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EXAMINATION OF LAW AND PROCEDURE FOR DOMESTICATION OF TREATIES IN NIGERIA

BY

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DECLARATION

I, DAMINA JOSHUA JOHN, declare that this thesis is my own original work and that it has not been presented, nor intended to be presented for a degree in any other university in compliance with the regulations for an award of Master degree LLM. All the sources used or quoted have been duly acknowledged

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APPROVAL PAGE

This thesis is submitted for examination with my approval as university supervisor.

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DEDICATION

This thesis is dedicated to the Almighty God, the source of all profitable knowledge.

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LIST OF ABBREVIATION

ACHPR	African Charter on Human and People's Rights.
CAT	Committee Against Torture; Convention Against Torture and other Cruel Inhuman and Degrading Treatment or Punishment.
CERD	Committee on the Elimination of Racial Discrimination.
CFRN	Constitution, Federal Republic of Nigeria
CRA	Child Rights Act
CRF	Consolidated Revenue Fund
DHRD	Declaration on Human Rights Defenders
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
FIDA	International Federation of Women Lawyers
HRC	Human Rights Council
ICC	International Co-Ordinating Committee
ICC	International Court of Justice
ICCPR-OP1	Optional Protocols to the International Convention on Civil and Political Rights.
ICERD	International Convention on the Elimination of all forms of Racial Discrimination.
ILO	International Labour Organisation
NAP	National Action Plan.
NHRC	National Human Rights Commission
NHRI	National Human Rights Institution
NGO	Non government Organisation
NLRC	Nigerian Law Reform Commission

- Nigerian law Reform Commission Act, CAP N118 LFN, 2004.
- Optional protocols to the International Covenant on Civil and Political Rights (ICCPR-OP1).
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ABSTRACT

No doubt countries which are geographically far apart are becoming increasingly interconnected and interdependent, sovereign privacy is gradually being obliterated as the high walls of nationalism continue to give way to internationalism, events which up to the middle of the twentieth century, were private and internal to the Sovereign are now the focus of international action. This result is the product of the unity created by both bilateral and multilateral treaties geared toward the common good of the international community. An intention to be so bonded is often evidenced by becoming a signatory to the said treaty, sometimes though in addition to being a signatory to a treaty, such a treaty may also have to be domestically incorporated by the state assuming such obligation before her citizens can fully benefit from its provisions. Section 12 of the Constitution of the Federal Republic of Nigeria 1999 as amended is one such instance. It requires that a treaty be domesticated by the Nigerian legislature before it can be admitted in Nigeria court. This section further provides that where the subject matter of a treaty falls outside the Exclusive legislative list, a bill for an Act of the National Assembly to give the treaty the force of law must be ratified by a majority of all the Houses of the State Assembly in the Federation before it is enacted and assented to by the president. This study examined the mode of enforcement of treaties in Nigeria and the challenges faced in the implementation and application of treaties the study was also geared towards ascertaining whether certain important treaties in international law have been effectively applied in Nigeria to promote the well-being of Nigerians. The study relied on case law and certain fundamental international conventions such as the Vienna Convention on treaties 1969 amongst others. The study also examined the position of Nigeria before and after the Third Alteration Act 2010 and the Treaties Making Procedure Act 2004 so as to ascertain whether or not the status of Nigeria has changed in her relationship with the international community. The study went further to make some recommendations. It is clear that more still has to be done towards promoting domestication of treaties in Nigeria.

CHAPTER ONE

1.0 INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The Vienna Convention on the Law of Treaties of 1969[1] (VCLT) defines a treaty as an international agreement concluded between states in written form and governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Every state possesses capacity to conclude trelaties according to Article 6[2]. Thus capacity in itself is.evidence of statehood as prescribed in the Montevideo Convention 1933 and how a state wants or organizes the exercise of its treaty making power is its own concern. Treaties are usually concluded in the form either of agreements between states, of agreements between heads of state, or of intergovernmental agreements.

The persons that can represent their state for the purpose of adopting or authenticating the text of a treaty, or for the purpose of expressing the consent of the state to be bound by a treaty are the Heads of state, heads of government and minister of Foreign Affairs by virtue of their Functions. Limited powers to adopt the text of a treaty on behalf of their state can be given to the heads of diplomatic missions or to representatives accredited by states to an international conference or international organization or one of it organizations[3].

When sovereign states come together to negotiate and agree to the text of a treaty, it is implied that the state parties accept the obligation and responsibility arising therefrom. Treaties are the most important sources of Law in the contemporary time because they are all written down, and bear significant implications for national law,

1. Article 2(1)(a)
2. VCLT 1969
3. Ladan M.T., Materials and Cases on Public International Law, 50

national institutions and the nationals of states[4]. More than that, treaties have ended wars, regulated navigation, pledged troops, and at times encouraged trade[5].

According to G.A.S. Grenville

Treaties are landmarks which guide nations in their relations with each other. They express intentions, promises and normally appear to contain reciprocal advantages. Treaties represent attempts to reduce the measure of uncertainty inherent in the conduct of international affairs.

Right of States to engage in treaties: The power of a nation to enter into a binding agreement on the international plane is one of the incidents of its sovereignty. This right of a state to enter into treaties was laid down in the Montevideo Convention of 1933 on the Rights and Duties of States.

The method and procedure for implementing treaties are matters flowing directly from state sovereign and hence are governed exclusively by municipal law.[6] Parties to a treaty may conclude their treaties in virtually any manner they wish.[7] There is no prescribed form on how a treaty is to be made or conclude. However, certain rules apply in the formation of treaties. Article 7 of the VCLT 1969 provides the following guidelines,

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
   (a) He produces appropriate full powers; or
   (b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing

4. Olutoyin B.I, Treaty making and its application under Nigeria Law: The Journey so far (2014) 3
5. Ibid
6. Akinyemi, A.B (ed), Readings of Federalism, (NIIA/University of Ibadan Press, (1979) , 52-522
7. Shaw, M.N Ibid, 634.

the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
   (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
   (c) Representatives accredited by States to. an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

The essence of the above provision is to provide security to their parties to the treaty that they are making agreements with persons competent to do so.

General, a treaty will only bind parties who consent to be bound by it (except a rule in the treaty is also one of customary law. There are several ways by which states may consent to be bound by a treaty. They include;

1.1.1 **Consent by signature**

Article 12 of the 1969 VCLT provides for circumstances in which consent to be bound by a treaty may be expressed by signature. Some treaties expressly stipulate that they come into force at the moment of signature and require no ratification. An example is the Anglo-Polish treaty of Alliance of 25 August 1939.[8] However, where the treaty is made subject to acceptance, approval or ratification, the signature will be a mere formality and will mean no more than that state representatives have agreed upon an acceptable text which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection.[9]

8. Grenville, G.A.S Ibid, 639.
9. Shaw, M.N Ibid, 639

1.1.2 Consent by exchange of Instruments

Article 13 of the 1969 Convention provides that the consent of States to be bound by a treaty constitute by instruments exchanged between them is expressed either when the instruments provide that their exchange shall have that effect or when it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

1.1.3 Consent by ratification

Article 14 of the 1969 Convention provides for consent by ratification. A controversy, exists as to which treaties need to be ratified. Some writers are of the view that ratification is only necessary if it is clearly contemplated by the parties to the treaty.[10] On the other hand, it has been opined that ratification should be required unless the treaty clearly reveals a contrary intention.[11] Ratification was originally designed to ensure that the representative of a state did not act *ultra vires* with regard to the making of a treaty. At present the importance of ratification lies in the need to secure the consent of the legislative arm of the government of the country intending to enter into the treaty.[12] Ratification gives a state additional time to consider the treaty and sample the opinion of its populace concerning the treaty.

According to Shaw,[13]

> By providing for ratification the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration.

10. Fitzmaurice, G. 'Do Treaties Need Ratification?;, 15 BYIL, p. 129 and O'Connell, International Law, p. 222 in MN Shaw, Ibid, 640
11. MacNair, Law of Treaties, p. 133. In MN Shaw, Ibid, 641.
12. Grenville, G.A.S Ibid, 9.
13. Shaw, MN Ibid, 640

1.1.4 Consent by Accession

Article 15 of the 1969 Convention provides for this. In this case a state becomes a party to a treaty it has not signed. Certain important treaties provide that states may accede to a treaty at a later date.[14]

1.2 STATEMENT OF THE RESEARCH PROBLEM

Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 as amended provides for the implementation of treaties by way of ratification. Nigeria as a developing country has a good record in signing, asserting to and ratifying numerous regional and international instruments. It should also be noted that a number of countries have also signed and ratified international instruments dealing with the protection of various human rights. Upon signing and ratifying these international instruments, each state has the responsibility to fulfill, respect and protect her citizens. However, as noted by one commentator.

> "The burden seems to be heavier and the task complicated when economics, social or cultural rights are involved,[15] in Nigeria, several challenges are encountered in the domestication and application of treaties. This study is aimed at finding out;

1. Whether the present mode of transformation of treaties is effective, the objective of this study is to explore whether a dual legal system is a constraint in the domestication of treaties in Nigeria.
2. What challenges stand in the way of effective domestication of treaties.
3. Ways of effectively implementing and applying treaties to enhance the well being of Nigerians.

