects of international law.

The Act is divided into 7 sections as follows:

a. Section 1, Treaty-making procedure
b. Section 2, Treaties-making
c. Section 3, Treaties classification of treaties
d. Section 4, Treaties' depository designation
e. Section 5, Treaties register
f. Section 6, Responsibilities of giving information to the National Printer
g. Section 7, Provision for the Act's short title

[196]Laws of the Federation of Nigeria, Chapter T 20, 2004.

CHAPTER V

INTERNATIONAL TREATIES AND THE NIGERIAN LEGAL SYSTEM: INCOPORATION OR SUBJUGATION?

5.1 Introduction

Being Nigeria a member state in the international community of nations, and going by the provisions contained therein the Convention on the Law of Treaties,[197] it is qualified to negotiate and enter into treaties with other member states in its dealing with international

[197]The Vienna Convention (n 1).

law as it relates to its foreign policies. It is a signatory and has ratified the said Convention, negotiated and entered into numerous international treaties both bilateral and multilateral. The usual question posed in many literatures is what is the place of such treaties under the Nigerian domestic laws? In response to such questions recourse has to be made to the provisions of the Nigerian constitution as well as the various judicial pronouncements contained in Nigeria's case laws. Many studies were conducted regarding the position of international treaties whether domesticated or undomesticated under the country's domestic laws, and a lot of controversies generated in that regard, yet the situation appears to remain unsettled.

Under international law, a treaty remains the only instrument parallel to legislative enactments obtainable in municipal setting, constituting the major channel through which international agreements are entered by and between member states. Thus, international treaties bear momentous implications for Nigeria its citizens and institutions. Nigeria does not only use international treaties as a means through which it enters into agreements, but it courts equally use such treaties in interpreting statutes and its legislatures use it in promulgating laws for the nation. For example, section 12 of the constitution requires all international treaties so ratified to be incorporated into domestic laws by the national assembly before they can be relied upon and enforced before Nigerian courts. The place of international treaties under the Nigerian domestic laws can therefore not be underestimated. It has been the bedrock of many international agreements relating to labor matters, human rights, aviation and climate issues

5.2 International Obligations and the Nigerian Domestic Laws

Nigeria as a dualist state can be said to have been using the provisions of section 12 of the 1999 constitution as a means by which it separates its domestic laws from the rules of international law, however this attempt to separate the two legal orders has been rendered ineffective by the application of some basic principles of treaties' interpretation. Thus, one of these principles came up in a land and maritime dispute between Nigeria and Cameroon in 1998, as discussed in the preceding chapter above, the case was filed before the ICJ as *Federal Republic of Nigeria v Republic of Cameroon*. The dispute relates to the demarcation of some straddling village settlements, where the ICJ was approached by the

parties to determine among other issues the validity or otherwise of the 1975*Maroua* Declaration which the duo entered in 1975.

In its argument, Nigeria submitted that: 'The agreement could not be valid and binding because at the time of its conclusion it has in contravention of constitutional requirements not been approved by the Nigerian Supreme Military Council'. Nigeria's argument that 'the validity of the treaty is subject to its constitutional law' though astutely submitted was however rejected in the final decision of the court. Consequently, the court declared that: 'The provisions of states' domestic laws cannot be invoked to justify its failure to perform international treaties obligations'. Additionally, the 1975 constitutional requirements that: 'No obligations should arise in relation to the treaty in question' was declared to be against the principles of international law contained therein the 1969 Vienna Convention on the Law of Treaties. Thus, Nigeria's obligation to the treaty in question was confirmed and the requirements of its constitutional law negated.

Under international law, 'the rules of domestic law may invalidate consent to be bound by a treaty if it is shown that such domestic law is evidently objective and it is of fundamental importance'. The Nigeria's arguments in the above case, that 'the provisions of its constitution[198]are of fundamental importance' and thus objectively evident to Cameroon in the instant treaty were erroneous. Furthermore the Nigerian legal team's submissions that, 'there is an expectation that member states should normally follow and respect their neighboring states' legislative and constitutional developments which are having effect on their interstate relations' was held to be wrongly placed.

Relying on article 46 of the Act, Nigeria further argued that:

> Based on test of objectivity, and in line with the provisions contained there in the Convention, Cameroon might either have known or, should have conducted itself in a normally farsighted manner, and should have equally known that the Nigeria's Head of State was not having the legal authority to make commitments that are legally binding on the country without

[198]Section 12 (1) of the Constitution (n 2).

> seeking the approval of the highest decision making body, i.e. The Supreme Military Council, and that within the context of article 46 of the Act, those facts should have been "objectively evident" to Cameroon.[199]

Despite the above strong argument, the ICJ disagreed with Nigeria's submissions. To the extent that the rules of international law forbids state parties to a treaty from using the rules of domestic laws in order to avoid international treaties obligations, domestic laws seem to be subsumed by the rules of international law. These restrictive powers of the rules of international law over Nigeria's domestic laws points to the strength and the viability of the Monists' argument against the Nigeria's dualists' position on the relationship between the two legal orders.

Though many Nigerian legal experts have held the view that; 'no international instruments such as a treaty, convention, or protocol shall have any legal effect before Nigerian courts except same having being incorporated into domestic laws', however, the reality on the ground and in practice contradict their positions especially as it relates to rules of customary international law, *jus cogen* norm, and the ineffectiveness of domestic laws in shielding states from international obligations under the pretext of the requirements of domestic laws. Thus, it is of outmost importance to submit here that, the rules of international law as it relate to member states' international obligations are not in any way revolving around Nigeria's domestic legal order.

Furthermore, for Nigeria to be relying on the arguments that its constitutional provisions are of fundamental importance and should be evidenced objectively, its representatives in treaty-making should be making references to such constitutional provisions such as section 12 (1) of the 1999 constitution (as amended) by for example inserting the requirement of such provisions into the text of the treaty and making sure that the other parties thereto the treaty have taken note thereof and consented.

In what many view as going against the provision of section 12 (1) of the constitution, many international treaties have been ratified by Nigeria as discussed in the

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[199]Vienna Convention (n 1).

preceding chapter but have not yet been domesticated and/or incorporated into the domestic laws. These trends coupled with other factors contributing to poor implementation of international treaties by Nigeria hampers the negotiation spirit of its representatives in treaty making and send a bad signal to other members that it is not acting in good faiths as expected abs required by international law.

Nigeria's treaty-making and other related issues are being shrouded mostly in secrecy, because up till this moment it is not known with exactitude the number of treaties that are entered, ratified, or domesticated. For Nigeria's treaty-making procedures to be transparent and thus reliable the full list of international treaties entered should be compiled, and those that are domesticated should be made public and separated from those that were not. Thus, the National Assembly works with all the relevant authorities that are stake holders in treaty-making, and the full list of treaties incorporated or non incorporated can be drawn up from easily accessible sources like the office of the Attorney General in the Justice Ministry. Additionally, the lists of customary international rules that bind Nigeria are not compiled, thus hindering the contribution of those rules to the development of Nigeria's legal system. If those rules were to be compiled and applied as they should, it would have made the Nigerian foreign policy more coherent and in line with the best international practice.

In line with the best international practices, domestic legislations are made and applied in the most transparent ways. Thus, section 254 (C) should have listed and spelt out with clear expressions all the treaties it covers. If the NIC's practice directions are spelled out clearly and the subsequent modifications or amendments thereto those rules published by the Attorney General's office, the issue of lack of transparency being raised by many Nigerian scholars will be put to rest.

Furthermore, for its international relations and other foreign policies related thereto, it is most legitimate for Nigeria as sovereign nation to exercise its sovereignty by seeking to achieve the kind of protections offered by the provisions of for example section 12 (1) of the constitution. Notwithstanding those provisions however, it cannot run or shy away from its treaty obligations which it willfully entered and concluded unless if such

"protective previsions" are inserted into the text of a given treaty during the processes leading to its conclusion.

As discussed in the preceding chapter above, the GTA was intended to be used in implementing the ICJ's judgment of 10th October 2002, among the issues was the award of the *Bakassi* Peninsula's ownership to Cameroon.[200]

The argument of the Nigerian National Assembly was heavily predicated on the provisions of the 1999 constitution (as amended) in its section 12, the section provides that: '…the agreement was null, void and of no legal effect because it was not referred to them for ratification before it was given effect by the Executive'. However, the Legislatures seem to misconceive the overall legal effect of the provisions of section 12 (1) as it relates to the differences between treaty-making and treaty implementation.

Because of the mare reason that the legislatures have not domesticated the GTA, thus making it ineffective domestically, will not avail Nigeria of its obligations under the said agreement. At the first instance Nigeria has an obligation under the 10th October judgment of the ICJ and at the second instance its obligation under the GTA

Nigeria as member state of the UN and a state party to the ICJ's statute has an obligation to comply with the said ICJ's judgment. The UN charter provides that: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party'.[201]If Nigeria decides to remain non compliant to the ICJ's judgment, thus fails to discharge the obligations imposed on it by the judgment, Cameroon can impose the said judgment through the UNSC, which under the powers conferred on it by the UN charter can sanction Nigeria.[202]Diplomatically, it will not be wise for Nigeria to allow Cameroon to use such mechanism, especially as the USA, UK and the France who were witnesses to the GTA are also among the permanent Members of the UNSC.

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[200] See, *Nigeria v Cameroon* (n 192)
[201] In its article 94 (1), see again article 59 of the statute of the ICJ.
[202] Again, see article 94 (2) thereof the UN charter.

Additionally, under the Convention,[203] Nigeria as discussed previously cannot invoke the provisions of section 12 (1) of the 1999 amended constitution to justify its refusal or failure to perform its international obligations, in this instance the GTA. The Convention provides, thus: 'A state party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[204]

For all intents and purposes Nigeria will not be availed by the *proviso* to the above provisions, because under international law, the consent of the Nigeria's President as its head and representative to the GTA stands as a valid consent to be bound irrespective of the fact that domestically the National Assembly were not consulted before such consent was given.

5.3 Nigerian Domestic Laws' Intersections with International Instruments

In Nigeria's legal tradition as a dualist state, it has always considered its domestic laws to be operating in distinct spheres with the rules of international law. By this position therefore, the rules of international law require the validation of Nigeria's domestic laws before conferring certain duties, rights or obligations on the state, its institutions, or citizens. The validation of the rules of international law is the prerogative of the National Assembly as provided by the Constitution,[205]and is exercised 'through legislative intervention by way of domestication or incorporation of an international instrument into the domestic legal system'. However, in a sharp contradiction with its dualist position, Nigerian domestic laws intersect with international law as it relates to the application of international treaties and these usually happen without compliance with the requirement of its Constitutional provisions.

5.3.1 The curtailment of Nigeria's domestic laws by *Jus Cogen* Norms

Under international law, 'derogation from *jus cogen* norms is not permitted, however same can be changed or replaced by other *jus cogen* norms'. Thus, the

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[203]The Vienna Convention (n 1).
[204] Ibid, article 27 thereof.
[205]The Constitution (n 2).

international community recognizes the *jus cogen* norms as 'those norms from which derogations are not allowed'. Crimes such as genocide, torture and slavery are considered as crimes against international humanitarian law (IHL) and as such *jus cogens* norms. These norms though part of customary international law, they however operate with overriding superiority over and above the rules of domestic laws. The International Criminal Tribunal for former Yugoslavia (ICTY) has while considering the effect of *jus cogen* norms on the prohibition of crimes against humanity (such as those mentioned above) agreed with the above position in *Prosecutor v Anto Furundzija*.

If in the exercise of the Nigerian sovereignty, it decides to through the National Assembly enacts laws that are considered by the international community as being in direct contradiction with the *jus cogen* norms prohibiting tortures, genocide, slavery or other crimes against humanity, such enactments will to the extents of their contradiction to the *jus cogen* norm be invalid. The facts that the processes leading to the enactment of such domestic legislations are in compliance with the constitutional requirement will not validate them.

In its dualist approach to international law, Nigerian domestic laws should ordinarily operate domestically in relation to the prohibition of crimes against humanity such as slavery, torture or genocide. Furthermore, the rule of international norms as they relate to these issues can only become effective within the domestic legal system if and only when domesticated and incorporated by the legislatures.

However, in Nigeria *jus cogen* norms as they relate to crimes against humanity such as torture, slavery, and genocide, are in reality legally effective even in instances where domestic enactments are silent regarding such crimes. Consequently, any domestic Nigerian enactment that is in contradiction with *jus cogen* norms is considered under international law as a nullity and legally in valid. Thus, the Nigerian domestic legislations are in this context curtailed by the *jus cogen* norms.

In a much similar way, all international treaties entered between Nigeria and other subjects of international law the provisions of which violate the *jus cogen* norms as they relate to for example torture, slavery or genocide will to the extent of such violation be in

valid and legally in effective. Notwithstanding the domestication and/or incorporation of such treaties into the Nigerian domestic laws pursuant to the provisions of section 12 (1) of the constitution, the treaty remains in valid and thus ineffective. In this regard, the rules of domestic legislations can be seen to have been curtailed by the *jus cogen* norms.

To buttress the above position, an illustration can be made using *Nazi* era Germany, during the regime of which German domestic laws legalized acts considered as being crimes against humanity committed on some classified persons on the account of their ancestry. These domestic legislations might have been considered and applied validly under the then German domestic laws, they were however considered illegal and illegitimate under international law because of their inconsistency with *jus cogen* norms. *Jus cogen* norms such as those prohibiting war crimes are considered as example of the types that impose individuals' rights and obligations notwithstanding the individuals' domestic legislation.

Additionally, nations' individual citizens bear the obligations of not committing acts considered as crimes against humanities. These international obligations confer on individual citizens the rights to disobey instructions, authorizations or commands directing them to participate in committing acts constituting crimes against humanities despite any contrary legality under the rules of their respective domestic laws.

5.4 Analyzing the Status of International Treaties under Nigerian Domestic Laws

Going by the provisions of the 1999 Constitution, it will be absolutely right to submit that, once international treaties are promulgated into law by a legislative act, being such treaties part of the domestic laws is no more in doubt. This matter has for long been laid to rest prior to coming into force of the 1999 Constitution. Thus, in *Ogugu v The State*, it was unanimously held by the Supreme Court that: 'The African Charter on Human and Peoples' Rights, "which was a regional treaty" promulgated as a law in 1983 by the legislatures, has become a Nigerian municipal law'. However, the 1999 Constitution just like the defunct Constitutions before it did not sufficiently provide answers to the question of the position of domesticated international treaties among other domestic laws. Thus, this constitutional loophole is arguably among other factors contributing fueling controversies surrounding

the place of domesticated international treaties within the hierarchy of Nigerian laws. Initially the Nigerian courts attitudes towards the above controversy were that a domesticated international treaty retains its international status and features and as such should be considered as superior over the nation's municipal laws. It goes therefore that, any municipal legislation which is in contrast with the charter is a nullity.

Understandably, the Court of Appeal's decision in the above case lead to much controversies, legal arguments and debates among both jurists and scholars, because it openly contradicts the position of the law as pronounced in *Lakanmi v The Attorney General of the Western States of Nigeria* in which case 'the supremacy of enacted Nigerian Decrees as a legal principle was reaffirmed'. Equally, the Constitution was by that decision placed below The (ACHPR) and this contradicts the doctrine of supremacy of the constitution as enshrined in Section 1 (1).[206]Those decisions were intended to curb and check the excesses of military juntas back then,[207] and were only meant to serve as proactive judicial interventions.

Despite the above decision of the Supreme Court, controversies regarding the relationship between domesticated international treaties and the municipal laws remain, even though Ogundare, JSC was specific when he held that: 'The Charter possesses a greater vigor and strength than any other domestic statute..'.[208]

The above *dicta* continued to remain the position of the law until upturned later by the Supreme Court's decision in the same *Abacha v Fawehinmi*,[209] I therefore hold the humble opinion that elevating domesticated international treaties above municipal laws has no legal basis in Nigeria today, reason being that, domesticated international treaties do operate under Nigerian legal system at the instance of the statutes promulgated to implement them not at the instance of international law. Myview is further strengthened by

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[206]Constitution (n 2).
[207]During the undemocratic military eras in the 1980s.
[208]In *Abacha* (n 19).
[209]Ibid.

Akin Oyebode's position that: 'It is the statute enacted to implement a treaty that normally serves as a source of law and not the treaty per se'.

Despite the obvious flaw in the earlier Court of Appeal's decision, it remained the position of the law and was so used as a precedent in multiple numbers of judicial pronouncements. For instance, in *Chima Ubani v The DSS & Anor*, while making reference to *Abacha*'s case[210] the Court of Appeal reaffirmed its earlier decision that: 'The African Charter on Humans' and Peoples' rights remains supreme over all Nigerian municipal laws'.[211]

However, those erroneous pronouncements of the Court of Appeal were corrected by The Supreme Court in *Abacha v Fawehinmi*,[212] where Ogundare, JSC (as he then was) held in the lead judgment 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'. In concurring with the lead judgment, Mohammed Bello, JSC (as he then was), observed 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'. It is thus my humble submission that, the controversy surrounding the supremacy of the municipal Nigerian legislations above domesticated international treaties was with the above Supreme Court decision brought to a conclusion.

Against the backdrop of the above decisions of both the Court of Appeal and later that of the Supreme Court, I submit that it is not accidental or erroneous that those who drafted the 1999 Constitution failed to include in section 12 (1) that: 'Domesticated international treaties should have superiority over other municipal legislations'. If the draftsmen had intended that result, it would have been specifically provided and inserted into the draft.

The above provision survived three amendments, one in 1979 when the then constitution was repealed and two in the 1999 amendment. It is equally worthy of being

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[210] *Abacha* (n 19).
[211] These include military decrees and impliedly the constitution as well.
[212] *Abacha* (n 19).

pointed here that even in the initial quashed judgment of the Court of Appeal in *Abacha*'s case, Achike, JSC (as he then was) decided in his dissenting judgment against the upholding of domesticated international treaties as supreme to other municipal laws.[213]

literature review carried out in the conduct of this research on the above controversies shows that most Nigerian scholars, jurists, and authors incline towards the dissenting judgment of Achike, JSC than Ogundare's lead judgment due to how coherent and cogent its *ratio decidendi* was. My submission here is that, in issues relating to the relationship between municipal laws and international treaties implementing statutes, the rules regulating the relationship should be applied mutatis mutandis. In a similar way, treaties-implementing statutes regulating specific matters, override other ordinary statutes in line with *lex specialis derogatgenerali* principle.

From the foregoing therefore, it can rightly be submitted that domestication of international treaties in Nigeria is a constitutional matter. Thus, the constitution in section 12 provides:

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

The implication of the above provision of the constitution is obviously clear that, international treaties shall not have the force of law before Nigerian courts unless same having been reenacted into domestic laws by the national assembly through the legislative acts of incorporation and, or domestication.

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[213] Ibid.

Similar issue was raised in the case of *Sei Fuji v California*, where the question "whether the UN Charter stands as a self-executing international treaty superseding conflicting municipal legislations?"came up. In response to the question, it was unanimously held by the court that: 'In deciding whether an international treaty is self-executing or not, the court has to consult and study the terms of the treaty itself, in order to try and infer the necessary intendments of the all the parties thereto and take into consideration all relevant facts and circumstances'. Thus, it was eventually concluded by the court that: 'It was not the necessary intendments of the draftsmen that the UN charter should be self executing'.

Additionally, the court held that:

> Private and individual's rights are not created by the "Charter", and that for the "Charter" to be binding on individual citizens just like the domestic laws of a nation are, further legislative enactments are required from the member states that are signatories thereto. Accordingly, the Californian local legislations in question cannot be superseded by the UN Charter which has not been incorporated or domesticated.

Though the UNSC resolutions are considered as having become among some of the important features and instruments of international law, however, they are not automatically enforceable under member states' municipal legal system. For example, in dualist states such as UK and Nigeria the enforceability of the UN's resolutions, charters, objectives, or principles requires a legislative intervention. Thus, as a dualist state, such instruments are not self-executing in Nigeria. Although the decisions of the ECJ are having a direct and binding effect within the municipal laws of member states, such decisions are for instance enforceable in the UK then a member state only due to the fact that they are in conformity with the UK's domestic enactments, i.e. the UK's municipal legislations have expressly made provisions for such enforceability.

Additionally, the UK's courts must interpret such EU's laws as laws of the EU and not as UK's legislations, and such laws are not automatically enforceable without further legislative interventions, after all certain decisions of the ECJ are not intended to have

direct effect within the municipal laws of member states without additional local legislations.

5.5 International Treaties in the Processes of Nigerian Legal System Reforms

International treaties play vital roles in the developmental process of Nigerian judicial and legal systems, and this is underscoring the interdependence between Nigerian municipal laws and international law. However, its worthy of being noted here that domesticated international treaties have already become part of the Nigerian Jurisprudence. Thus, international treaties have not only become part of Nigerian legal system, but they equally fill in some loopholes and gaps in the system. The African Charter for instance, which was domesticated in 1983 by the National Assembly provided the basis for the enforcement of human and peoples' rights and also retained some provisions of chapter 11 of the 1979 Constitution.[214]

Going by the wordings of section 12 (1) of the 1999 Constitution it's very clear that undomesticated international treaties though having no force of law in the Nigerian legal system, yet a viable domestic Nigerian legal system could not have been entrenched completely without having recourse to the roles they play. Firstly, undomesticated international treaties have a persuasive non binding authority before the Nigerian courts, hence, domestic courts more often rely on such treaties as guides and aids when interpreting of municipal laws. Though not of binding authority, yet the courts invoke those treaties as guides to interpret status. The Courts in Nigeria as previously adumbrated do rely on undomesticated international treaties to interpret statutes, thereby expanding the horizon of Nigerian legal system. Thus, a country that signs an international treaty is obliged to act in all possible ways for achieving the objectives of the treaty until either the treaty is suspended or terminated based on the terms contained therein. Additionally, Nigerian Courts hold the rebuttable presumption that international law as a source of law is meant

[214]Retained as chapter II of the constitution (n 2).

to be part of municipal laws, thus becoming an aid not only for interpretation but for reforms as well.

However, the above presumption is rebuttable and applies primarily in relations to undomesticated international treaties, where its application on ambiguous municipal status is considered as of persuasive rather than of binding authority. Similarly, municipal laws are based on the doctrine of statutory interpretation, interpreted by Nigerian Courts in conformity with international obligations contained in treaties and other conventions. Additionally, undomesticated international treaties provide a legal guidance in law-making processes to the National Assembly. Hence, a lot of legislative enactments by the Nigerian law makers were influenced both at the federal and state levels by undomesticated international treaties, most especially in the areas of humanitarian and human rights laws. The enactment of The Child Rights Act and the Child Right Laws by majority of the state Houses of Assembly are examples of the influence of international conventions on the law making processes in Nigeria.[215]

In a similar way, the Convention on the Elimination of All forms of Discriminations against Women of 1979 influenced immensely the enactment of the 2015 Violence against Persons (Prohibition) Act, an enactment by the National Assembly which criminalizes and prohibits circumcision on female, genital mutilation and all forms of harmful cultural practices against widows. Equally, the doctrine of legitimate expectations stemmed from some ratified but undomesticated international treaties, hence the citizens' genuine expectations that governmental agencies and institutions would be acting in accordance with the States' obligations contained in such treaties. Thus, the Privy Council in *Higgs & Anor v. MNS & Ors* held that:

> 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

[215] Those enactments were a ratification and adoption of the United Nations Convention on the Rights of the Child 1989 and the African Charter on the Right of the Child 1990.

> rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty.

It is of outmost importance to point out here that, the Supreme Court has adopted the above decision of the Privy Council in the *Abacha* case,[216] where the Court observed that: 'The makers of administrative decisions shall always exercise their statutory discretions in line with the provisions contained in the Convention on the Rights of the Child'. [217] It suffices to note that the said convention is an unincorporated international treaty, and when treaties are ratified citizens have a legitimate expectation that all institutions of the government shall be acting in conformity with such terms as contained therein.

However, notwithstanding the contributions of international treaties to the development of the Nigerian legal system, the failure on the part of the government to domesticate such treaties into law after ratification constitutes a clog in the wheel of Nigeria's legal system development. This submission is strengthened by the facts that citizens will not have the juristic and legal capacity in approaching the courts at international level for the enforcement of their rights under such international treaties and thereby denying the municipal courts an opportunity to interpret same and make them part of the nation's judicial precedent. Thus, parties to such treaties would use its status to avoid obligations. For instance, the GTA, which provides among others the means through which Nigeria should withdraw and transfer all authorities in the *Bakassi* peninsula to the Republic of Cameroon, has for more than a decade after coming into force not been domesticated by the Nigerian authorities. This has denied the Nigerian courts an opportunity to interpret same, and make it a part of Nigerian legal and judicial system.

5.5.1 International treaties: as aids to judicial interpretation

Though the Supreme Court of Nigeria (SCN) has in *Abacha v Fawehinmi*[218]held that 'an unincorporated international treaty do not have the force of law in Nigeria' yet

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[216]*Abacha* (n 19).
[217]The Convention on the Rights of the Child 1989.
[218]*Abacha* (n 19).