14. An example of such a treaty is the 1958 Geneva Convention on the High Seas. See MN Shaw, Ibid, 642
15. Katarina K and a Rosas, H Economic Social and Cultural Rights, 98

1.3 AIM AND OBJECTIVES OF THE STUDY

This study aims at assessing the following:-

1. To examine the procedure of domestication of treaties in Nigeria, highlighting areas in need of improvement and proffering solutions there to.
2. An analysis of the status of treaties in relation to other municipal laws and how this affects the effective application of treaties in Nigeria.
3. To identify challenges faced in the application of treaties in Nigeria and proffering solutions to them.

1.4 SCOPE AND LIMITATION OF THE STUDY

International law can broadly be divided into two categories – classical and contemporary. Classical international Law deals with international customs while contemporary international law deals essentially with treaties. This work will focus on contemporary international law using the Convention on the Rights of the Child and the African Charter on Human and Peoples Rights as case studies. These human rights treaties have been ratified in Nigeria. In discussing the application of treaties in Nigeria a look will be had at the treaty reporting process and the role of human rights institutions within Nigeria in treaty reporting. Furthermore, this study will identify national and international human rights protection mechanisms and how they can aid the application of treaties in Nigeria. This work will not only be limited to the domestication and application of treaties in Nigeria as reference will, where necessary, be made to other jurisdictions.

1.5 SIGNIFICANCE OF THE STUDY

The significance of this study lies not in the enormous importance of treaties in international law but also in the challenges being presently encountered in the

domestication and effective application of some treaties such as the Convention on the Rights of the Child and the African Declaration on Human and peoples' Rights.

1.6 RESEARCH METHODOLOGY

This thesis places emphasis on an analysis of the relevant available literature on the subject and Relies on practical sources of research. In regard to the literature, the study relies on primary sources including international Laws, instruments, constitutions, and others conventions.

It also uses a comparative methodology in arguing the thesis that the Nigerian government has not effectively utilized available treaties in promoting the welfare of its citizens as certain treaties of critical importance have either been awaiting domestication for too long a time[16] or after domestication are not being effectively applied.

1.7 LITERATURE REVIEW

A discussion of the legal implications of Section 12 of the Constitution of Nigeria, 1999 as amended throws into sharp focus the dichotomy between the doctrines of monism and dualism on which there is tremendous amount of literature. For purposes of this research, relevant parts of the utilized literature will be reviewed.

Henkin et al,[17] Malcolm Shaw,[18] Ian Brownlie[19] and Louis[20] as well as Anthony Aust,[21] discuss the distinction between monism and dualism. Henkin et al gives the

16. Presenting, the Bill to domesticate the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment is still pending before the National Assembly although Nigeria ratified this Convention as far back as 28th June, 2001. See Human Rights Newsietter, NHRC Oct-Dec 2010, Vol; 11, 5 & 19.
17. Henkin, L. et. Al. 1987. *International Law Cases and Materials.* 2nd ed. St. Paul, Minnesota: West Publishing Co. 137-227
18. Shaw, M. 2008. *International Law.* 6th ed. Cambridge: Cambridge University Press. 99-136
19. Brownlie, I. 1008. *Principles of Public International Law.* 7th ed. Oxford: Clarendon Press. 31-53.
20. Montesquiei, C. 1748 *De l,esprit des Lois/The Spirit of Laws.* Available at: http://etext.lib.virginia.edu/toc/modeng/public/MonLaws.html (Accessed 5 October 2016).
21. Aust, A. 2007. *Modern Treaty Law and Practice.* 2nd ed. Cambridge: Cambridge of University Press.

general distinction between the two systems. They argue that in explaining the relationship between international law and municipal law, two principal and separate approaches have evolved, that is, dualism and monism.[22] Shaw observes that the positivists, basing their view on the legal theory of sovereignty and equality of states, and that no state can exercise jurisdiction over another,[23] assert the supremacy of states' municipal law over international law and emphasize "the existence of wide differences between (the) two...orders".[24] Discussing the principles of justiciability and non-justiciability,.he argues that for a rule of international law to have legal force in the domestic or internal legal order, it must be transformed into municipal law by legislation. This is the theory of dualism which stresses the view that "international law and municipal law exist separately and cannot purport to have an effect on, or overrule the other".[25] Municipal law governs domestic affairs between individuals and the state organs, while international law governs international relations between states. Henkin et al adds that once incorporated into municipal law, international law is subject to the municipal law constitutional limitations and can be amended by an Act of Parliament.

Shaw further explains that monists, who embrace the naturalist view, on the other hand, see "the primary function of all law as concerned with the well being of individuals". Advocating "the supremacy of international law",[26] monists root for the unitary view of law and reject the strict division posited by the positivists. Starting with Britain and the US, Shaw distinguishes between self-executing and non-self-executing treaties and goes on to survey the modes adopted by various states in domesticating treaties.

22. Henkin, L. et. Al. Supra 140
23. Lord Pearson, in Nissan v Attorney General (1970) AC 179, 239.
24. Shaw, M.N 2008. *International Law.* 6th ed. Cambridge: Cambridge University Press, 129.
25.Ibid, 129
26. Ibid, 131

Brownlie basically expresses the same views as those of Shaw and Henkin et al on this distinction between monism and dualism. On dualism, he emphasizes "the essential difference (between) international and municipal law... as consisting primarily in the fact that the two systems regulate different subject-matter". Whereas international law regulates relations between sovereign states, municipal law, on the other hand, "applies within a state and regulates the relations of its citizens with each other and with the executive".[27] "Each system is superior in its own field, and neither has hegemony over the other"[28]. On the issue of monism, according to the primacy of international law over municipal law, he says dualists regard "such doctrine...(as) antipathetic to the legal corollaries of the existence of sovereign states, and reduce municipal law to the status of pensioner to international law".[29]

Stating the monist view, Brownlie posits that monists assert "the supremacy of international law even within the municipal sphere" as both systems are based on international law as the basic or grundnorm. (Noting that Kelsen, the proponent of the grundnorm theory, does not himself support the primacy of international law over municipal law)[30]. Brownlie adds that, like municipal law, international law imposes duties that both states and individuals cannot evade by pleading their constitutions or other municipal laws as defence. He gives examples of the International Military Tribunal at Nuremberg dismissing please of accused persons charged with war crimes and genocide as having "Acted in accordance with their national laws".[31] Henkin et al shares the same view that monists regard both international and municipal law as simply parts of a single system with municipal law deriving its validity from international law which is higher in the hierarchy of legal norms.[32]

27. Brownlie, I. 2008. *Principles of Public International Law.* 7th ed. Oxford: Clarendon Press, 32.
28. Ibid, 53.
29. Ibid, 32.
30. Ibid, 33.
31. Ibid, 35.
32. Henkin, L. et. Al. 1987. *International Law Cases and Materials.* 2nd ed. St. Paul, Minnesota: West Publishing Co. 141.

After dealing with the scope of the Vienna Convention on the Law of Treaties 1969, Anthony Aust expounds on the term 'Treaty' as defined by the Convention. He then deals with the treaty process and covers the two major approaches to treaty transformation or domestication into municipal law. He gives the United Kingdom and Switzerland as the best examples of the dualist and monist systems, respectively, and describes the systems in the United States and South Africa as examples of states that implement a blend dualism and monism.

Various articles written on the distinction between the two systems and the modes adopted by various states to domesticate rules of customary international law, in general, and treaties in particular, include those by Richard Frimpong Oppong,[33] Somppong Melisa A. Waters[34] Justice Dikgang Mosenke,[35] Abdul Ghafur Hamid[36] and Francis Situma.[37] In his article, "Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa"[38], Richard Frimpong states that most common law jurisdictions in Africa follow the dualist system, while those of civil law follow the monist system. He explains however, that member states of regional bodies, like East African Community and the Organisation for the Harmonisation of Business Law in Africa (OHADA), have, for economic considerations, to some extent, ceded their sovereign through the execution of agreement that are directly applicable and enforceable

33. Oppong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal System in Africa. *Fordham International Law Journal,* 30, 295-345
34. Waters, M. 2007. Creeping Monism: The Judicial Trend Toward International Incorporation of Human Rights Treaties. *Columbia Law Journal, 107, 628-705*
35. *Moseneke, D. 2010. The Role of comparative and public international law in domestic legal systems: a South African perspective:* Available at: http://www.middletemple.org.uk/Downloads/3A%20-%20Dikgang%20Moseneke%20%20OROLE%200F%20COMPARATIVE%AND%20PUBLIC%2oINTERNATIONAL%20LAW.pdf (Accessed October 20, 2016.
36. Hamid, A. 2005. Judicial Application of International Law in Malaysia: A Critical Analysis. *Asia-Pacific Yearbook of International Humanitarian Law,* 1, 196-214.
37. Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field* (Unpublished: On file with author).
38. Oppong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa.

municipally. The increasing use of unincorporated treaties by courts in Africa under the doctrine of legitimate expectation, thus in effect incorporating those treaties into the municipal laws, has also posed, and continues to pose, significant challenges that threaten to disturb the balance of power between the executive and legislative arms of government as regards law-making. While lauding the use of international decisions and ceding some sovereign to regional bodies, Oppong concludes that those issues should be seriously thought out lest citizens of those countries be saddled with foreign law the making of which they have not participated in through their elected representatives.

Sompong Sucharikul discusses the history of incorporation of international law into the domestic plane.[39] He gives an example of how the theory of incorporation was introduced in the United Kingdom by English courts incorporating customary rules of international law into common law.[40] Robyn Layton,[41] writing on "When and How can Domestic Judges and Lawyers use International Law in Dualist Systems", gives the nature and characteristics of dualist systems, variations of dualism and the methods of incorporation as well as the courts' use of ungratified and/or unincorporated treaties and conventions.