Nigerian courts use the same treaties as aids to judicial interpretation. The court held in the above case that:

> However, it is also pertinent to observe that the provisions of an incorporated treaty might have indirect effect upon the construction of status or might give rise to legitimate expectations by citizens that the government, in its acts affecting them, would observe the terms of the treaty

In arriving at the above decision, the Court made reference to the case of *Unity Dow v Attorney Genera lof Botswana* where Aguda, JSC (as he then was) held the view that:

> I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretations as to whether or not some legislations breached any of the provisions entrenched in chapter 11 of the Botswana's constitution which deal with fundamental Rights and Freedoms of Individuals, is entitled to look at the international agreements, treaties and obligations entered into force before or after the legislations was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties and obligations binding upon this country save upon clear and unambiguous languages. In my view this must be so whether or not such international conventions, agreement, treaties, protocols, or obligations have been specifically incorporated into our domestic law.[219]

The above Supreme Court's decision is of great significance. Firstly, it does not only point to the preparedness of Nigerian Courts in applying undomesticated international treaties notwithstanding the stand of the constitution on the same, but it shows that the courts also apply them in the interpretation of municipal statutes. Additionally, the decision shows that ratification and a subsequent domestication of international treaties by Nigeria raises the legitimate expectations of citizens of the government's commitments in keeping to the terms of such international treaties especially those concerning citizens' basic rights

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[219][1999] BLR 323 pt 660 pg 224.

under international law. *Mojekwu v Ejikeme*,[220] is one of the many instances where Courts in Nigeria have relied on non-domesticated international treaties to interpret relevant municipal Laws.

The ILO's principles on freedom of association can in this regard be relied on by the courts in interpreting some municipal status on citizens' rights. By implication therefore, the courts will always rely on such principles in interpreting status unless where they contradict the provisions of domestic laws either directly or by necessary implications. Thus, unlike in Monist's theory where international treaties cannot under any circumstances override municipal laws, under Dualist's theory it is possible, and the Courts are allowed by the law to rely on a ratified but undomesticated international treaty in the interpretation of status unless where it contradicts the provisions of a municipal law.

Based on the 'Bangalore Principles on the Domestic Application of International Human Rights Norms', Nigerian Courts can as well rely on ratified but undomesticated international treaties or convention, in instances where the municipal laws appear to be ambiguous, or conflicting. Thus, the principles may apply to either constitutional or statutory matters.

The principles states in its Paragraph 4 thus:

> In most countries whose legal systems are based upon common law, international been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regards to these international instruments for the purpose of deciding conventions are not directly enforceable in national courts unless their provisions have cases where the domestic law is uncertain or incomplete

Therefore, laws must be interpreted by the courts in such a way that the principles of international law are not in any way violated, hence: the existence of a presumption under the 'Bangalore Principles' that law makers do not intend promulgating laws that aid states to violate their obligations in international treaties. Nigerian courts may on the basis

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[220][2012] 6 SCQLR, pt 220 pg 1214.

of the said principles rely on international instruments such as conventions and treaties in protecting the citizens' basic rights such as rights to strike and right to peaceful assembly.

5.5.2 Undomesticated Treaties as Customary International Law

'When a treaty or a part thereof attains the status of a customary law, then it can be applied in Nigeria even though it's not incorporated into its local legislations'.[221]Thus, without the need for legislative intervention through domestication, customary international law is automatically applied as part of domestic legislations by the Nigerian courts.

Going by the above position, the right to freedom of association for instance, would be held to have formed part of customary international law. Most nations have adopted the ILO Convention on Freedom of Association and that acceptance has made it made it to be part of customary international law. Thus, the ILO Committee on Freedom of Association's reports that: 'ILO members, due to their membership are bound to respect a certain number of general rules which have been established for the common good….Among these principles, freedom of association has become a customary rule above the convention'[222]

It is therefore significant to point out that, all international treaties that have attained the status of customary international law are considered to have escaped the scope of the provision of section 12 (1) of the constitution[223] and should be automatically considered as part of Nigeria's domestic legislation without the necessity of incorporation. It is the submission of this thesis that, freedom of association as contained in the ILO principles is a reflection of chapter IV of the Nigerian constitution and as such should be considered as forming part of Nigeria's domestic legislations

The rules of customary international law are largely not in written form due to the nature of their formulations as against international treaties which by the rules regulating

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[221] E. Egede, 'Bringing Human Rights Home: "An Examination of the Domestication of Human Rights Treaties in Nigeria" (2007)51 (2) JAL pg 249.
[222] See the Committee on Freedom of Association: fact finding and Conciliation Report (ILO) Chile (Geneva International Office, 1975) paragraph 10.
[223] The constitution (n 2).

their formations are in written form. However, customary international law's rules become codified in some circumstances into international treaties, just as some provisions of international treaties are sometime transformed into the rules of customary international law. As it is generally the case, the rules of customary international law are not produced through negotiations or formal agreements, rather they are a product of constant and accepted practices developed and recognized as legally binding by civilized nations as members of international community.

The provisions of section 12 (1) of the constitution has not contemplated the evolvement of the rules of customary international law from Nigeria's international practices, thus, by section 12 (1) of the constitution, such basic rules 'are not in line with the constitutional meaning of an international treaty'. Unlike in the case of international treaties which the constitution requires for their domestication before becoming effective and enforceable in Nigerian courts, there is no such requirement by the same constitution or any other Nigerian statute in the case of the rules of customary international law. The absence of such requirement in the case of the rules of customary international law by the constitution gave rise to many inquisitorial debates regarding its application and/or status in Nigeria.

The Nigerian Supreme Court made reference to the rules of customary international law[224] in arriving at its decision in *Abacha v Fawehinmi*.[225] The VCLT was ratified by Nigeria in 1969 by depositing its instruments of ratification the same year, but the National Assembly has not yet promulgated an enactment effecting its domestication as it did in the case of other treaties such as the African Charter on Human and Peoples Rights (ACHPR). However, despite its status as a non domesticated international treaty, the Supreme Court relied on it its provision in the above mentioned case. Particularly, the apex court in rejecting the submission that a treaty signifies a "mere contract as understood in the law of contract" referred and used the exact wordings of the VCLT's definition of a treaty, thus: 'An international agreement concluded between states in written form and governed by

[224] These principles were codified in the Vienna Convention (n 1).
[225] *Abacha* (n 19).

international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

Furthermore, in using an undomesticated international treaty as a customary international law to arrive at its decisions, the Supreme Court distinguished a treaty from other forms of contracts by drawing a line between agreements entered by states and which are governed by the rules of domestic laws of contract and international agreements governed by rules of international law. Therefore, it can rightly be submitted that, the rules of customary international law were the pillars upon which the definition of treaties was built by the Nigerian Supreme Court as is the case with the VCLT's treaty definition in article 2 thereof.

Similarly, the Supreme Court has through its decision in the same *Abacha* case given another indication of the applicability and reliance on the rules of customary international law by Nigerian courts. The question as regards to the idea of subjects of international law was examined by the Supreme Court in the said case, the court examined the idea of subjects of international law within the contemplation of the rules of customary international law and decided that: 'Under strict customary international law, individuals are not subjects of international law'

Under international law, the status of individual citizens has been evolving, however, what is most relevant to this study is that an undomesticated treaty's place within the Nigerian legal system is considered as a product of customary international law that can be relied on directly by Nigerian courts in the determinations of citizens' basic rights and obligations.

The Supreme Court applies the rules of customary international law in a distinct manner from the way it applies foreign law. Foreign laws are ordinarily matters of facts the proof of which is necessary. Thus, the existence or otherwise of such laws must be proved through evidence (in a situation of conflict of laws) by a party intending to rely on them. Such evidences can for example be a book of statutes etc. Although the requirement for the presentation of evidences of the existence of the basic rules of customary international law intended to be relied on was not considered necessary in *Abacha* case,

however, the rules of customary international law were applied directly in a similar way that other Nigerian domestic laws would have been applied. Consequently, the Supreme Court has by that decision laid down a precedent for undomesticated international treaties to be applied as rules of customary international law, thus becoming part of Nigeria's legal and judicial system.

5.5.3 Requirement for Domestication: a shield against treaties obligation?

The 1999 Constitution provides on the domestication of international treaties in Nigeria, thus:

> (1) 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.
>
> 2) The 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.
>
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of sub-section 2 of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The Nigerian Courts do not by virtue of the above provisions have the powers to recognize and apply the terms of a ratified international treaty without domestication by the National Assembly. Therefore, ratification by the executives would not confer a power to the Courts to apply international treaties unless such treaties are incorporated into the Nigerian domestic laws by the Legislatures. National Assembly is therefore the only arm of the Government with the powers to domesticate international treaties on matters falling under the exclusive legislative list. The Constitutional provisions above, clearly provides that such powers of the National Assembly to domesticate international treaties should also

extend to matters falling under the concurrent legislative list.[226] However, the approval of the majority of the state houses of Assembly is necessary if the matter falls under both the concurrent and residual legislative lists.

Ogundare, JSC (as he then was) held in the case of *Abacha v Fawehinmi*[227] that: 'A treaty will not be binding on Nigeria after ratification until incorporated into Nigerian domestic laws by an Act of the National Assembly, it therefore has no force of law or become binding and enforceable by the Nigerian Courts'. This was half a decade reaffirmed by the Court of Appeal in the case of *MHWUN v Minister of Health & Productivity &Ors*, where the court decided that: 'The ILO's provisions has no force of law in Nigeria after it is incorporated into the Nigerian domestic laws by the National Assembly'. Delivering the lead judgment in the said case, Muntaka-Coomassie, JCA (as he then was) held that:

> There is no evidence before the court that the ILO convention has been enacted into law by the National Assembly. In so far as the ILO convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria and it cannot possibly apply....Where, however, the 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 African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria 1990 it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the Courts.

The above decisions of the Nigerian Courts influenced many leading Academics and politicians' conclusions that Nigeria is using such decisions to shield itself from some international treaty obligations. Thus, a ranking member of the lower Chamber of the National Assembly and former Chairman Committee on Treaties and Protocols of the

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[226]In sub 2 of section 12.
[227]*Abacha* (n 19).

House of Representative,[228] lamented that: 'The National Assembly cannot state with accuracy the number of treaties that have been signed by Nigeria, and the National Assembly had had to issue a letter calling on the Executive to forward treaties to it for domestication'. Thus, the Nigerian Government was using the non domestication of such treaties to avoid complying with its obligations as contained therein. Nwabueze submitted in that regard, that: 'Such were sad developments in Nigeria's diplomacy as it portrays Nigeria to be acting in bad faith when engaging with its international partners'.

Additionally, these unfortunate conducts of the Nigerian Government resulting in the non-domestication of international treaties are clogging the wheels of Nigeria's legal system development, hence a literature review on Nigeria's case law conducted at the course of this research (discussed in chapter five here in) points to the Nigeria's Dualist nature in its approach to International law. It points to Nigeria's usage of the status of undomesticated international treaties to not only maintain its sovereignty and shield itself from its obligations under such international instruments, but also to reaffirm the supremacy of its domestic laws over 'any other law' as enshrined in chapter 1 of the 1999 constitution which provides that: 'This constitution is supreme over any law in Nigeria and any other law which is inconsistent to this constitution shall to the extent of such inconsistency be null and void'

Furthermore, Nigeria has ratified a number of international treaties in the area of International Property Law (IPL) but such treaties are still not domesticated. For example, the WIPO international treaties, which were made up of both the WIPO Copyright and WIPO Performance and Phonograms Treaties, though ratified as far back as 1996, yet they are still not incorporated into the Nigerian domestic laws. Thus, Nigeria is yet to be bound by the terms of such treaties simply because of lack of domestication. Other international treaties that are still waiting for domestication include for example the 'Beijing Treaty on Audio-Visual Performances' 2011, the 'Marrakesh VIP Treaty' 2016 among others. These international treaties were entered into not only for the purpose of compelling Nigeria in respecting and enforcing the rights of the physically challenged persons (such as blind,

[228]Dayo Bush-Alebiosu (n 129).

visually impaired persons) through facilitating their access to printed or published works, but to equally help in developing the IPL within the Nigerian legal system, however those treaties are still left undomesticated. Thus making Nigeria shielded from its obligations under those treaties

In a similar way, Nigeria has ratified the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa together with other AU members since 2012 for addressing the issues of refugees and internally displaced persons, unfortunately however, the convention is yet to be domesticated despite its potentials in being part of Nigeria's legal system and the resultant effect of aiding the development of the country's legal and judicial systems especially in the areas of humanitarian law, climate change and migration.