Basing her views on the International Covenant on Civil and Political Rights (ICCPR), Melissa A. Waters in her article, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties",[42] examines the common interpretive incorporation techniques and observes that "common law judges

39. Sucharikul, S. 2010. International Law as Law, 5.
40. Ibid, 5.
41. Layton, R. 2006. *When and How can Domestic Judges and Lawyers use International Law in Dualist System.* Available at: http://training.itcilo.it/ils/ils judges/training materials/english/ Dualist System Layton.pdf Accessed 20th October, 2016
42. Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties. *Columbia Law Journal,* 107, 628-705

are increasingly abandoning their traditional dualist orientation to treaties and are beginning to utilize human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties". She then examines empirical evidence of that trend in selected court decisions from common law jurisdiction.

In his article, "The Role of Comparative and Public International Law in Domestic Legal Systems: A South African Perspective",[43] Justice Dikgang Moseneke contrasts the two broad approaches of monism and dualism in how international law binds domestic jurisdictions and states that South Africa adopts a mixed approach to the incorporation of international law into domestic law. "It assumes a dualist approach in relation to treaties and a monist stance in respect of customary international law".[44] It incorporates customary international law into municipal legislation unless it is inconsistent with its Constitution or any other national legislation. As regards treaties, save for those of 'a technical, administrative or executive nature' which do not require ratification or accession, all others have to be approved by a resolution of both houses of Parliament[45] He then sets out the procedure adopted by South Africa in domesticating international treaties.

Professor M.T. Ladan in his book,[46] makes a clear distinction between the doctrines of incorporation and transformation while contrasting the theories of monism and dualism. He states that dualists maintain that international law cannot apply directly within municipal courts, it must first of all undergo a process of specific adoption by municipal Law before its rules and principles can operate in a domestic sphere. He further states that Nigeria being a dualist state, section 12[47] makes it mandatory for a

43. *Moseneke, D. 2010. The Role of comparative and public international law in domestic legal systems: a South African perspective:* Available at: http://www.middletemple.org.uk/Downloads/3A%20-%20Dikgang%20Moseneke%20%20OROLE%200F%20COMPARATIVE%AND%20PUBLIC%2oINTERNATIONAL%20LAW.pdf (Accessed 20th October, 2016.
44.Ibid, 64.
45. Ibid, 65
46.Ladan, M.T Materials and Cases on Public International Law, 4
47. CFRN 1999 as amended

treaty to be enacted into law by the National Assembly for it to be applicable domestically.

Christian N. Okeke[48], in his book also agrees with Professor M.T. Ladan that Nigeria being a dualist state, for a treaty to be enforceable section 12[49] required legislative recognition in the national legal system. He makes it clear that this provision is absent in the Ghanain constitution.

Olawale Adebambo[50] in his article says section 12(1) is in its terms, it provides a procedure by which a treaty might be made a part of Nigeria law, but further opines that the coming of the constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, more particularly, section 254(1) has brought another form of domestication by reference or what he calls an implied domestication, to him Nigeria no longer wears a complete cloak of dualism.

Bimbo Atilola[51] in her Article, opines in her conclusion that the third Alteration Act, 2010, constitutes a watershed in the history of the National Industrial Court in that it ushered in a number of radical reforms in the structure, powers, states and jurisdiction of the court. She says the Act gives the court power to invoke the provisions of any international labour treaty or convention to which Nigeria is a signatory notwithstanding that same have not been domesticated via an Act of the National Assembly. She however laments that this provision relates only to international conventions or treaties relating to labour, employment, workplace or industrial relations and not to international treaties generally, she also laments that human rights treaties will continue to suffer the constraint of section 12 unless something akin to the third Alteration Act of 2010 is done in relation to them.

48. The use of International Law in the domestic Courts of Ghana and Nigeria, 407
49. CFRN 1999 as amended.
50. Alawale A. Domesticating international treaties, 1.
51.Bimbo A. National Industrial Court and Jurisdiction over international labour Treaties under the Third Alteration Act, available at nicn.gh/.../accessed on 20th October, 2016

Though quite useful and informs the analysis of the issues in this project, this literature review covers the general treaty making process under both the monist and dualist system. It does not zero down to the proposed Nigeria practice. In that regard, reference will also be made to case decisions in Nigeria and other jurisdictions when analyzing procedure of domesticating treaties in Nigeria.

1.8 CHAPTERS ANALYSIS

This work is divided into five chapters. Chapter One contains an introduction to the law of treaties and the research. Chapter Two contains a definition of terms that recur in the body of the work, a brief discussion on Dualism and Monism and also an analysis of the place of treaties in the hierarchy of norms in Nigeria. Furthermore, this chapter discusses how federalism affects treaty implementation in Nigeria. Chapter three discusses the attitude and ideal role of the courts in the application of treaties and also the role of the Nigeria Law Reform Commission. It also examines treaty reporting in furtherance of treaty application, highlighting the key ingredients of a standard report to United Nations treaty bodies. In the same vein the role of National human rights institutions in the treaty reporting process is discussed. This chapter culminates in identifying the challenges faced in treaty application in Nigeria. Chapter Four looks at the changing nature of domestication in Nigeria under the Third Alteration Act 2010 and under the Treaties making procedure Act 2004. Chapter Five concludes the study and contains, summary of findings, observations recommendations and contribution to knowledge aimed at ensuring that important treaties are speedily domesticated and fully applied in Nigeria.

CHAPTER TWO

TREATY IMPLEMENTATION

2.1.0 DEFINITION OF TERMS

2.1.1 ***Signature:*** Signature indicates an intention to become a party to a treaty, and does not usually establish consent to be bound by the terms of the treaty, unless the treaty provides for the signature having the effect.

2.1.2 ***Ratification of treaties:*** This is the final establishment of consent to be bound by a treaty, by the parties to the treaty.[52] According to P.T Akper, Ratification is an international act whereby a country signifies its intention on the international plane to be bound by provisions of a treaty'. Ratification is usually an act of the Executive arm of government.

2.1.3 ***Accession:*** A state which has not signed a treaty can formally indicate its intention to be bound by the treaty before or after the treaty has come into force.

2.1.4 ***Reservation to treaties:*** Once a treaty comes into force, a state cannot decide which parts of a treaty it chooses to be bound by. However, upon signing a treaty, a state may lodge a formal reservation to it which may modify the scope of the legal obligation owned by that state under the treaty. A reservation cannot be made if the terms of the treaty exclude reservation, or if the reservation is incompatible with the object and purpose of the treaty; and other parties to the treaty can object to a reservation.

2.1.5 ***Transformation:*** The doctrine of transformation stipulate that before any rule or principle of international law can have any effect within a country it must be converted into municipal law by specific adoption.[53]

52. Blacks Law Dictionary, 7th ed, 1269
53. Shaw, M.N Ibid, 105

2.1.6 ***Incorporation:*** This doctrine, on the other hand, holds that international law should apply directly within a country without the need for tranformation.[54]

2.1.7 ***Domestication:*** This is the transformation of treaties into municipal law. P.T. Akper explains it as 'subjecting treaties made on behalf of the Federation to the legislative process, as is the case with other municipal legislation.[55]

2.1.8 ***High Contracting Parties or Contracting Parties:*** When conclusion of treaties is between Heads of States, the parties are referred to as 'High Contracting Parties'; where the treaties are concluded between States or governments the parties are referred to as 'contracting parties'.[56]

2.1.9 ***Application of treaties:*** This relates to the enforcement of treaty provisions within a country.

2.1.10 ***Implementation of treaties:*** This is the process of giving treaties the force of law within a country. In Nigeria, this is usually done by enacting an enabling statute.

In Nigeria, ratification of a treaty by the Executive is insufficient to give a treaty the force of law domestically. It is the legislative approval of the treaty in the form of an enabling statute that actually 'opens the door' for its implementation.[57] The duty to implement treaties is firmly rooted in the international law principle of *pacta sunt servanda.* Although this duty originates from international law, the form and procedure for implementing treaties if governed by munipal.[58] A.B. Oyebode opines that,

> More often than not it is the Constitution of a State that provides the guidelines for treaty implementation either by specifying the location of treaties within the hierarchy of sources of the domestic law or by

54. Ibid
55. Ibid, 8
56. Grenville, G.A.S, Ibid, 12.
57. Ibid, 324
58. Ibid, 286

establishing the relationship between international law and domestic law.[59]

Therefore, in a discussion on the domestication of treaties in Nigeria, it is pertinent to not only locate the position of treaties in the hierarchy of norms in Nigeria but also establish the nature of the relationship between international law and municipal law within the country.

2.2 DUALISM AND MONISM

On the relationship between international law and municipal law, there are two major[60] theories; Monism and Dualism.