As discussed from the beginning of this sub-chapter, section 12 (1)of 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'. However, this provision has been a subject of heated academic and judicial debates, with some scholars arguing that the provision is just a shield in the hands of the Nigerian Government for protection against unfavorable treaty obligations which it has entered out bad faith but for political or diplomatic expediencies.

The well celebrated case of *Abacha v Fawehinmi* has always been the referring judicial authority in this regard. Thus, the Supreme Court was presented with an opportunity to consider and examine the constitutional provisions contained therein the constitution. The brief facts of the case were that, on Tuesday, the 30th day of January 1996, the Respondent (Gani Fawehinmi) was whisked away from his residence by some persons believed to have been operatives of the Federal Government's State Security Services (SSS) and the Nigerian Police (NPF). Gani Fawehinmi, who was the Respondent at the Supreme Court (The Applicant, Appellant before the Federal High Court and the Court of Appeal respectively), was after his arrest taken to the SSS's office in Lagos[229]and detained

[229] The then Nigerian capital from independence in 1960 to 1993 when it was later relocated to the current capital, Abuja.

for several days without being charged before a court of law for any crime. After spending an unspecified number of days in detention at their Lagos office, the SSS took him to *Bauchi* prison where he was kept in detention without warrant or a detention order by any court.

The Respondent applied and filed at the Federal High Court's Lagos division to enforce his rights as enshrined in chapter 4 of the 1999 constitution. Among his prayers was that the court should declare his arrest without an arrest warrant, and his subsequent detention were not only arbitrary but illegal and in violation of his rights to human person contrary to the provisions of the African Charter on Human and Peoples' Rights (ACHPR).[230] Additionally, the Respondent urged the Court to in the alternative to the earlier prayer compel the Appellants by issuing an order of "*Mandamus*" to produce him in court for a proper trial or unconditionally release him in accordance with the provisions of Article 7 of the ACHPR.

Preliminary objection was raised by the Appellants (Defendants and Respondents before the Federal High Court and Court of Appeal respectively) challenging the trial court's jurisdiction to entertain the matter before it. The Federal High Court allowed the preliminary objection raised and dismissed the Appellant's suit, and further held that: -'In line with the 1984State Security (Detention of Persons) Decree No. 2 the NPF have the powers and authorities in detaining persons they reasonably suspect to be a threat to the security of the state'. The trial court further held that:- 'The ACHPR's provisions is valid and enforceable in Nigeria only to the extent that it is not in contradiction with the 1993 Constitution (Suspension and Modification) Decree'.[231]

On an appeal before the Federal Court of Appeal, part of the appeal was allowed, and the case remitted back to the Federal High Court for a re-trial. In delivering its judgment on the issue of the Appellants detention without a lawful detention order, the Court submitted that:- 'The Learned trial judge at the Federal High Court's decision stands, and the decision was right that "the NPF has the power of detaining suspects under the

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[230] Articles, 4, 5, 6 and 12 thereof.
[231] See, the 1993 Decree No. 107 thereof.

provisions of the 1984Decree No. 2" and that the 1994 Decree No. 11 has barred the Federal High Courts from exercising jurisdictions over such matters'.

With regards to the provisions of the ACHPR, the court observed that:

> While Decrees promulgated by the Federal Military Government of Nigeria can override Nigerian domestic laws, they can however not oust the powers of the Federal High Court to properly and constitutionally exercise its powers on matters such as the violation of human rights in accordance with the provisions of the ACHPR. Additionally, those matters pertaining to human rights are *jus cogen* norms under international law, and as such cannot be derogated from by the Decree of the Federal Military Government, and that Federal Military Government cannot be allowed to use such decrees in legislating itself out of its international obligations.

The matter eventually went to the Supreme court, where among other issues for determination 'was the consideration of the ACHPR within the contemplation of section 12 (1) of the amended 1979 constitution which was later repelled by section 12 (1) of the amended 1999 constitution', The apex court held among others that: 'Before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justifiable in our courts'. The West African Privy Council's decision in *Higgs v MNS & others* was further quoted by the court to have decided 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 citizens' 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.

5.6 Position of Domesticated International Treaties in the Hierarchy of Nigerian Domestic Laws

The notion of state sovereignty, a long-standing core concept of international law, has a significant influence on the position of law with regard to the applicability of domesticated treaties in Nigeria. Nigeria's 1999 Constitution, under Section 1, declares that the document is supreme and states the following:

> This constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria'. If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void.

Section 12 of Nigeria's constitution, which limits the applicability of international law and norms to only treaties that have been domesticated (re-enacted) by the legislature, is the current fundamental law that aims to make international treaties enforceable in Nigeria.

In this regard, some case laws are illuminating on the hierarchy of norms in Nigeria, vis-à-vis international treaties. The purpose of the aforementioned provision is to reinforce the doctrine of the supremacy of the constitution and the sovereignty of Nigeria. For instance, the court determined in the case of *Aeroflot v Air Cargo Egypt* that "the provisions of an international treaty which has been ratified prevail over the rules of domestic law when they are incompatible with the other." Additionally, the court found that the Decrees of the previous Military Governments of Nigeria were subordinate to the African Charter on Human and Peoples Rights because it is an international treaty. This was in the case of *Registered Trustees of the Constitutional Rights Project v President the Federal Republic of Nigeria and Ors.* This case is very important because it discusses how the African Charter should be interpreted when it conflicts with a member state's domestic legislation. Similar to this, the court determined in *Oshievere v British Caledonia Airways* that; international treaties are a reflection of a compromise that the contracting governments have reached and, in general, their application and construction are independent of the local

laws of the contracting states. It is important to understand that a convention or treaty that contains an international agreement is autonomous because the parties have agreed to be bound by its provisions, which are then superior to domestic laws. As a result, any domestic law that conflicts with the convention is invalid.

The preceding case law seems to imply that international treaties take precedence over national laws. As if that weren't enough, in *UAC (Nig) Ltd. v Global Transport SA*, the court made the following ruling, according to Muhammed, JCA: "I quite agree that an international agreement embodied in a convention such as the Hague Rules is autonomous and above the domestic legislation of the contracting states and that the provisions of such conventions cannot be suspended or interpreted even by the agreement of the parties.".[232]

In the midst of the controversy, the Supreme Court was given the chance to weigh in on the matter in the case of *Abacha v Fawehinmi*. According to Ogundare, JSC, the Court decided that: CAP 10 is undoubtedly a law with a global feel. As a result, I would assume that in the event of a conflict between it and another statute, its provisions would take precedence over those of other statutes because it is assumed that the legislature had no intention of violating an international agreement. I concur with their Lordships of the court below that the Charter has more energy and vigor than any domestic act in this regard.

The aforementioned ruling does not, however, imply that the Charter is superior to the constitution. The basic rule is that a treaty that has been incorporated into the body of municipal law ranks at level with the municipal statutes, according to Achike, JSC. It is somewhat surprising that a legislation approved to carry out a treaty should have precedence over all other local laws. Scholars who prefer Achike, JSC's stance that "both laws are at par" have harshly criticized Acholonu and Ogundare, JSC's position on the superiority of treaty law over municipal law. Although article 27 of the Vienna Convention on the Law of Treaties, which was adopted in 1969, states that "A party cannot invoke the provisions of its internal law as basis or excuse for its failure to perform a treaty obligation," this analysis supports the stance of Acholonu and Ogundare, JSCs.

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[232] [2006] 7 NWLR pg 448.

Additionally, once a state signs an international treaty, it is bound by its terms, and in the event that a disagreement arises between the terms of the signed treaty and local laws in the state, the terms of the signed treaty take precedence. Nigeria can be said to have accepted the Blackstonian doctrine of incorporation of customary law, as used in the UK, with regard to the application of customary international law. Nigeria's laws and constitution don't address how customary international law fits into the overall hierarchy of its standards. There are certain scholarly concerns because the Nigerian constitution does not explicitly mention the standing of customary international law.

The Supreme Court held on the issue of hierarchy, that:

> The ACHPR is not having any superiority over or above the Nigerian Constitution, neither will the National Assembly be prevented by the ACHPR's international flavor from expunging it from the Nigerian domestic legislations by for example repealing the Act under which it was incorporated into the Nigerian laws.

Similarly, the validity of any written Nigerian law is not subject to its conformity with the ACPHR or any other international treaty to which Nigeria is a party. However, in the event of conflict between the provisions of any written law and the provisions of the ACPHR, the provisions of the later shall prevail over those of the former by virtue of the assumption that it was not the necessary intendment of the legislatures to shield Nigeria from its obligations internationally. Probably, this is the position of the Court of Appeal in *Oshevire v British Caledonian Airways*, where it was observed that: 'Any municipal law that is in contradiction with international instruments such as treaties, convention, protocols, etc is void and of no effect'.

The case of *Chae Chin Pin v United States* was relied on by the Supreme Court in the same *Abacha v Fawehinmi,*[233] where it held that:

> International treaties cannot be higher in dignity than the Acts of the Congress, and same may be modified or repealed by the Acts of the

[233]*Abach*a (n 19).

> Congress. The question as to the appropriateness or justness of such modification or repeal is a political not a judicial one. Whether such modification or repeal is wise or just is not a judicial question.

Though the 1999 constitution in section 12 (1) deals with international treaties entered between Nigeria and other sovereign states, it by implications extends to such treaties concluded with other subjects of international law such as international organizations.

The position of the Nigerian constitution in section 12 (1) on the status of international treaties before domestication is the same with the positions of most dualist states such as the UK. Thus, the UK's House of Lords in *McLane Watson v Department of Trade and Industry* decided thus: 'A treaty is not part of English law unless and until it has been incorporated into the law by legislation'.

5.7 The Effect of "Third Amendment" on the Implementation of International Treaties

The main objective in entering and conclusion of international treaties is the creation of legally binding rules that create rights and obligations on the parties thereto. Thus, all the parties thereto accept to be bound by the provisions thereto, and are assumed and expected to discharge their obligations in good faith. Accordingly, the Third Amendment to the Nigerian 1999 Constitution becomes a law in Nigeria in 2011giving effect to many judicial and legal changes affecting the role played by international instruments in the Nigerian legal and judicial system development such as, the reestablishment of the National Industrial Court, the Supremacy of the Nigerian laws over and above international law, etc.

5.7.1 Placement of Nigeria's Laws above all other laws

The major impact of the "Third Amendment" on the development of Nigerian legal system is the placement of Nigerian laws over and above all other laws, international law inclusive. Thus, the Constitution[234] in section 1 (3) provides clearly and unequivocally that:

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[234]The Constitution of the Federal Republic of Nigerian 1999 (as amended).

'It is supreme over any other law in Nigeria, and any other law which is inconsistent thereto shall be a nullity to the extent of that inconsistency'. The constitution provides further that: 'If any other law is inconsistent with this constitution, this constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'.[235]

It is therefore submitted that, the provisions of section 12 (1) is meant to safeguard that doctrine of the supremacy of the constitution, and by implication its superiority over all other laws, international instruments inclusive. It could rightly be submitted therefore, that considering the provisions of section 1, the main objective of section 12 therein is the reiteration of the supremacy of the Nigerian domestic laws. Thus striking a balance between respecting the principles of international law and maintaining the nation's sovereignty

Thus, the application of many labor related international treaties which Nigerian Courts were initially reluctant to apply appear to have been recognized by the constitution in the said section,[236] hence, the Supreme Court's decision in the case of *MHWUN v The Minister of Health & Productivity & Ors* that: 'In so far as the International Labor Organization Convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria', will no more be the position of the law in this regard. It equally suggests that the Court's dictum in *Abacha v Fawehinmi*[237] will no longer be relied on as an authority when determining the issues of domestic application of international treaties that are related to labor matters, reason being that the effect of the application of section 12 (1) appears to have been suspended in section 254 (c) (2)

5.7.2 Establishment of the National Industrial Court

Another important effect of the "Third Amendment" to the Nigerian Legal System reforms is the reestablishment of National Industrial Court (NIC). The Third Amendment Act[238] becomes a law in Nigeria in 2011 there by reestablishing the NIC *via* the National Industrial

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[235]The constitution (n 2) Chapter 1 section 1 part 1.
[236] Ibid, section 254 (c) (2).
[237]*Abacha* (n 19).
[238]Laws of the Federation of Nigeria, 2010.

Court Act 2010.[239] Essentially, the Third Amendment Act was incorporated into the 1999 Constitution by the NIC Act 2010. Thus, the 'Act' introduced numerous reforms by restructuring the powers, jurisdictions and status of the Court, hence placing it among the superior Courts of records and at par with the State High Courts.