Dualists view international and municipal legal orders as mutually exclusive, each possession its sources, subjects and subject matter.[61] H Mohr According to the Dualists, international law and municipal law are two distinct legal systems, so distinct that conflicts between them are impossible. The chief exponents of the dualist view are Triepal[62] and Strupp,[63] both of the positivist school of thought. Dualism is largely based on the concept of the state as sovereign and the 'highest good in society'[64] Elucidating on this, H. Mohr explains that, 'whilst the domestic legal order was a reflection of the sovereign will expressed inwardly, the international legal order represented a synthesis of the wills of various sovereigns manifested in the international plane'.[65] Hence, the dualists identified two differences they considered

59. Ibid
60. Apart from these major theories such as the delegation and harmonization theories exist.J.A.S Grenville, Ibid, 12.
61. Treaties and the Legal Order Paper present at the Graduate Seminar on Legal Research, Policy and Reform at Osgoode Hall Law School, York University, Canada, 1981, 7
62. Triepel, H Volkerrecht and Landesrecht, Berlin, 1899 in Shaw, MN Ibid, 100 and A. Conte Human Rights in the Prevention and Punishment of Terrorism; Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand (2010, Springer Heldelberg Dordrecht London Newyork) 91 fn41.
63. R Strupp, 47 HR, 389 in Shaw, MN Ibid, 100
64. Ibid.
65. Mohr, H Ibid.

fundamental between international and municipal laws. Firstly, they argued that whilst the subjects of municipal law are individuals, the subjects of international law are states. Secondly, while municipal law derives its source from the will of the state itself, international law has its source rooted in the common will of states. Oppenheim opines that, whereas the sources of domestic law are to be found in home-grown customs and the domestic statutes, those of international law are to be found in the customs of the community of states and treaties'.[66] Another proponent of Dualism, Anzilotlis, approaches this argument from another perspective. According to him, Municipal law operates on the fundamental principle that state legislation is imperative while international law operates on the principle of *pacta sunt servanda.* He therefore concludes that the two systems are so distinct that they cannot conflict with each other. The Dualists thus conclude that since neither legal order can operate in the sphere of the other, international law can neither bind individuals nor confer rights on them directly. International law can only apply within the sphere of municipal law after domestication. Furthermore, they conclude that if ever there is a conflict between international law and municipal law, the courts are to apply the latter.[67] Going by the dualist theory, treaties should be non-self executive.[68]

Monism, on the other hand, considers law as a whole with hierarchies; international law being regarded as superior to municipal law. Monists argue that law, whether municipal or international, has the same elements and are thus the same.[69] A leading proponent of the Monist theory is Hans Kelsen. Kelsen viewed Law as an 'integrated, united system of laws'.[70] According to him,

66. Ibid
67. Higgins, R., Problems and Process: International Law and How We Use it, Oxford University Press (1994), p205 in C Nwapi African Journal of International and Comparative Law, Mar, 2011, Vol 19, No. 1, pp. 38-65, at p44.
68. Enabulele, A.O.E, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' African Juornal of International and Comparative Law 2009, Vol. 17, 326-341, at 328. See fn 5.
69. Shaw, M.N Ibid, 101
70. Mohr, H Ibid, 6.

> International law and national law cannot be different and mutually independent norms if the norms of both systems are considered to be valid for the same space and at the same time. It is logically not possible that simultaneously valid norms belong to different, mutually independent systems.[71]

Kelsen further argues that municipal law derives its validity from the international legal order.[72] In reaction to the distinguishing factors between both legal orders, highlighted by the Dualists, Kelsen argued that like municipal law, International law governs individuals as States are composed of individuals. Hence, individual human country, who is being prosecuted by his state for violating this national law, can invoke the human rights treaty in a national courtroom and can ask the judge to apply this treaty and to decide that the national law is invalid. He or she does not have to wait for national law that translates international law. His or her government can, after all, be negligent or even unwilling to translate. The treaty was perhaps only accepted for political reasons, in order to please donor-countries for example.

"So when someone in **Holland** feels his human rights are being violated he can go to a Dutch judge and the judge must apply the law of the Convention. He must apply international law even if it is not in conformity with Dutch law.[73]

2.3 DUALISM THEORY

Dualism- or rather, the doctrine of transformation – for its part perceives international law and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character.

The two legal orders are separate and self-contained spheres of legal action, and theoretically there should be no point of conflict between them. Since they are

71. Ibid, 9
72. Shaw, M.N, Ibid, 42.
73. Wiarda, G.J in Antonio Cassess, International Law in a Divide World, Clarendon Press, Oxford, 1992, 17.

separate legal systems, international law would as such not form part of the municipal law of the state.

Dualism argues that the two legal systems are distinct in nature. First, the two legal systems are different in the particular relations that they govern: state law deals with the social relations between individuals, and international law regulates the social relations between states, who alone are subject to it.

Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this transaction, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law.

"International law as such can confer no rights cognizable in the municipal courts. It is only insofar as the rules of international law are recognized as include in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations"[74]

The supremacy of international law is a rule in monist systems as opposed to dualist systems. Sir HerschLauterpacht pointed out the Court's determination to discourage the evasion of international obligations, and its repeated affirmation of the self-evident principle of international law that a State cannot invoke its municipal law as the reason for the non-fulfillment of its international obligations.[75] If international law

74. James A. Baron A. in M. Akehurts, Modern introduction to International Law, Harper Collins, London, 45.

75. See the Development of International Law by the International Court, HerschLauterpacht (ed), Cambridge University Press, 1982, ISBN 0-521-46332-7 262.

is not directly applicable, as is the case in monist systems, then it must be translated into national law, and existing national law that contradicts international law must be "translated away". It must be modified or eliminated in order to conform to international law. Again, from a human rights point of view, if a human rights treaty is accepted for purely political reasons, and states do not intend to fully translate it into national law or to take a monist view on international law, then the implementation of the treaty is very uncertain.

In some countries, such as the United Kingdom (UK) for instance, the dualist view is predominant. International law is only part of British national law once it is accepted in national law. A treaty

"has no effect in municipal law until an Act of Parliament is passed to give effect to it. In other countries this distinction tends to be blurred. In the vast majority of democratic countries outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously. For instance, the constitution of the United States provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur'. Treaties ratified in accordance with the Constitution automatically become part of the municipal law of the USA"[76]

The United States of America has a "mixed" monist-dualist system' international law applies directly in US courts in some instances but not others. US Constitution, art. VI, does indeed say that treaties are part of the Supreme Law of the Land, as suggested by the quote above; however, its Supreme Court, as late as the recent **cMedellin v. Texas**[77] has restated that some treaties are not "self-executing". Such

76. Akehurts, M, Modern Introduction to International Law, Harper Collins, London, 45.
77. 552 U.S. 491 (2008)

treaties must be implemented by statute before their provisions may be given effect by national and sub-national courts. Similarly with regard to customary international law, its Supreme Court stated, in the **case of the Pacquete Habana** (1900), that "international law is part of our law". However, it also said that international law would not be applied if there is a controlling legislative, executive, or judicial act to the country[78]

2.4 MONISM THEORY

Monism is the view that reality consists of one fundamental ultimate essence. Monists accept that the internal and international legal systems form a unity. Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determine whether actions are legal or illegal.[79] In most so-called "monist" states, a distinction between international law in the form of treaties, and other international law, e.g., customary international law or jus cogens, is made; such states may thus be partly monist and partly dualist.

In a pure monist state, international law does not need to be translated into national law it is just incorporated and has effect automatically in national or domestic laws. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is treated as part of national law as well. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority. In other states, like in Germany, treaties have the same effect as legislation, and by the principle of lex posterior, only take precedence over national legislation enacted prior to their ratification. In its most pure form, monism dictates that national

78. "Basic Concepts of Pubic International Law- Monism & Dualism ed, Marko Novakovic, Belgrade 2013.
79. Pieter K, International publiekrecht in vgelvlucht, Wolters-Groningen, 1994, 82.

law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution. From a human rights point of view, for example, this has some advantages. Suppose a country has accepted a human rights treaty- the International Covenant on Civil and Political Rights for instance – but some of its national laws limit the freedom of the press. A citizen of that Monism, on the other hands, considers law as a whole with hierarchies; International law being regarded as superior to municipal law. They argue that law, whether municipal or international, has the same elements and are thus the same.[80] A leading proponent of the Monist theory is Hans Kelsen, Kelsen viewed Law as a 'integrated, united system of laws'[81]. According to him,

International law and national law cannot be different and mutually independent norms if the norms of both systems are considered to be valid for the same space and at the same time. It is logically not possible that simultaneously valid norms belong to different, mutually independent systems.[82]

Kelsen further argues that municipal law derives its validity from the international legal order.[83] In reaction to the distinguishing factors between both legal orders, highlighted by the Dualists, Kelsen argued that like municipal law, International law governs individuals as States are composed of individuals. Hence, individual human beings are the subject of both legal orders. In the same vein, there was no difference in the subject matter over which both legal orders could legislative. According to him, 'since every matter that is or can be regulated by national law is open to regulation by international law as well … it is… impossible to substantiate the pluralistic view'. [84]

The Monists thus, conclude that where there is a conflict between both legal orders,

80. Shaw, M.N, Ibid, 101
81. Mohr, H Ibid, 6
82. Ibid, 8
83. Shaw, MN Ibid, 42.
84. Mohr, H ibid,9

the courts are to apply international law. Furthermore, International law is to be immediately applicable within the municipal legal order without a need for transformation.

Generally, while civil law countries are traditionally Monists in approach, common law countries are traditionally Dualists[85]. The same place occupied by other Nigerian statutes; all being subject to the Nigerian Constitution.

The confusion as to the position of treaties in the Nigerian hierarchy of laws lies not in the adequacy or inadequacy of the Constitutional provisions on treaties but in the interpretation given to this provision by the Nigerian courts.