The NIC is vested by the NIC Act 2010 with exclusive civil jurisdiction over causes and matters relating to labor, industrial and trade unions' matters. Nigerian Jurists share divided opinions regarding the NIC's exclusive jurisdictions in labor and trade union relations and the place and status it occupies in the hierarchy of Nigerian courts. In *Oloruntoba Ojo v Dopamu* for example, it was held by the Supreme Court that: 'The exclusive jurisdiction of the NIC does not cover all labor matters as provided in the NIC Act 2010'. Again in *National Union of Electricity Employees v Bureau of Public Enterprise*, it was held by the Supreme Court that: 'The NIC contrary to its place in the hierarchy of Nigerian courts as enshrined in the "Act" establishing it, is an inferior court at the same level with both the Federal and State High Courts'. The decisions of the Supreme Court in the above case influenced the National Assembly to alter and amend the 1999 Constitution and enacted what is now known as the Third Alteration Act, 2010.

Section 254 (c) of the 1999 Constitution defines the jurisdiction of the NIC as enshrined in the Third Alteration Act 2010.[240] Surprisingly however, the same Act[241] seems to impliedly adopt the "Monist's Theory" by automatically incorporating undomesticated international labor treaties into Nigeria domestic laws. The Act provides in the said subsection 2 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 labor,

[239]Laws of the Federation of Nigeria, 2011.
[240] See, sections 6 and 7 thereto.
[241] In sub section 2 of section 254.

> employment, workplace, industrial relations or matters connected therewith.

The automatic jurisdiction of the NIC in applying terms contained in a ratified international labor, employment, and industrial treaties has been clearly defined by the above provision of the Act.

Furthermore, the NIC has been empowered by the Act[242] to adjudicate over matters covering not only labor relations, but also the interpretation and application of international labor treaties. Thus, the Act specifically provides in section 254 (c) (2) the procedure for the application of international instruments such as treaties, conventions, and other protocols which have been ratified by Nigeria.

The Act provides in the above section that: the National Industrial Court shall have the jurisdiction and authority to handle any matter related to or pertaining to the application of any international convention, treaty, or protocol that Nigeria has ratified relating to labor, employment, workplace, industrial relations, or matters related thereto, notwithstanding anything to the contrary in this Constitution.

However, the above provision uniquely contradicts the earlier position of the constitution which requires the domestication of international instruments such as international labor treaties by the National Assembly, before they could have the force of law in Nigeria. Impliedly, Nigerian citizens can now by virtue of the above provision rely on undomesticated international treaties when seeking for a redress before the NIA and the case of *Abacha v Fawehinmi*[243] cannot be relied on as an authority in deciding questions relating to the application of international treaties on labor, aviation and other protocols.

5.7.3 Unenforceability of Energy and Investments Treaties

Another major effect of the Third amendment on the implementation of international treaties in Nigeria is the limitation it creates to the enforceability of

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[242]The National Industrial Court Act 2010.
[243]*Abacha* (n 19).

international treaties dealing with energy and investments before Nigerian courts. By virtue of section 254 of the Third Alteration Act, non domesticated international treaties are not binding on Nigeria because they do not have legal effect before Nigerian courts by virtue of section 12 (1) of the constitution, thus, the legal effect of non domestication of these international treaties have far-reaching implications that affects the validity and enforceability of many international treaties dealing with investments, business and energy before domestic courts.

Additionally, it will create difficulties in the application of the principles of Exhausting of Local Remedies (ELR) and exclusive forum clauses. Furthermore, differences and disputes relating to issues of justice denial and unfair bargaining may be affected, and may lead to other issues such as Nigeria losing its "non-complaint" status, and more expensive or costlier alternative dispute resolution mechanisms for the investors.

5.8 Implication of Non-Domestication of Treaties

Lack of domestication of international agreements by the National Assembly renders the agreements in questions in effective before Nigerian courts. Thus, international treaties that are ratified by Nigeria but are not yet domesticated are for all intents and purposes considered as non binding. Constitutionally, no treaty should have the force of law in Nigeria prior to its domestication. Hence, all international treaties concluded and ratified by Nigeria in the areas of energy, business and investments remain ineffective and unenforceable before the Nigerian courts. The Supreme Court has in its many judicial pronouncements affirmed this position, as for example in the case of *African Reinsurance Corporation v Abata Fantaye.*[244]

5.8.1 Un Enforceability of Obligations on Nigeria

In the area of energy, many energy investments treaties have been ratified but have not yet been domesticated by Nigeria. Failure to domesticate energy related treaties like the Nuclear Treaty by Nigeria has rendered those treaties in effective, thus, mere codes guiding

[244] Unreported.

the country's nuclear activities without any legal significance. Economically, it is harmful to the Nigerian economy, because potential foreign investors may be discouraged from investing in such areas without guarantee of protection to their investments through mechanism such as the "Nuclear Treaty"

5.8.2 Negative Impact on Settlements by Domestic Courts

Non domestication of international treaties by Nigeria has a negative effect on settlements of disputes through domestic judicial processes. Thus, key investments principles will be grossly hampered as a result of the unenforceability of undomesticated treaties. For example, there is option for an aggrieved party in BIT to file an investment claim before domestic courts under the provisions of Investor State Dispute Settlement (ISDS). Such a claim can be initiated by an aggrieved party either before a court having jurisdiction over the contracting party within the territory of which the investments were made or before the Permanent Court of Arbitration (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) etc.

In a situation where ELR or FITR clauses are provided in the provisions of a BIT then, the non domestication of the treaty in question will become a stumbling block for an investor who wants use the option mentioned in the above paragraph. Thus, the position of such an investor becomes a legal question especially in instances where his investments are covered by a BIT containing the mandatory ELR or FITR clauses that have not been domesticated by the National Assembly. For example, a foreign investor in a BIT having a dispute cannot meet his obligations in exhausting available local remedies before Nigerian courts because the BIT in question will not have a force of law before the courts, thus, it is of no legal effect since it has not been domesticated or incorporated into the Nigerian domestic legislations. Consequently, the investor will be disadvantaged and prejudiced by the unnecessary delays in search of justice, and may eventually lose the "investor protection" he deserves under the signed BIT

5.8.3 Adverse effect on Nigeria's Treaty Compliance Status

One of the oldest adage in treaty negotiation under international law is the expectation that all parties thereto a treaty are acting in good faith, and a state party that ratifies a treaty but fails to domesticate same will be viewed to have been acting in bad faith and in total disregard to what it has submitted itself to. Thus, the non domestication of international treaties by Nigeria coupled with the resultant legal effect there from, portrays Nigeria in a bad light as a "non compliant" international partner who is unwilling to meet its international obligations.[245]

After the signing and the ensuing ratification of international treaties, the next legal step that completes a treaty contract is the acceptance by parties to be bound by the content therein the treaty, failure by a party as a result of bureaucratic or other domestic legal shortcomings to fulfill its duties in completing all the domestic processes leading to implementation will give an impression to the other parties that the country's real intention is negative, and this will erode the confidence of investors. The Contracting Parties in a BIT for example, have their respective duties, rights and obligations embodied therein the treaty, thus, are expected to fulfill all the domestic legislative requirements of their countries for the proper implementation of the treaty.

5.8.4 Unfavorable Destination for Direct Foreign Investments

As a result of a naturally endowed region, full of abundant human and natural resources coupled with large market potentials, Nigeria stands among the most attractive destinations for direct foreign investments (DFI) in Africa. Despite these prospect however, Nigeria is still counted among the perceived risky destinations for foreign investments. Thus, Nigeria's strict domestic legal requirement in terms of treaty implementation which in some cases erodes the confidence of investors and put their "investment protection" in doubt creates barriers against direct foreign investments.

It can rightly be submitted that, foreign investors have to make their decisions wiser in the choice of a country in which their investment will have all the legal protection it

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[245]See, for example, the Nigeria-Spain 2000 BIT and the Nigeria-Netherlands 1992 BIT, articles 13 and 15 (1) thereof respectively.

deserves. Thus, investors' interest will go along the line of not only market dynamics but the legal ramifications as it relates to applicable domestic laws of their investments' destination. Additionally, investors' decisions to invest in a country will largely be influenced by treaties' provisions favorable to their investments as contained in the BIT. Considering the requirements for domestication of treaties under the Nigerian constitution and all the other issues associated thereto, especially as it relates to BIT and other energy related treaties, investors will perceive Nigeria as a less attractive destination for investment, especially in sectors such as nuclear and energy. With other African countries like South Africa domesticating most of their international treaties, Nigeria might be left behind, as investors will prefer to invest in those African countries that have fully domesticated the relevant international treaties and incorporate same into their domestic legislations.

Africa is a large market in terms of foreign investments, therefore Nigeria is competing for DFI with over 53 other African countries, it is therefore a matter of necessity that all legal issues that might create a clog in the wheel of its foreign investments attraction are addressed. With a weakened nuclear energy industry as a result of the non domestication of energy related international treaties, the ability of Nigeria to attract foreign investments for the purposes of developing that sector is to say the least, unrealistic.

Furthermore, there are strong indicators that the existence of a well negotiated and excellently concluded BIT of stronger investment protection plays a vital role in investors' choices and decisions, because stronger BIT boosts investors' confidence. Thus, BIT protective provisions attract the curious interests of investors in their decision making, but an undomesticated BIT exposes the investor to serious risks as he is left exposed without legal protection because his interests are not enforceable in the host countries' legal and judicial systems. The Nigeria's domestic institutions' legal ability to interrelate positively with BIT plays a leading role in attracting DFI. The authority or power of Nigeria's domestic institutions such as the Justice Ministry, and the courts to protect foreign investors is limited by the non domestication of BIT, and this is additionally affecting the investors' decision in choice of investment destination.

Non domestication of international treaties does not only hinder foreign investment or adversely affect foreign investors, but it is as well limiting the host country's economic potentials. Thus, it will be less expensive for Nigeria to make use of its domestic courts in settling disputes with investors; after all as a "dualist" state, it will perceive international arbitration as an erosion of its sovereignty. Nigeria may barrow a leaf from many of its international partners like Turkey, the United Arab Emirate, etc, who are revolutionalizing their domestic legislations as they relate to treaty implementation with a view to restraining its legal and judicial institutions for settlement of investment disputes and the preservation of its sovereignty. But, without taking the necessary steps in the right direction, and with a huge workload of undomesticated but ratified international treaties related to energy and other relevant sectors, the chances of FDI attraction are very minimal.

5.8.5 Negative Impact on Internationally Accepted Principles of Investment

Non domestication of international treaties by Nigeria would have a negative impact on the major driving principles of investments known as "Key Investment Principles". These principles are vital to foreign investments especially in energy, gas and nuclear sectors; they are significant to international investments in agricultural products, shipping, and construction technology, etc.

The nationals of a home state must have sought and exhausted all legal avenues for redress in the local courts before diplomatic protections can be exercised by the home state under customary international law. These processes are under international law referred to as the 'Exhaustion of Local Remedies' (ELR). This principle was entrenched by the ICJ's decision in the case of *Inter handel v ELSI*, and codified by the United Nation's International Law Commission (ILC).

Dispute arising from of investments are however expected to be settled at the tribunals for international arbitrations known under international investment law as International Arbitration Tribunals (IAT) to the exclusion of domestic remedies, unless if the parties to the dispute opt for the contrary. This is an assumption by default, and is enshrined as a principle by the International Center for the Settlement of Investments

Disputes (ICSID), where its Convention provides, thus: 'A contracting state may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention'.[246]

There are many instances where the BIT made it mandatory for parties to exhaust the utilization of domestic courts as a condition for consent to be bound, for example, the Netherland-Malaysia 1971 BIT. Similarly, in the case of *Argentina v Germany*, the utilization and exhaustion of domestic legal remedies was made a mandatory condition precedent for assumption of consent. Thus, the BIT provides that: 'If any dispute in terms of paragraph 1 above could not be settled within the term of six months, it shall be submitted to the Courts of competent jurisdiction of the Contracting Party in whose territory the investment was made'.[247] The "shall" in the tribunal's decision was interpreted to mean compulsory, i.e., the resort to domestic courts is legally binding. [248]

International Arbitration can in some situations apply ELR principles indirectly, even where the BIT in question did not expressly provided for such application. Example, include claims concerning expropriations and denial of justice, where the ELR may be interpreted as substantive standard. Thus, it was held in the case of *Loewe v USA*, that the tribunal cannot entertain matters regarding denial of justice claims unless it is shown that: 'The parties have exhausted all available domestic legal remedies'. Similarly, as regards to expropriation, it was required by the tribunal in the case of *EnCana v Ecuador* that: 'Before it could assume jurisdiction on the matter, there must have been a preliminary determination by the domestic courts of the legality or otherwise of the administrative acts for the incidences of the expropriations'.

Additionally, tribunals have dismissed as untimely many BIT claims pertaining to expropriations on the grounds that the parties have failed to exhaust available remedies provided by local courts against the measures in disputes. Thus, as a result of growth in

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[246] See, article 26 thereof.
[247] See, article 10 (2) thereof.
[248] See, again, the Egypt-UK 1975 BIT and also the France-Morocco 1996 BIT articles 8 (1) and 10 thereof respectively.

economy and the expansion of markets due to globalization, there is an increase in number of cases regarding investor-state arbitrations, resulting into different kind of interpretations by investment tribunals. Consequently, modern investment laws are being enacted with provisions containing explicit requirements for exhaustion of local remedies before seeking for redress at the international tribunals.

Other key principles on investments include those that are referred to as "Fork-in-the-Road" clauses, which referred to clauses contained in a BIT foreclosing parties thereto a BIT from pursuing to settle their investment disputes either before domestic courts at the host nation or the international arbitration tribunals simultaneously. Thus, the parties thereto the BIT are right from the beginning required to decide on which of the settlement mechanisms they may resort to in the event of an investment dispute. Thus, a final alternative path is established beforehand to which the investors may submit their dispute for settlement. If for example, the parties decide to choose a resort to international investment arbitration, then, the option for a resort to domestic local remedies is foreclosed. [249]

Most of the BITs between Nigeria and its international partners have the FITR causes inserted in them, necessitating the need for Nigeria to domesticate its international treaties especially those relating to energy investment. For example, it was provided in the 2001 Nigeria-China BIT that, the Contracting Party accepting the investment may submit disputes for settlement to a competent court or to an arbitration tribunal as the parties might have decided before the conclusion of the BIT.

It was equally, provided in the Finland-Nigeria BIT[250] that: If an investor withdraws their case before a national court has rendered a decision on the matter and declares they will no longer pursue the case through national proceedings, they may still use one of the aforementioned arbitral proceedings even though they have taken their dispute to a national court.

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[249] See, for example, the Finland-Nigeria 1991 BIT, article 8 (2) thereof.
[250] See, article 9 (3) thereof.

In some situations, a forum selection clause referred to as "Exclusive Forum Choice" (EFC) is inserted into an investment contract. This clause requires settlement of disputes from investment contract between investors and host nation to be taken to domestic courts of the host state. Under this clause, the choice of domestic courts is indicated by the investment contract as the exclusive mechanism for disputes settlement. However, it should be noted here that, the foreign investor is in this context given the option of resorting to local courts not as a condition precedent for a resort to arbitral tribunal but as an exclusive choice. Additionally, a clause called "umbrella clause" may be used to protect an investment between the host nation and the investor's home state, which may eventually lead to series of complicated legal international arbitrations.

Without prejudice to the jurisdictions of international arbitration tribunals on ECFC, domestic courts are still vital and play significant roles in settling some parts thereof the claim especially those connected purely with the contractual part of the treaty. The tribunal at both the local and international levels finds themselves in a difficult situations in these cases, because both proceeding occur concurrently at the local and the international tribunals, thus the parties are pursuing what is termed as "claim splitting", hence: the necessity to stay proceeding by one party till the conclusion of one of the proceedings, and this has proven difficult in many such instances. Example of this could be found in Pre-Shipment Inspection Agreement PSI, where for example, PSI agreement arbitration was opposed and application filed by an investor at a domestic court praying for an injunction against the agreement. Thus, in the case of *SGS v. Pakistan* such application for injunction was filed specifically on the ground that the dispute should be settled by the ICSID arbitration and that there should be a stay of proceeding on the PSI arbitration until the final determination by the ICSID Tribunal of the Pakistan's objection as regards its jurisdiction.

On appeal, the Pakistan's Supreme Court dismissed the appeal of the Claimant and ordered that, the PSI agreement arbitration should continue. The court further restrained the Claimant from participating in further arbitrations by the ICSIDS. Consequently, the ICSID jurisdiction to arbitrate on the issue of the alleged breach by the Claimant was upheld, leading to eventual splitting of the claims.

In certain circumstances, parties to an investment dispute may be allowed to ask that they should under international arbitration be issued with provisional measures by local courts. Where parties to an investment dispute expressly agree to provisional measures in their consent's instruments, the local courts are permitted by ICSID Arbitration (amendment) Rules of 1985 to issue such prayers referred under the investment law as "provisional measures".

Furthermore, according to article 46(4) of the Additional Facility to the ICSID, "The parties may apply to any competent judicial authority for interim or conservatory measures." They cannot be accused of violating the arbitration agreement or interfering with the Tribunal's authority by doing this.

CHAPTER VI

CONCLUTIONS

6.1 Findings

This thesis has through the research methodology adopted (discussed in chapter one) analyzed and examined the place and role of international treaties in the developmental processes of Nigeria's legal and judicial systems reforms. In attempt to achieve the main objectives of this research, the differences between international treaties being binding on Nigeria at international level on one hand and the same treaties being part of Nigerian laws at domestic level on the other were studied, examined and analyzed. The place of international treaties not only in the processes of Nigeria' legal system development but also in its relationship with international community cannot be overemphasized, thus, many of Nigeria's foreign policies were formulated and shaped through the influence of international treaties.

The thesis began with the implication that its discussions should be viewed in light of the controversial relationship between international law and domestic laws. The message is as simple as it seems to appear; if doctoral thesis's goal is contribution to original knowledge, it should therefore make such contributions through the ploughing of its own intellectual channel. It's my belief that this has been achieved in this study.

I have strived to reemphasize the importance of the rules of international law as they relate to international treaties, I have equally attempted to reflect the extraordinary diversity of knowledge existing in the areas of international law and constitutional law, and have been privileged to study the intricate dissections of Nigerian domestic laws'

interaction with international norms. While endeavoring to challenge accepted wisdoms, I have borrowed the accepted principles of international law and applied same to Nigerian constitutional and case laws. This thesis has therefore been all about developing new ideas and proposing solutions to some of the central issues in the relationship between international law and domestic laws of civilized nations using Nigeria as a case study. Some of these issues relate to questions such as; why must treaties which Nigeria consensually entered be ratified? Why are the contents of international treaties limited in their ability to achieve enforcements? What are the major reasons behind the poor implementations of international treaties by Nigeria? When and how can Nigeria breach its treaty obligations without incurring liabilities? From the very beginning of this thesis these are some of the questions that formed the crux of its objectives.

As an independent and sovereign state, Nigeria has through its executive arm of the government negotiated and signed many international instruments, many of which were domesticated and incorporated into the country's domestic legislations through the legislative intervention of the National Assembly. Accordingly, the domesticated international instruments are applicable and enforceable before the domestic courts, while the non domesticated ones are by virtue of section 12 (1) of the constitution unenforceable and of no legal effect.

Being it a member of the civilized nations, Nigeria respects and observes the basic rules of international law, and as such it is mandated by its constitution to implement the provisions of international treaties though without specifically and categorically pointing to "at whose door does the whole processes stop?" Though the Treaty-Making (Procedure, etc) Act has provided some insights into treaty-making procedure in Nigeria yet it is submitted that such important processes should have been treated with the importance it deserves by for example dedicating a whole chapter in the constitution dealing solely with treaty making procedures in order to avoid the likes of the current debates it is generating among jurists, lawyers and academicians. Thus, the constitution provides only the means of implementing an international treaty but left the processes leading to negotiations, conclusions and the subsequent incorporation to be shrouded in inferences. Issues such as the relationship between Nigerian domestic laws and international law are equally left to

be determined by academic debates and in some instances by case law. To this end, the status of international treaties and its hierarchy among Nigerian legislations still remains a subject of much heated academic and judicial debates.

As discussed in the preceding chapters above, it is concluded that there is no any constitutional provision pointing to the superiority or otherwise of international instruments against the country's domestic legislations: Hence such issue is left to be determined by the judiciary through arguments and observations presented to it by parties seeking for interpretation or in some cases by parties praying for enforcements.

From the discussions in both chapters 4 and 5 above, it has been shown by this study that international treaties play some significant roles in the processes of Nigerian judicial and legal systems reforms and development, thus the interdependence between Nigerian domestic legislations and international law is by this virtue underscored. It has also been determined that, Nigerian jurisprudence has been boosted by the incorporation of international instruments into the domestic laws thereof. Hence; international instruments have been used by Nigerian courts in filling some loopholes and gaps existing in the system through the processes of interpretation and references. The African Charter for Human and Peoples' Rights for instance, which was in 1983 domesticated by Nigeria was shown in chapter four above to provide the basis for the enforcement of human and peoples' rights under the 1999 constitution (as amended).

It has equally been highlighted that, domestic courts in Nigeria hold a presumption that international law being among the sources of Nigerian law is meant to be part and parcels of nation's domestic legislations, thus becoming a catalyst to legal developments and reforms. From many judicial decisions cited it has been shown that courts in Nigeria do resort to both domesticated and undomesticated international treaties in interpreting statutes and this has significantly expanded the horizon and scopes of Nigerian legal and judicial systems.

The most pressing finding that has occurred throughout this thesis has been the conclusion that numerous international instruments were entered into by Nigeria, many of which impose on the country varying types of obligations bordering on wide range of

issues, unfortunately it has been found by this study that a lot of these instruments are not effective and are legally unenforceable due to lack of domestication by the National Assembly though they are of outmost importance to the country, these has been found and concluded to be caused by among other factors a lack of political interest and lackadaisical attitudes of the Legislative arm of the Federal Government towards domestication of such instruments for religious/ethnic and in some cases economic/political considerations. This lack of interest in incorporating international treaties into the Nigerian domestic legislations has also been determined to be attributable to some conflicting political interests among the political elites in the country. The study has however not overlooked the legislatures argument that: 'The poor or non domestication of international treaties should be attributed to the lateness in referral of such international instruments to the National Assembly by the Executive Arm for incorporation and sometimes due to other factors such as politicization of matters affecting national interests and interferences with the responsibilities of the National Assembly'.

It has been determined that, matters relating to basic rights of the weak and vulnerable such as the Child Rights Act (CRA) for instance have failed to scale the huddles of domestication before the Legislatures for reasons ranging from religious to cultural considerations despite being Nigeria a party and signatory to the 1989 Convention on the rights of the child.[251]Nomenclatures used to refer who a "Child" is? and the child designated "age" in the Convention for example were used as grounds to raise and advance arguments leading to scuttling the smooth processes of domesticating the Act. Where the *Shariah* Law was operational (in the predominantly Muslims Northern part of the Country) the Bill was perceived as being against the sacred provisions of the tenets of Islam, thus, intended to be used as a cover in order to smuggle in and impose foreign values on the region especially where such issues relate to marriageable age of a child which under Islamic Law is thirteen (13) years and fall under residual legislative powers.

From many judicial precedence cited and examined in chapter four (4) of this study, it's very clear that undomesticated international treaties though having no force of law in

[251]Convention on the Rights of the Child 1989.

the Nigerian legal system, yet a viable domestic Nigerian legal system could not have been entrenched completely without having recourse to the roles they play. Firstly, undomesticated international treaties have a persuasive non binding authority before the Nigerian courts, hence, domestic courts are found to been more often relying on such treaties as guides and aids when interpreting municipal laws. Though not of binding authority yet the courts have been found to be invoking those treaties as guides to interpret status.

It's equally, concluded from the foregoing that 'an international instrument is not binding on Nigeria after ratification until incorporated into Nigerian domestic laws by an Act of the National Assembly', thus it's having no force of law before the Nigerian Courts.

It has also been determined that, 'delays and poor implementation of international treaties are attributable to among other factors the "dualist" nature of Nigerian foreign policies'. Nigeria has signed hundreds of international instruments, but it is found that not more than fifteen have been domesticated or incorporated, and none among the domesticated has been a Bilateral Investment Treaty BIT. This is found to be responsible for most of the controversies raging on among jurists, scholars and lawyers as to the status of those treaties which though signed but are still pending before the National Assembly for legislative actions. It's therefore determined that poor implementation of such treaties due to the issues of non domestication, presents a major setback for the application of for example many BIT and other Human Rights related instruments.

Furthermore, the absence of clear and express provisions regarding treaty making procedures has been determined to contribute immensely to the Legislatures' lack of knowledge of the existence of so many international treaties, thus leading to avoidable and unnecessary delays in the incorporation and subsequent domestication of such treaties into Nigerian local enactments.

Improper documentations of treaties' instrument have also been noted as another reason for poor implementation of treaties in Nigeria. It was previously pointed out that, the Federal Ministry of Justice headed by the Attorney General of the Federation has been

designated by the Act [252] as the repository where all international treaties concluded by Nigeria are kept and the register of such treaties prepared and maintained. The ministry is also saddled with the responsibilities of notifying and directing the relevant agency[253] to publish all such treaties as concluded by the federal government. However, due to lack of synergy between the various agencies of the government involved in these processes, such information is found to be shrouded in secrecy and lost between the ministries of justice, foreign affairs and legislative committee on foreign relations.