In the much debated case of *General Sanni Abacha v. Gani Fawehimni*[86] where the issue of the supremacy of the Constitution over the African Charter on Human and Peoples Rights came up for consideration, the Supreme Court, per Ogundare, JSC held,

No doubt Cap. 10 (The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1990) is a Statute with International flavour. Being so therefore, I would think that if there is a conflict between it and another Statute, its provision will prevail over those of that other Statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the court below that the Charter possesses 'a greater vigor and strength' than any other domestic Statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor can its international flavor prevent the National Assembly or the Federal Military government to remove it from our body of municipal laws by simply repealing Cap. 10 nor also is the validity of

85. Abugu J.E.A a treatise on the application of ILO convention in Nigeria by Lagos press 2009, 10
86. (2001) 51 WRN 29

another Statute necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter.

This position of the Supreme Court has been criticized for differing reasons. Some[87] have based their criticism of this decision on the principle of international law governing the position of municipal law within the international sphere. To wit; that a State cannot plead its municipal law in breach of international law. They content that until the sovereign power of a State 'is exercised to repeal or denounce an international treaty, it retains its international flavor and powers above all municipal laws including the Constitution.[88]

This criticism is, with respect, misguided. In view of the fact that Nigeria is a dualist State, believing also in the sovereignty of the State and the supremacy of municipal legislation over international laws, Hence, the need to domesticate treaties before their application within Nigeria. Once a treaty has been domesticated it forms part of the body of laws in Nigeria and is therefore, irrespective of its international flavour, subject to the ground norm within the Nigerian legal order.[89] it is pertinent to note that it is the statute enacted in the implementation of the treaty that serves as a source of law and not the treaty per se.[90] The argument that 'the idea that a government could assume an obligation at the international level but remain free to breach it at the national level seems legally unattractive and morally reprehensible; it paints a picture only 26 states in Nigeria had passed the Convention into law.[91] With some of the states, even after intense and prolonged advocacy by Civil Society Organizations, adopting a slightly varied version of the CRA.[92]

87. Abugu, J.E.O, ibid, 15
88. Ibid, 16
89.See Section 1, Constitution of the Federal Republic of Nigeria, 1999
90.Murmansk State Steamship Line v. The Kano Oil Millers Ltd. (1974) 252 S.C 1, 2
91. A statement by IjeomaOgbe, communication officer, media and External Relations, UNICEF Enugu Office 18 May, 2016.
92.Nigeria: National Laws, ibid. on the marriageable age, while the S. 21 CRA places it at 18 years, the Child Rights Law of Akwa Ibom state places it at 16 years and in Jigawa state, it is placed at puberty. See Committee on the Rights of the Child 54th session 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention CRC/C/NGA/CO/3-4 11 June, 2010.

The provision of Section 12 of the 1999 Constitution has been criticized on the grounds that it is unclear and 'undermines the concept of federalism'.[93] To forestall a situation where states refuse to 'ratify'[94] a treaty in cases where they are required by law to do so, C Nwapi suggests that states be allowed to take part in the treaty making process arguing that if this is done it would give the state legislatures a sense of belonging with regard to the treaty as well as a moral obligation to cooperate constructively, through dialogue and concession, with the federal legislature in the implementation process'.[95] In Nigeria, treaty making falls within the prerogatives of the Executive arm of the federal government. External affairs are, In fact, firmly under the control of the Federal government as it is an item under the Exclusive Legislative List. However, if members of the executive arm of the Thirty-six state governments are allowed to participate in the treaty making process what guarantee is there that the executive members of some states would not stall or worse still frustrate even the signing of certain fundamental human rights treaties which they may find offensive. Thus, preventing all the states in the Federation from benefiting from the provisions of the said treaty as against the present practice wherein if a state desires to domesticate a treaty already domesticated by the National Assembly without the latter complying with the provisions of Section 12(2) and (3), the state may do so irrespective of opposition to that treaty by other states. It is thus, safer to leave treaty making where it presently is-in the hands of the federal government of an irresponsible government'[96] is one based more on the tenets of morality than on the principles of law.

Having examined the above criticism of the Supreme Court's decision in *Abacha's*

93. Nwapi, C. Ibid, 49
94. See fn 81
95. Nwapi, C. Ibid, 50
96. R F Oppong 'Re-imaging International Law: An Examination of Recent trends in the Reception of International Law into National Legal Systems in Africa' (Fordham Inter'l L.J 2007) 173 in J.E.O

case, attention will now be paid to the decision itself which, with respect, has fanned the members of confusion regarding the position of treaties in the hierarchy of norms in Nigeria by creating a special position between the Constitution of the Federal Republic of Nigeria and other Municipal legislation for statutes with international flavour. This decision was based on the premise that statutes with international flavourposses 'a greater vigour and strength' than other domestic statutes. This position of the Supreme Court is unsupported by the Constitution of the Federal Republic of Nigeria and by established principles of law in Nigeria regarding the position of statutes in relation to one another.[97] Thankfully, the Supreme Court, in this suit, upheld the supremacy of the Constitution which has frequently been restated in numerous other court decisions. The Supreme Court in *Oloruntoba-Oju v. Dopamu*[98] held per Oguntade JSC, that 'any provision of an existing law which is in conflict with the provisions of the 1999 Constitution must be pronounced void to the extent of such inconsistency'. This pronouncement underscores the supreme position occupied by the Nigerian Constitution in the hierarchy of laws. In the same vein, in Regd. Trustees, C.S.S.T. v C.O.E., Kogi State[99]. The Court of Appeal, per Omage JCA at p. 1562 para C-D, stated the position of the law explicitly, as follows,

> It is settled law that the jurisdiction of the 1999 Nigerian Constitution supersedes any other Nigerian legislation not exempted or except by it. See Section 1 of the 1999 Constitution which subscribes and produces the supremacy of the provisions of the 1999 Constitution throughout the Federal Republic of Nigeria. Therefore any other view which is inconsistent with its provision is void, and the provision of the Constitution will prevail. In the light therefore of

97. See capital Bancorp Ltd v. Shelter Savings and Loans Ltd (2007) All FWLR (Pt 440) 684 where it was held that 'the Constitution of Nigeria and its provisions are supreme.
98. (2008) All FWLR (Pt 411) 810.
99. (2006) All FWLR (Pt 299) 1549.

> the constitutional provision, when there is a binding law, there cannot exist any law in Nigeria, which unfolds to be inconsistent with the Constitution. The 1999 Constitution itself contains its corrective mechanism.

On the relation of treaty enabling statutes to other municipal laws, A.O. Enabulele puts it aptly thus,

> Since statute implementing treaties are Acts of the National Assembly, they must maintain parity with all other Acts of the National Assembly. If Cap. A9 is not an Act of the national Assembly, then it is simply a treaty, and if it is a treaty, no Nigerian court can take cognizance of it; it will remain an obligation between independent states.

The above opinion of A.O Enabulele is in line with the dissenting opinion of Pats-Acholonu, JCA, In *Abacha's* case, where the Learned Justice opined that 'The general rule is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal laws'.

According to A.O. Enabulele,[100] there are three modes via which treaties can be made applicable in Nigeria. They are;

(a) Treaties entered into by the British Government and extended to Nigeria by the same government in exercise of her Colonial Power. An example of this is the Warsaw Convention made applicable to Nigeria by the Carriage by Air (Colonies, Protectorates and trust Territories) Order, 1953.

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100. Supra, 332.

(b) Treaties which are applicable as Nigerian law- these are treaties which provisions are enacted into Nigerian statutes as Nigerian law without necessarily making reference to the mother treaty. Example is Carriage of Goods by Sea Act.

(c) Treaties that are applicable through Nigerian law-those in this category are holistically made applicable to Nigeria through an enabling Act. Example is Cap. A9.

In Chief *J.E Oshevire v. British Caledonian Airways Ltd*[58] the treaty under consideration was the Warsaw Convention on International Carriage by air enacted into Carriage by Air (Colonies, Protectorates and Trust territories) Order,[59] which is a treaty that falls under the first category of mode of implementation of treaties in Nigeria as opined by A.O. Enabulele, the Court held that,

An international agreement embodied in a convention or treaty is autonomous, as the high contracting persons have submitted themselves to be bound by its provisions which are above domestic legislations. Thus any domestic legislation in conflict with the convention is void.

In delivering this decision, the court completely ignored or failed to averts its mind to the provisions of S. 12 of the 1979 Constitution which provided for domestication of treaties before their application within Nigeria. Going by this wittingly or unwittingly, substantially complies with a treaty obligation incurred by Nigeria. (Emphasis mine)

The first defect in this proffered solution is the issue of what amounts to substantial compliance. How many provisions in a Treaty would a municipal law have to comply with to be regarded as a statute with 'international flavour'? Apparently, it would be sufficient if just one or a few provisions in the statute relate to a treaty in view of the example, given by C. Nwapi, of the Canadian Criminal Code. The said Criminal Code

101. (1990) NWLR (Pt 160), 507
102. Laws of Nigeria 1958

was amended in 1985 to create the offence of torture in implementation of the Convention Against Torture 1984. Adopting the above solution of 'substantial compliance' would lead the Nigerian courts to elevating so many statutes passed by the National Assembly as there would be instances where more than one statute comply with the provisions of a particular treaty. The country would end up having a sizeable portion of its federal laws being placed over and above other federal laws.

This proffered solution is distinguished from the Second category of treaties as enumerated by A.O Enabulele. This category covers obvious cases, such as the Child Rights Act and the Convention on the Rights of the Child which it apparently domesticates.