Based on studies conducted on some literatures, it was found that: 'The legislative arm of the government is in most cases not carried alone by the executive arm in the processes of treaty negotiation and conclusions', and this is determined to have also contributed to poor implementation of treaties in Nigeria.

The Executive has always been arguing that:

> There is no any specific role provided in both the constitution and the Act for the involvement of the Legislatures in the processes of treaty negotiation and conclusions, except the role of domesticating such treaties after they are already concluded and ratified by the Executives.

The Legislative Arm is thus consulted and made aware of the existence of such treaties only when their inputs are needed for the purposes of domestication. This lack of corporation between the two arms of the government is as well found by this study to have increased their level of rivalry and intergovernmental frictions, and subsequently lead to the lost of interest in carrying out the constitutional role assigned to the Legislatures.

This study has equally found that, even the procedure for presentations of bills to the National Assembly for the purposes of treaties' implementation and eventual domestication has not been specified by either the Constitution or the Treaties Act. Hence,

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[252]The Treaty (Making Procedure, Etc) Act (n 138).
[253] The relevant agency here is The National Security Printing and Minting Company.

it remains unclear as to who among the various ministries, and the relevant Legislative committees should have the powers to sponsor such bills.

The study has determined that, though Nigeria has ratified many international instruments in areas relating to human and peoples' rights, environment, defense, international trade, aviation, security, etc. However, most of these instruments are found to have remained ineffective and without the force of law before the courts due to their status as "undomesticated".[254] Hence, by virtue of being undomesticated, such treaties remain invalid and unenforceable, and as such cannot be relied upon by citizens in enforcing some of their basic rights before the Nigerian courts. Furthermore, no punitive measures can be taken against the state's institutions for violating the contents of such treaties.

Nigeria being the largest and biggest economy in Africa has been found by this study to have been playing significant roles in the processes leading to negotiations and conclusions of numerous regional and international treaties. However the zeal with which it enters into such treaties is found to be missing when it comes to domesticating them into its domestic laws. Thus, after so many years of ratifying many international treaties, majority of such treaties still remain undomesticated and as such ineffective and of no legal force domestically.

This study has additionally found that 'Nigeria has ratified twelve (12) and domesticated only seven (7) out of the fourteen (14) international treaties relating to human and peoples' rights'. Thus, the 2017 Torture Act, the 2015 NAPTIP Act, and the 2018 Persons with Disabilities Act were in this regard domesticated.

The country has under the Third Alteration Act,[255] ratified forty (40) out of ILO's one hundred and seventy eight (178) conventions, but domesticated only twenty six through the processes of "Domestication by Reference".

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[254]See, The Constitution of the Federal Republic of Nigeria 1999 (as amended) section 12.
[255]The Constitution of the Federal Republic of Nigeria 1999 (as amended) Third Alteration Act 2010.

The study also concludes that: 'The 1999 Constitution just like the previous ones before it has not sufficiently provided answers to the questions of the position of domesticated international treaties among the other sources of Nigerian domestic laws'. This constitutional loophole is together with other factors previously discussed found to be responsible for the controversies surrounding the place of domesticated international treaties in the hierarchy of Nigerian laws. Initially the Nigerian courts attitudes towards the above controversy were that a domesticated international treaty retains its international status and features and as such should be considered as superior over the nation's municipal laws.

Having carefully looked at the wordings of the 1999 Constitution, it's right to conclude that: 'Undomesticated international instruments though having no force of law in the Nigerian legal system, yet a viable domestic Nigerian legal system could not have been entrenched completely without having recourse to the roles they play in developing Nigeria's legal and judicial systems'. In the first instance, undomesticated international treaties have a persuasive non binding authority before the Nigerian courts, hence, domestic courts more often rely on such treaties as guides and aids when interpreting domestic legislations. Though not of binding but of persuasive authority, yet Nigerian courts invoke those treaties as guides to interpret status.

It has further been determined that, Nigerian courts as previously discussed are found to have been relying on undomesticated international treaties in interpreting statutes, and this has in no small measures led to expanding the horizon of Nigerian legal system. Because when Nigeria signs an international instruments it is obliged to act in all possible ways to achieve the objectives of the treaty until either the treaty is suspended or terminated based on the terms contained therein. It is additionally found that Nigerian courts hold an uncontestable opinion that international law as a source of law is meant to be part and parcel of Nigerian domestic laws, thus becoming an aid not only for interpretation but for reforms as well.

The study has again concluded that: 'Notwithstanding the contributions of international instruments to Nigerian legal system reforms and developments, the failure on the part of the government to domesticate and incorporate such instruments into law

after ratification constitutes a clog in the wheel of Nigeria's legal system reforms and development'. This conclusion is influenced by the facts that citizens will not have the juristic and legal capacity in approaching the courts at international level for the enforcement of their rights under such international instruments and this may deny domestic courts the opportunity to interpret same and make them part of the nation's judicial precedent. For example, parties to such treaties would use its status in avoiding obligations. For instance, the GTA, which provides among others the means through which Nigeria should withdraw and transfer all authorities in the *Bakassi* peninsula to the Republic of Cameroon, has for more than a decade after coming into force not been domesticated by the Nigerian authorities. This is denying Nigerian courts an opportunity to interpret same, and make it a part of Nigerian legal and judicial system.

It is found that, though it was held by the Supreme Court in *Abacha*[256]that: 'An unincorporated international treaty does not have the force of law in Nigeria', yet Nigerian courts use the same treaties as aids to judicial interpretation.

It is further determined that: 'When a treaty or a part thereof attains the status of a customary law, then it can be applied in Nigeria even though it's not incorporated into the domestic laws by an act of the National Assembly'.[257]Thus, without the need for legislative intervention through domestication, customary international law is automatically applied as part of domestic legislations by the Nigerian courts.

The study has concluded from the foregoing that, 'for the purposes of interpretation and as a guide to judicial interpretation of status, some international law rules and provisions can be applicable in Nigeria without the necessity of legislative acts'. This is however subject to many interpretations, but what is generally accepted by majority of the literatures consulted is the fact that: 'The essence of accepting such unincorporated instruments is for the purposes of interpretation of status and not for the purposes of enforcement'. Thus, it's found that Nigeria has for reasons of its foreign policy been

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[256]*Abacha* (n 19).
[257] E. Egede, 'Bringing Human Rights Home: "An Examination of the Domestication of Human Rights Treaties in Nigeria" (2007) 51 (2) JAL pg 249.

seeking to achieve the kind of protections that can be offered by the provisions of its constitution.[258]

From the *dicta* of Ogundare, JSC (as he then was) in *Abacha*, it is here by concluded that incorporation of international treaties into Nigerian domestic legislations has not in any way subjugated same to the supremacy of international law, rather international law through its instruments has strengthened and emboldened the Nigerian legal system and expanded its horizon which subsequently made it to be in consonant with the current legal realities. The learned Justice in the said case [259] held that: 'A treaty will not be binding on Nigeria after ratification until incorporated into Nigerian domestic laws by an Act of the National Assembly, it therefore has no force of law or become binding and enforceable by the Nigerian Courts'.

Drawing inference from the above decision, I hold the view that the above judgment has not subjugated Nigerian laws to the supremacy of international law, but pointed to the fact that an incorporated international instruments is at par with locally enacted legislations. However, the decisions is found to have influenced many leading Academics and politicians' conclusions that Nigeria is using such decisions to shield itself from its international obligations. This is pointing to the proven fact that, the Nigerian Government was using the non domestication of such treaties in order to avoid complying with its international obligations. Nwabueze, submitted that: 'Such were sad developments in Nigeria's diplomacy as it portrays Nigeria to be acting in bad faith when engaging with its international partners'.

It is further concluded that: 'These unfortunate conducts of Nigeria resulting in the non-domestication of international treaties are clogging the wheels of Nigeria's legal system development'. The decision is also found to have given room to Nigeria in using the status of undomesticated international treaties to not only maintain its sovereignty and shield itself from its obligations under such international instruments, but also to reaffirm the supremacy of its domestic laws over 'any other law' as enshrined in chapter 1 of the

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[258] See, The Constitution (n 2) section 12 (1).
[259] *Abacha* (n 19).

1999 constitution which provides that: ‘This constitution is supreme over any law in Nigeria and any other law which is inconsistent to this constitution shall to the extent of such inconsistency be null and void’

No country can effectively pursue its foreign policy goals without taking into account the contraction of one or both types of treaties because they are essential tools for external relations. Because Nigeria is a dualist state, any treaties that the government enters into must first be domesticated by an act of the National Assembly before they can become law or be used as evidence in local courts. The National Assembly is a crucial entity in Nigerian treaty-making because of this constitutional mandate.

The success of treaties domesticated in Nigeria during the twentieth century has been adversely impacted by frequent disputes between the executive and the National Assembly, constitutional requirements, particularly the roles of the federating states, outside political influence on the National Assembly, excessive politicking of treaty Bills, and a lack of political will among legislators.

It is evident from the above that domestication of treaties in Nigeria is a constitutional function, supported by case law. The analysis reveals also that between 1960 and May 2021, Nigeria has triggered four out of 5 different methods of domestication of treaties on different subjects. Due to the complexity of AfCFTA and its Protocols, all the four options are open for possible consideration or a combination of domestication by Reference and Hybrid may be plausible.

Apart from some of the limitations inherent in conducting research of this nature, I am confident that this thesis has achieved its goals and objectives set out in chapter one hereof. The originality of this thesis is indicated through the successful analysis of the various questions raised herein.

6.2 Recommendations

Contrary to the provision of section 12 (1) of the constitution, many international treaties have been ratified by Nigeria as discussed in this study but have not yet been domesticated and/or incorporated into its domestic laws. These trends coupled with other factors

contributing to poor implementation of international treaties by Nigeria hampers the negotiation spirit of those representing it in treaty making and send a bad signal to its international partners that it is not acting in good faiths as expected and required by international law.

Nigeria's treaty-making and other related matters are being shrouded mostly in secrecy, because up till this moment it is not known with exactitude the number of treaties that have been entered, ratified, or domesticated. For Nigeria's treaty making procedures to be transparent and thus reliable the full list of international treaties entered should be compiled, and those that are domesticated be made public and separated from those that were not. Thus, the National Assembly works with all the relevant authorities that are stake holders in treaty making, and the full list of treaties incorporated or non incorporated can be drawn up from easily accessible sources like the office of the Attorney General in the Justice Ministry. Additionally, the lists of customary international rules that bind Nigeria are not compiled, thus hindering the contribution of those rules to the development of Nigeria's legal system. If those rules were to be compiled and applied as they should, it would have made the Nigerian foreign policy more coherent and in line with the best international practices.

In line with the best international practices, domestic legislations are made and applied in the most transparent ways. Thus, section 254 (c) should have listed and spelt out with clear expressions all the treaties it covers. If the NIC's practice directions are spelled out clearly and the subsequent modifications or amendments thereto those rules published by the Attorney General's office, the issue of lack of transparency being raised by many Nigerian scholars would have for long been put to rest.

Furthermore, for its international relations and other foreign policies related thereto, it is most legitimate for Nigeria as a sovereign nation to exercise its sovereignty by seeking to achieve the kind of protections offered by the provisions of for example section 12 (1) of the constitution. Notwithstanding those provisions however, it cannot run or shy away from its treaty obligations which it willfully entered and concluded unless if such "protective previsions" are inserted into the text of a given treaty during the processes leading to its conclusion.

There is need for the enactment of a comprehensive law that will clearly assign the duties to make treaties between Nigeria and other states, especially where matters such as security, aviation, human rights and labor are concerned, because the provisions as presently spelt out in the constitution are ambiguous. As noted by Nwabueze,[260] it is not clear from the wordings of the constitution that between the President, the Chief of Defense Staff, or the Minister of Defense who will be responsible for making security treaties on behalf of the federal government.

It is submitted therefore, that, though the Executive has the exclusive treaty-making powers in Nigeria, such powers could only be exercised in conjunction with the legislatures as intended by the draftsmen in section 12 of the constitution. Hence, the Legislatures are not empowered by the constitution to commence domestication processes until the Executives arm initiates same, and all these would in the absence of synergy between the two arms become impossible.