In spite of all criticisms against it, the position of the law in Nigeria as it relates to the position of treaties in the hierarchy of norms in Nigeria is, pending overrule, as decided in the case of *Abacha v. Fawehinmi*[130] to wit: that treaties are, with the exception of the Constitution, of a higher status than other municipal laws. Going by this decision it would be logical to conclude that even at the state government levels, statutes with 'international flavour' would supersede other state legislation. Hence, the Child Rights Laws being passed by some states are to supersede other state Laws in the event of a conflict.

2.5 GENERAL NOTION ON TREATIES DOMESTICATION

International law does not determine which point of view is to be preferred, monism or dualism. Every state decides for itself, according to its legal traditions. International law only requires that its rules are respected, and states are free to decide on the manner in which they want to respect these rules and make them binding on its citizens and agencies.

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103. Ibid

"The transformation of international norms into domestic law is not necessary from the point of view of international law...the necessity of transformation is a question of national, not of international law"[104]

Both a monist state and a dualist state can comply with international law. All one can say is that a monist state is less at risk of violating international rules, because its judges can apply international law directly.[105] Negligence or unwillingness to implement international law in national law can only pose a problem in dualist states. States are free to choose the way in which they want to respect international law, but they are always accountable if they fail to adapt their national legal system in a way that they can respect international law. Either they adopt a constitution that implements a monist system so that international law can be applied directly and without.

2.6 PLACE OF TREATIES IN THE HIERARCHY OF NORMS IN NIGERIA

Whereas the general rule with regard to the position of municipal law within the international sphere is that, 'a State which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation.[106] The position of International law within the sphere of municipal law varies from State to State. In Great Britain a distinction is made between rules of customary International Law and Treaties. The courts do not treat the former as foreign law for the purpose of evidence. Thus, rules of customary international law are for the purpose of evidence considered as part of the law of the land although subject to Acts of Parliament and prior judicial decision.[107] On the other hand, treaties, in most cases,[108] undergo domestication

104. Antonio Cases, International Law in a Divided World, Clarendon Press, Oxford, 1992, 21-22.
105. Pieter K. International publiekrecht in vogelvucht, Wolters-Noordhoff, Groningen, 1994, 83.
106. Shaw, m.n Ibid, 102; Article 27 vienna Convention, 1969
107. Ajomo, M.O 'Development in International Law and International Relations' in The Challenge of the Nigerian Nation Ed T.A. Aguda (Lagos Nigerian Institute of Advanced Legal Studies 1985) 197; A.B. Oyebode *Treaty Making and Treaty Implementation in Nigeria: An Appraisal* Bolabay Publications, Ikeja Lagos 2003, 289.
108. Oyebode, A.B Ibid, 291

before they are applied in Great Britain. Whereas, under the Constitution of the Federal Republic of Germany "generally recognised rules of international law are held to be component parts of the Federal law and no further action is necessary to render treaty provisions'[109] operative within the Federal Republic of Germany.

In Nigeria, Section 12 of the 1999 Constitution portrays Nigeria as a Dualist State. This section provides for the domestication of all treaties before they can apply within the country. Hence logically, treaties after domestication should occupy the same place occupied by other Nigerian statutes; all being subject to the Nigerian Constitution.

It has been said that 'Nigeria, like other Commonwealth countries practically inherited the English Common Law rules governing the municipal application of international law'.[110] This statement is correct only to an extent. In Great Britain not all treaties require domestication whereas in Nigeria the Constitution makes no exemptions as regards the domestication of treaties. The confusion as to the position of treaties in the Nigerian hierarchy of laws lies not in the adequacy or inadequacy of the Constitutional provision on treaties but in the interpretation given to this provision by the Nigerian courts.

In General Sanni Abacha v. Gani Fawehinmi,[111] where the issue of the supremacy of the Constitution over the African Charter on Human and Peoples Rights came up for consideration, the Supreme Court, per Ogundare, JSC held:

> No doubt Cap. 10 (The African Charter on Human and Peoples Rights (Ratification and Enforcement Act (1990) is a Statute with International flavor. Being so therefore, I would think that if there is a conflict between it and another Statute, its provision will prevail over

109. Ibid
110. Ibid, 343.
111. (2005)51 WRN 29

> those of that other Statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses 'a greater vigor and strength' than any other domestic Statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor can its international flavour prevent the National Assembly or the Federal Military Government to remove it from our body of municipal laws by simply repealing Cap. 10 nor also is the validity of another Statute necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter.

This position of the Supreme Court has been criticized for differing reasons. Some[112] have based their criticism of this decision on the principle of international law governing the position of municipal law within the international sphere. To wit; that a State cannot plead its municipal law in breach of international law. They contend that until the sovereign power of a State 'is exercised to repeal or denounce an international treaty, it retains its international flavour and hovers above all municipal laws including the Constitution'.[113]

This criticism is, with respect, misguided, in view of the fact that Nigeria is a dualist State, believing also in the sovereignty of the State and the supremacy of municipal legislation over international laws, hence, the need to domesticate treaties before their application within Nigeria. Once a treaty has been domesticated it forms part of the body of laws in Nigeria and is therefore, irrespective of its international flavour,

112. Abugu, J.E.O ibid, 15
113. Ibid, 16

subject to the ground norm within the Nigerian legal order.[114] it is pertinent to note that it is the statute enacted in the implementation of the treaty that serves as a source of law and not the treaty per se.[115] The argument that 'the idea that a government could assume an obligation at the international level but remain free to breach it at the national level seems legally unattractive and morally reprehensible; it paints a picture of an irresponsible government'[116] is one based more on the tenets of morality than on the principles of law.

Attention will now be paid to the decision itself which, with respect, has fanned the members of confusion regarding the position of treaties in the hierarchy of norms in Nigeria by creating a position between the Constitution of the Federal Republic of Nigeria and other Municipal legislation for statutes with international flavour. This decision was based on the proposition that statutes with international flavour posses 'a greater vigour and strength' than other domestic statutes. This position of the Supreme Court is unsupported by the Constitution of the Federal Republic of Nigeria and by established principles of law in Nigeria regarding the position of statutes in relation to one another.[117] The Supreme Court in *Oloruntoba-Oju v. Dopamu*[118] held per Oguntade JSC, that 'any provision of an existing law which is in conflict with the provisions of the 1999 Constitution must be pronounced void to the extent of such inconsistency'. This pronouncement underscores the supreme position occupied by the Nigerian Constitution in the hierarchy of laws. In the same vein, in Regd. Trustees, C.S.S.T. v C.O.E., Kogi State[119]. The Court of Appeal, per Omage JCA at p. 1562 para C-D, stated the position of the law explicitly, as follows,

114. See Section 1, Constitution of the Federal Republic of Nigeria, 1999
115. Murmansk State Steamship Line v. The Kano Oil Millers Ltd. (1974) 252 S.C 1, 2
116. R F Oppng, 'Re-imagining International law: An Examination of Recent trends in the Reception of International Law into National Legal Systems in Africa' (Fordham Inter'l L.J 2007) 173
117. See capital Bancorp Ltd v. Shelter Savings and Loans Ltd (2007) All FWLR (Pt 440) 684 where it was held that 'the Constitution of Nigeria and its provisions are supreme.
118. (2008) All FWLR (Pt 411) 810.
119. (2006) All FWLR (Pt 299) 1549.

> It is settled law that the jurisdiction of the 1999 Nigerian Constitution supersedes any other Nigerian legislation not exempted or except by it. See Section 1 of the 1999 Constitution which subscribes and produces the supremacy of the provisions of the 1999 Constitution throughout the Federal Republic of Nigeria. Therefore any other view which is inconsistent with its provision is void, and the provision of the Constitution will prevail. In the light therefore of the constitutional provision, when there is a binding law, there cannot exist any law in Nigeria, which unfolds to be inconsistent with the Constitution. The 1999 Constitution itself contains its corrective mechanism.

In Chief J.E. Oshevire v. British Coledonion Airways ltd[120] the Court held that an international agreement embodies in a covenant or treaty is above domestic legislation and any domestic legislation in conflict with such convention is void. This decision of the court completely ignores or fails to avert its mind to the provisions of S. 12 of the 1979 Constitution which provided for domestication of treaties before their application within Nigeria. Going by this provision a treaty which has not been domesticated cannot have the force of law in Nigeria, least of which prevail over other domestic legislation.

2.7 FEDERALISM AND TREATY IMPLEMENTATION IN NIGERIA

A ready source for determining how the national law of a state interacts with international law is the constitution. Such interaction determines the extent to which individuals can employ international law to enforce their rights within the national legal system.[121]It is a firm principle of international law that every state is competent to enter into treaty regarding matters that fall within its sovereignty. But at times, to

120. (1990) NWLR (Pt 160) 507
121. Op cit fn 2

locate the department that is responsible for negotiating and ratifying treaty in Nigeria may not be as easy as expected.

According to Nwabueze,[122] the law and procedure on treaty making capacity is not documented under the Nigerian Constitution. What is visible in the constitution is treaty implementation.[123] This is unlike what is obtainable in other jurisdictions like the United States of America and the United Kingdom where the position is well spelt out. In the case of the former, power to make treaty resides with the president with the advice and consent of the Senate, and the concurrence of two-thirds of the senator. In the case of the latter, treaty-making capacity is within the prerogative of the crown[124].

According to Wheare, one of the arguments for establishing a Federation is that it will provide for a harmonized foreign policy within the State[125].It is common in federations to find their constitutions 'either forbidding their component states from entering into treaty relations with foreign state or permitting them to do so only with express authorization from the federal government'.[126] This is as it relates to treaty making as against treaty implementation. In Nigeria, issues relating to the external

Nigeria is a federal state and as such, treaty making is within the jurisdictional purview of the federal government. Nwabueze[127] lend credence to this assertion when he posited that:

The President, as the chief executive of the federal government, is designated head of

122. Nwabueze, B.O Federalism in Nigeria under the Presidential Constitution. (London, Sweet & Maxwell, 1985) , 25.
123. The Nigerian Treaties (Making Procedure etc) Cap.T20 LFN 2004 classifies treaty into three categories and stipulates the conditions which they must satisfy (1) law-making treaties (which affect or modify existing legislation or powers of the National assembly) these must be enacted into law, (2) agreement (which impose financial, political and social obligations or have scientific or technological importance) these must be ratified and (3) those that deal with mutual exchange of cultural and educational facilities and needs no ratification by any legal instrument. Ibid p. 256
124. Op citfn 7
125. Wheare,K.C Federal government, 1963, p. 179 in Treaties: Their Making and Implementation under the N56. ew Nigerian Constitution, 2.
126. Treaties: Their making and Implementation under the New Nigerian Constitution, Ibid, 9.
127. Ibid

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 affairs of the Republic are placed within the competence of the Federal government[128].

According to M.O. Ajomo[129]

> In a unitary State whose legislature possesses unlimited powers, the problem is simple. Parliament will either fulfill or not, treaty obligations imposed upon the state by its Executive. But in a State with multiple legislative authorities the problem becomes complex. The obligations imposed by a treaty may have to be personal, if at all, by several legislations... The problem then becomes one of trying to balance the interests of the federal authority against those of the constituent units of the federation... without detriment to the federal government's ability to fulfill its treaty obligations in good faith.

Section 12 of the Constitution of the Federal Republic of Nigeria, 1999, which deals with implementation of treaties, provides 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'. In addition to the above, Section 12(3) of the Constitution brings the constituent states into process. It provides that, '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

128. Item 26 on the Exclusive Legislative List, 1999 Constitution as amended.
129. Ibid, 199

assent, and shall not be enacted unless it is ratified by a majority of all the houses of Assembly in the Federation'.

Whilst in the case of ordinary municipal legislation, Section 4(2) of the Constitution gives the National Assembly exclusive powers to make laws with respect to any matter included in the Exclusive Legislative List and Section 4(4)(a) of the Constitution gives the National Assembly powers to make laws with respect to any matter in the Concurrent Legislative List. This latter power of the National Assembly is shared with the states.[130] Section 4(7)(a) of the Constitution gives the state Houses of Assembly exclusive powers to make laws over residual matters.[131]

However, in the implementation of treaties the National Assembly is involved irrespective of the subject matter of the treaty. Where the subject matter of the treaty is one outside the Exclusive Legislative List, a majority of the state Houses of Assembly must 'ratify'[132] the bill wanting to domesticate the treaty. Where a treaty whose subject matter is not contained in the Exclusive Legislative List is erroneously passed by the National Assembly without first obtaining the consent of the required majority of the Houses of Assembly, the resulting enabling legislature will be taken as governing only the Federal Capital Territory. This was the case with the Convention on the Rights of the Child, whose enabling legislation, the Child Rights Act, is now being ratified on a state by state basis. As at May 18 year 2016.

130. See Section 4(7)(b) Constitution, Federal Republic of Nigeria, 1999
131. Note that the present Constitution does not contain a Residual Legislative List, but matters which fall outside the two lists provided for by the Constitution are considered to be residual matters.
132. This term is used here in the sense in which it is used in S. 12 CFRN, 1999.

CHAPTER THREE

3.0 TREATY APPLICATION

The ratification and implementation of a treaty culminates in its application. Where a treaty is not applied the entire progress is defeated. In view of this, the application of treaties is closely monitored by the United Nations through its treaty bodies[133]. These bodies monitor the progress in the application of treaties basically through reports received from State parties to treaties.

3.1 TREATY REPORTINNG

Contained in most treaties is an undertaking by State parties to submit reports on the measures they have adopted and the progress made in achieving the objectives of the treaty.[134] These reports are to be submitted at different periods. First, there is to be submitted an initial report within a specified time frame and subsequently, periodic reports at intervals either by the treaty or its treaty body.[135] A treaty report consists of two complementary documents; the common core document and a targeted treaty specific document.

Treaty reporting is aimed at rendering account to the United Nations, via its treaty bodies, on how States have fared in the implementation and application of respective treaties. The process of treaty reporting is expected to enable the citizens of a State evaluate the performance of that State in fulfilling its treaty obligations. In the same vein, it has been said that, 'the process of treaty reporting provides an appropriate opportunity for the State to strategically align its policies in such a way that

133. Such as the Committee Against Torture (CAT), the Committee on the Rights of the Child and the Human Rights Committee (HRC).

134. For Instance, Article 62 African Charter provides that 'each State Party shall undertake to submit every two years from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedom recognized and guaranteed by the present Charter.

135. The Committee on the Rights of the Child receives reports from state parties at five year intervals. See Committee on the Rights of the Child, 54th session, ibid, 28.

communities can be brought together, whilst vulnerable and marginalized groups can be brought into active participation of the nation building process.'[136]

The contents of treaty reports largely depend on the specification provided by the Treaty itself or its treaty body. For instance, State parties to human rights treaties are expected to submit to the relevant treaty bodies, reports on 'the measures, including legislative, judicial, administrative or other measures which they have adopted and the progress made in achieving the observance or enjoyment of the rights recognized in the treaty'.[137] Some treaties require State parties to also report on the factors and difficulties, if any, affecting the implementation of the treaty.[138]

Hitherto, as a result of insufficient guidelines governing States in treaty reporting the UN has had to deal with volumes of reports from States parties that are, in spite of their volume, off the mark as they fail to provide the Treaty bodies with information considered relevant to the latter. To guard against further submission of unnecessarily voluminous treaty reports by States, several treaty bodies have come up with guidelines on treaty reporting. These guidelines attempt to curtail excesses in treaty reports by specifying amongst other things, the form and content of treaty reports to be submitted to the treaty body. Thus, brevity has become the watchword in treaty reporting. It is in view of the above situation that the Committee Against Torture (CAT) and the Human Rights Council (HRC) came up with what they refer to as 'the new optional reporting procedure' to enable States parties present 'more focused reports'.[139] Similarly, the UN secretariat has come up with harmonized guidelines on

136. Curry, G 'Building Sustainable Capacities on Human Rights Treaty Reporting Evaluation and Strategic Planning Report' (United Nations Development Programme Democratization and Civil Society Empowerment Unit, Kabul, Afganistan, 26 November, 2007) 1.

137. 'Harmonized guidelines on reporting under the international human rights treaties, including guidelines on common core document and treaty-specific targeted documents' UN Human Right Instruments General HRI/MC/2005/31st June, 2005, p. 5. See also Article 18 Convention on the Elimination of All Forms of Discrimination against Women.

138. Article 44 Convention on the Rights of the Child.

139. <http://www.ishr.ch/treaty-bodies/852-inter-committee-meeting-focuses-on-cats-new-reporting-procedure> Accessed 16th October, 2016.

reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents.[140]

3.1.1 ***Form of treaty report:*** A treaty report should generally be concise and well structured. Perhaps, in a bid to encourage uniformity in the way treaty reports are structured, some treaty bodies have provided detailed guidelines on the format a treaty report should take. The UN draft of harmonized guidelines on reporting under the international human rights treaties contains, amongst other things, the desire of the human rights treaties bodies that common core documents presented to them do not exceed 80 pages. Whilst, initial treaty-specific documents are not to exceed 60 pages, and subsequent treaty-specific documents are to be limited to 40 pages. Further, they require that Pages should be formatted for A4-size paper, with 1.5 line spacing, and text set in 12 point Times New Romans type.[141] The draft guidelines on reporting under the international human rights treaties provide a very detailed outline on the form a report to the concerned treaty bodies should take.