It is equally instructive to recommend that, all international treaties that have attained the status of customary international law shall be considered to have escaped the scope of the provision of section 12 (1) of the constitution [261] and should be automatically considered as part of Nigeria's domestic legislation without the necessity of incorporation. It is the submission of this thesis that, freedom of association as contained in the ILO principles for example is a reflection of chapter IV of the Nigerian constitution and as such should be considered as forming part of Nigeria's domestic legislations

In order to bridge knowledge and communication gaps between the two branches of government, the administration should innovate the National Assembly's participation at negotiating levels because international treaties are essential tools for formalizing external interactions. In the same line, the National Assembly should broaden the scope of public input and involvement in the procedures of drafting treaty bills in order to increase popular acceptance of domesticated treaties.

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[260] Nwabueze (n 4) pg 257.
[261] The Constitution (n 2).

As this study has shown, the Supreme Court still needs to reconsider its ruling in *Abacha v Fawehinmi* because many people have noted that the lead judgment cannot reflect the current state of the law, especially in light of the dissenting opinion of the same court that was present at the time. The status issue would have been resolved and addressed if the relationship between international law and Nigerian domestic laws was well established in the constitution. What's more, anything granted by the constitution cannot be taken away by any subsidiary legislation that incorporates international treaties. I thus urge the legislators to take another look at these matters as a matter of legal expediency.

Due to the broad scope of domestic courts' interpretational authority, it is essential to have a group of knowledgeable, brave, and sympathetic judges who can interpret both international and constitutional law in hostile political environments. This is why the Kenyan Supreme Court's courageous and firm decision to declare a national election invalid, for example, is a huge step in the right direction and will enhance the rule of law. This could also be seen as a sign of legal pragmatism, and it is hoped that it would motivate policymakers in governments all over the continent to uphold the rule of law.It is hoped that these gutsy and audacious actions will extend to how international treaties are interpreted and upheld by Nigerian courts. It is impossible to overstate the importance of municipal courts in the implementation of international treaties as evidenced by the numerous judicial declarations in the chapters above. For this reason, it is advised to avoid judicial and legal technicalities that limit the application of treaty laws in domestic legal contexts.

The greater the willingness on the part of the Nigerian judiciary to apply and enforce treaty laws, including but not limited to setting aside contrary local legislations where necessary, the greater will be the compliance with the provisions of international treaties on the part of the executive arm of the government. For example, there has in recent been an increasing emphasis on domestic courts' roles in ensuring compliance with treaties relating to for instance international human rights, aviations, terrorism, piracy, climate change etc. Unfortunately however, Nigerian Courts have bellowed away the opportunity to decry technicality and exhibit the judicial courage expected of them in enforcing international treaties.

The study recommends that the NIC should be willing and be courageous enough to enforce the ILO Conventions on the combined strengths of sections 7(6) of the NICA and 254 (c) (2) of the Third Alteration Act 2010. The said section of the NIA provides that:

> The court shall in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practices in labor or industrial relations and what amounts to good or international best practices in labor or industrial relations shall be a question of fact.

While section 254 (c) (2) of the Third Alteration Act to the Constitution of Nigeria 1999 as amended provides that the National Industrial Act shall have the jurisdiction and authority to deal with any matter related to or pertaining to the application of any international convention, treaty, or protocol that Nigeria has ratified relating to labor, employment, workplace, industrial relations, or matters related thereto, notwithstanding anything to the contrary in this constitution.

Despite the wordings of the above provisions, clearly empowering the Nigerian NIC to apply "any" international convention, treaty or protocol ratified by Nigeria, the NIC has in multiple instances declined to do so.

I once again recommend that Nigeria should for its coherent foreign policy have a full and readily available list of customary international law rules to which it is bound.

In my humble opinion, it is a little late for the Nigerian legislators to maintain their current position on issues like the GTA. Nigeria should adhere to its commitments under international law without any reservations. The better course of action should be to figure out how to hand over the *Bakassi* Peninsula in the best interests of its residents and to prevent a breakdown of peace and order, which could lead to untold hardships in the long run, particularly for those living in the towns and villages bordering the two contesting counties, namely Nigeria and Cameroon.

It's here by recommended that, the *Bakassi* indigenes be resettled to a decent and suitable new location comparable if not better to where they were formerly. This is a

responsibility to which both the Legislative and the Executive arm of the Nigerian Government, both at the federal and relevant State and Local government levels, should give the serious attention it deserve.

Additionally, for those indigenous people who choose to leave and stay in the *Bakassi*, it is important to make sure that Cameroon is encouraged to uphold its obligation under the GTA, which states in its article 3 that: (1) Cameroon, after receiving authority from Nigeria, ensures that Nigerian nationals residing in the *Bakassi* Peninsula are able to exercise the fundamental freedoms guaranteed by international human rights law and other pertinent provisions. (2) In particular, Cameroon shall: (a) not require Nigerian nationals residing in the *Bakass*i Peninsula to leave the zone or change their nationality; (b) respect their culture, language, and beliefs; (c) respect their right to continue their agricultural and fishing activities; (d) protect their property and their customary land rights; (e) not levy any taxes or other dues on Nigerian nationals residing in the zone in a manner that is discriminatory; and (f) take all

Regarding the aforementioned clause of the agreement, I advise the Nigerian government to establish some sort of body that would include representatives of Nigerian citizens in *Bakassi*, the Federal, States, and Local governments, as well as representatives of various security agencies, in addition to independent international experts in the areas of international law, human rights, and international taxation. In addition to other duties, this authority should be tasked with overseeing Cameroon's compliance with its commitments under the GTA with regard to Nigerian nationals who choose to stay in the Peninsular (*Bakass*i).

As the preparations for the review of the 1999 constitution are in top gear, there is never a more appropriate period for the incorporation into the new constitution clearer provisions specifically indicating the appropriate organ of government to have an exclusive power of treaty-making on behalf of the Nigerian federation. If incorporated into the new constitution, the reliance on unwritten inherited common law rules of the UK would be brought to a halt. It is additionally recommended that, a leaf should be borrowed from what is obtainable in the USA from where Nigeria borrowed its Presidential system of

government and where a much clear treaty-making role for the legislatures is expressly spelled out in the constitution.

6.3 Suggestions for Further Research

In addition to the above conclusions, I might as well point out the fact that focusing on Nigeria's constitutional provisions along a continuum restricted the level to which certain questions were examined and analyzed. In particular there should be a further research which will rely heavily on the case law, treaty body findings and case laws of other jurisdictions especially of common wealth states.

Having relied heavily on the provisions of the Nigerian constitution and literatures from constitutional law, international law and laws of treaties itself point to the fact that UN and ICJ documentations were secondary to the theoretical literature used by this study. In spite of that however, I have nonetheless placed reliance heavily on some celebrated Nigerian case laws and to some extent international treaties concluded between Nigeria and other states. Nevertheless, the most significant and pressing issue for further research remains the linking of academic discussions and theoretical works with more recent case laws through quantitative analysis preferably.

Despite the above, this thesis has shown that a lot of issues in international law's relationship with municipal laws remain under examined and that many of those areas need further analysis through extensive research.

Successfully analyzing international treaties' roles in developing legal system in Nigeria and linking both Nigerian constitutional and case laws under the spheres of international law, points to the originality of this study

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APPENDICES

A. Abbreviation in the Names of Law Reports and Journals

(a) Law Reports

Nigerian Monthly Law Reports	NMLR
Nigerian Quarterly Law Reports	NQLR
Nigerian Weekly Law Reports	NWLR
Northern Nigeria Law Reports	NNLR
Supreme Court of Nigeria Law Reports	SCNLR
Western Nigeria Law Reports	WNLR
International Court of Justice Judgments	ICJJ
International Court of Justice Reports	ICJR
International Criminal Tribunal Decisions	ICTD

(b) Journals

African Journal of International and Comparative Law	AJICL
African Law Journal	ALJ
African Journal of Legal Studies	AJLS
Ambic Press	AP
American Journal of International Law	AJIL
California Western International Law Journal	CWIJ
Columbia Journal of Transnational Law	CJTL
Columbia Law Review	CLR
Edition	Edsn

Editors	Edts
Electronic Journal of Comparative Law	EJCL
Edinburgh University Press	EUP
European Journal of International Law	EJIL
Gyan Publishing House	GPH
Hart Publishing	HP
International Journal of Business and Management Invention	IJBMI
Journal of African Law	JAL
Journal of Law and Judicial System	JLJS
Journal of Language, Technology and Entrepreneurship in Africa	JLTEA
Journal of Law, Policy and Globalization	JLPG
Journal of Legal Education	JLE
Mauritanian National Publications	MNP
Mediterranean Journal of Social Sciences	MJSS
McGill Law Journal	McLJ
National Assembly Press	NAP
Petoa Educational Publications	PEP
Professor	Prof.
Sydney Law Review	SLR
Vanderbilt Journal of Transformational Law	VJTL
Victoria University Wellington Law Review	UWLR
Volume	Vol
Yale Journal of International Law	YJIL

B. Abbreviations in Case Names

Attorney General	AG

Attorney General of the Federation	AGF
Another	Anor
Appeal Cases	AC
Botswana Law Reports	BLR
Court of Appeal	CA
Chief Justice of Nigeria	CJN
Department of State Security	DSS
European Court of Justice	ECJ
Federal High Court	FHC
International Criminal Court	ICC
International Court of Justice	ICJ
International Criminal Tribunal for former Yugoslavia	ICTY
Justice of the Supreme Court	JSC
Justice of the Court of Appeal	JCA
Limited	Ltd
Minister of National Security	MNS
National Deposit Insurance Corporation	NDIC
National Industrial Court Act	NICA
National Industrial Court	NIC
Nigerian Police Force	NPF
Others	Ors

Supreme Court	SC
Supreme Court Cases	SCC
United African Company	UAC
United Kingdom	UK
United Nations	UN
United States	US
Universal Declaration of Human Rights	UDHR
Versus	V
War Crimes Tribunal for Yugoslavia and Rwanda	WCTYR

C. Abbreviations in Footnotes

Cambridge University Press	CUP
Et cetera	Etc
Edinburgh University Press	EUP
Example	Eg
Ibadan University Press	IUP
That is	Ie
Number	No
Number of an Act	No.
Oxford University Press	OUP
Petoa Educational Publishers	PEP
Page/pages	P/pp

Paragraph/paragraphs	P/pp
Part	Pt
University of Ife Press	UIP

D. Abbreviations of Names of International Instruments/Institutions

African Charter on Human and Peoples' Rights	ACHPR
African Union	AU
Bilateral Investment Treaty	BIT
Child Rights Act	CRA
Convention on Treaties between States and International Organizations	CTSI
Direct Foreign Investment	DFI
Economic Corporation of West African States	ECOWAS
European Convention for the Protection of Human Rights and Fundamental Freedoms	ECPHRFF
European Union	EU
Exhaustion of Local Remedies	ELR
Exclusive Foreign Choice	EFC
Food and Agricultural Organization	FAO
Fork-in-the-Road	FITR
Freedom of Information Bill	FIB
Green Tree Agreement	GTA
International Arbitral Tribunals	IAT

International Covenant for Human Rights	ICHR
International Labor Organization	ILO
International Law Commission	ILC
International Convention on the law of Treaties	ICLT
International Investment Tribunals	IIT
Investor State Dispute Settlement	ISDS
Memorandum of Understanding	MoU
Multilateral International Treaty	MIT
North Atlantic Treaty Organization	NATO
Organization of American States	OAS
Permanent Court of Arbitration	PCA
Pre-Shipment Inspection Agreement	PSIA
Stockholm Chamber of Commerce	SCC
Universal Declaration of Human Rights	UDHR
United Nations General Assembly	UNGA
United Nations Security Council	UNSC
United Nations Human Rights Committee	UNHRC
United Nations Treaty Series	UNTS
Vienna Convention on the Law of Treaties	VCLT
World Health Organization	WHO
World War Two	WW11

E. Similarity Report

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F. CURRICULUM VITAE

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PUBLICATIONS

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1) AN IN-DEPTH ANALYSIS OF NIGERIAN PRELIMINARY OFFENCES. *International Journal for Innovative Research and Development*, 9 (2020) issue 9, paper No. 10.24940/ijird/2020/v9/i9/
2) THE NIGERIAN AVIATION LAWS AND BILATERAL AIR SERVICE AGREEMENT IN PERSPECTIVES, *Journal of Social Science, Policy and Society*, 173 (2020) Goldie Street, P. O. Box 727, G.P.O. Calabar, Cross Rivers state, Nigeria. Paper No. DUN/2020/079
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5) IMPLEMENTATION OF TREATIES IN NIGERIA: RATIFICATION AND DOMESTICATION ROLES?, *Journal of African Law, Cambridge University Press* (2023)

Books

1) *The compendiums of Nigerian Preliminary offences* (2020) Abu Ammar Printing, Nigeria

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