3.1.2 ***Content of treaty reports:*** Generally, a treaty report should provide information as to 'the measures that the state party has adopted to give effect to the provisions of the treaty, the progress made in giving effect to the provisions of the treaty, and the factors and difficulties the state party has encountered that have affected the degree of fulfillment of its obligations under the treaty'.[142] As earlier stated a treaty report consists of two complementary documents; a 'common core document and a 'treaty-specific document'. The common core document should include 'demographic, geographic, legal, political, economic, social and other basic information on the

140. A. Muller, F. Seidensticker The Role of National Human Rights Institutions in the United Nations Treaty Body Process (German Institute for Human Rights, 2007) 13, fn7

141. Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific target documents' UN Human Rights Instruments General HRI/MC/2005/3, pp9&10

142. http://www.bayefsky.com/complain/47_state_reporting.php.accessed 16th October, 2016

country, and should be updated whenever major changes occur in the country'.[143] Whilst the treaty-specific document has to address all the substantive provisions of the treaty, stating, amongst other things, legal and practical measures taken towards applying the provisions of the treaty.[144]

3.1.3 ***Procedure for treaty reporting:*** Although the procedure adopted by each treaty body in monitoring state reports differs, there are certain common elements found in the procedures. Generally, after the submission of the treaty report, the state party is invited to send representatives to present the report to the treaty body. To ensure a fruitful presentation, some treaty bodies, in advance of public presentation of the report, develop a 'list of issues', highlighting, the major concerns entertained by the treaty body regarding the implementation of the treaty. The 'list of issues' contains a list of specific requests for clarification on the content of the state report, and also on issues still unanswered from the examination of previous reports.[145] The 'list of issues' also aids in giving structure to the dialogue between the State part and members of the treaty body.[146] At the presentation of the report, the State representative is given an opportunity to dialogue with members of the treaty body, answering whatever questions they may have in respect of the report and noting whatever concerns that are raised. At the close of the presentation, the treaty body adopts concluding "observation" or "comments" on the state party's report. The concluding comments or observations contain concerns, raised by the treaty body about non-compliance. Finally, the treaty body makes recommendations to the state party to enable improved application of the treaty within the State.[147]

143. Muller, A. Seidensticker, F. ibid, p 13.
144. Ibid.
145. Ibid, p 14
146. Ibid, p 15
147. http://www.bayefsky.com/complain/47_state_reporting.php.accessed 16th October, 2016

The procedure for reporting on human rights treaties as set out by the harmonized guidelines is reproduced below:

(a) The State party submits the common core document to Secretary-General which is then transmitted to each of the treaty bodies monitoring the implementation of the treaties to which the State is party;

(b) The State party submits the treaty-specific document to the Secretary-General which is then transmitted to the specific treaty body concerned.

(c) Each treaty body considers the State report, consisting of the common core document and its treaty-specific document, according to its own procedure.

To achieve their desired result, treaty bodies have resorted to specifying what they, as individual bodies, expect should be contained in treaty reports. According to the UN draft of harmonized guidelines on reporting under the international human rights treaties,[148]

> The common core document should contain information relating to the implementation of each of the parties to which the reporting State is party and which may be of relevance to all or several of the treaty bodies monitoring the implementation of those treaties. The aim is to avoid reproducing the same information in several reports produced in accordance with the provisions of different treaties. It also allows each committee to view the implementation of its treaty in the wider context of the protection of human rights in the State in question.

148. 'Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents' Ibid, Paras 27 and 28.

The treaty-specific document should contain information relating to the implementation of the treaty which is of specific interest to the committee monitoring the implementation of that treaty or which needs to be brought to the particular attention of that committee, as well as any issues of particular concern which may be raised by the committee on a case-by-case basis.

3.2.0 THE TREATIES UNDER STUDY

3.2.1 THE CHILD RIGHTS ACT, 2003

The Child Rights Act, 2003, hereinafter referred to simply as 'the Act', is borne out of The Convention on the Rights of the Child and the African Union Charter on the Rights and Welfare of the Child. This Act was enacted principally to protect the rights of the Nigerian Child[149] whose rights were before the enactment of the Act not comprehensively provided for by any statute in Nigeria. The Child Rights Act, 2003 comprises 278 Sections[150] and 11 Schedules. The Act came into effect on the 31st day of July, 2003 against the backdrop of prevalent abuse of the rights of children in Nigeria due not just to ignorance of the populace on what rights accrue to children but due also to lack of political will by the Nigerian government to secure these rights.

Part I of the Act contains provisions stipulating that the best interest of the child is to be of paramount consideration in all actions concerning the child. Section 1 of the Act embodies what rightly be regarded as the central principle governing the application of the Act. The provision contain in Section 1 was welcome by the Committee on the Rights of the Child. However what is regarded as being in the best interest of the child is subject to debate.[151] Section 2(1) of the Act provides inter alia that 'a child shall be given such protection and care as necessary for the wellbeing of the child...'

149. See Preamble to the Child Rights Act, 2003
150. Divided into 24 Parts
151. Committee on the Rights of the Child, 54th session, Ibid, 8

Whilst Section 2(2) of the Act provides

> Every person, institution, service, agency, organization and body responsible for the care of protection of children shall conform with the standards established by the appropriate authorities, particularly in the areas of safety, healthy, welfare, number and suitability of their staff and competent supervision.

The Act omits to provide a penalty where the provisions of Section 2 are breached. In effect, where the above provisions are breached, redress lies only in civil litigation.

Part II of the Act provides for the rights and responsibilities of a child. These rights are more encompassing than the general rights provides for in Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 as Section 3 of the Act incorporates into the Child Rights Act, the provisions of Chapter IV of the Nigerian Constitution in addition to other rights set out in Section 4 to 18 of the Act.

Generally, any High Court in a state has jurisdiction to hear matters on the enforcement of the provisions of Chapter IV, of the 1999 Constitution, but in the case of the enforcement of the rights of a child, Section 152 of the Act restricts jurisdiction to the family court at the High court level. Hence where any of the rights of a child as provided for by Section 3 to 18, is infringed upon or there is a threatened infringement, redress can be sought at the family court at the High court level. Although, Section 161 provides that the Chief Justice of Nigeria may make rules regulating the procedure in the family court, this Section also admits the provisions of any written relating to the practice and procedure at the Magistrate or High Court which is not inconsistent with the provisions of the Child Rights Act. Thus, the provisions of the Fundamental Rights (Enforcement Procedure) Rules, may regulate

an application for the enforcement of the rights of the child as long as the said provisions do not fly in the face of the provisions of the Child Rights Act. Section 19 of the CRA outlines the responsibility of a child towards his family and society, the Federal Republic of Nigeria and other legally recognized communities, nationally and internationally, whilst Section 20 of the CRA places the responsibility of providing guidance with respect to the child's responsibilities on every parent, institution, person and authority responsible for the care upbringing, maintenance, education, training, socialization, employment and rehabilitation of a child. No penalty is stipulated for breach of the provisions of Sections 19 and 20 CRA. Indeed it would fall within the realm of the ridiculous if penalties were attached to failure of a child to 'respect his parents, superiors and elders at all times', etc. The provisions of Section 19 and 20 CRA are not practicably enforceable in any court of law in Nigeria. They may, at best, be regarded as ideals to be attained by all concerned parties.

Part III of the Act provides for the protection of the rights of a child. This Part prohibits certain activities such as child marriage[152], Child bethrothal[153], Tattoos and skin marks on children[154], exposure of children to use, producing and trafficking of narcotic drugs[155], etc. For every act prohibited under this Part, penalties are provided. In a bid to cover all loopholes, Section 26 of the Act contains an omnibus provisions and stipulates a penalty for its contravention. The provision of the Act on child marriage has been at the heart of the controversy surrounding the implementation and application of the Convention on the Rights of the Child. Some states in the Northern part of Nigeria have refused to pass the Child Rights Law because it goes against their religious and cultural practice which encourages child marriage. Jigawa State has in

152. Section 21 CRA
153. Section 22 CRA
154. Section 24 CRA.
155. Section 25 CRA

passing its Child Rights law reduced the marriageable age to 'puberty'. The above act by Jigawa state has been discouraged by the Committee on the Rights of the Child.[156] The committee expressed serious concerns over the extremely high prevalence of early marriage among female children in the Northern states in Nigeria and its attendant impact on the enjoyment of other human rights especially the rights to education.[157] To guard against fundamental disparities in the various Child Rights Laws in the federation, the Committee strongly recommended the placement of Child rights under the Concurrent Legislative List.[158] If this recommendation is carried out, the Child Rights Act will prevail over Child Rights Laws in the event of inconsistencies between them[159].

Section 30 of the Act prohibits the buying, selling or otherwise dealing in children of the purpose of hawking or begging for alms or prostitution, etc. Section 30(3), which supposedly is the penalty section for Section 30, only provides a penalty for the contravention of the Provisions of Section 30(1). Therefore, b implication, if a person contravenes the provisions of Section 30(2) he cannot be punished under the Act. It may be argued that Sections 26, 32 and 33 of the Act would avail the Prosecutor of a contravener of Section 30(2). This argument would not hold as these Sections apply to offences not already mentioned in the Act.

Section 34 of the Act prohibits the recruitment of children into the Armed Forces. Section (2) of this Section places on the Government or 'any other relevant agency or body', the responsibility of ensuring that no child is 'directly involved in any military operation or hostilities'. No penalty is attached to this section, perhaps in view of the impracticability of convicting the government or any of its agencies of bodies of offences.

156. Committee on the Rights of the Child, 54th session, Ibid p. 8
157. Ibid, p 18
158. Ibid, 3.
159. See S. 4(5) Constitution, Federal Republic of Nigeria, 1999 as amended

Part IV of the Act contains provisions aimed at providing security for abused children. Section 41 and 42 which deal with Child Assessment and Emergency Protection orders use the word 'may'. This connotes that it is optional for the relevant authorities to apply for these orders. Hence no duty lies on the state government or any appropriate authority to apply for these orders in the stipulated cases contained in the aforementioned Sections. However, where the option is exercised, Section 4294) of the Act provides that a person who willfully obstructs another from exercising power under subsection (3)(c) and (d) of Section 42 commits an offence.

Unlike Section 41 and 42 CRA discussed above, Section 45 of the Act makes it mandatory for a state government to conduct investigations where it is informed that a child is the subject of an emergency protection order or has been taken into police protection or where the state government has reasonable cause to suspect that a child is suffering or is likely to suffer significant harm. Hence, where a state government fails in this duty after a request has been made to it by an interested party, it follows that an order of mandamus may be sought and obtained, compelling the state government through its relevant official, to perform this dity[160]. However, the Order of mandamus, if granted, can only compel the State government to investigate. It cannot compel the state government to, based on its investigation, decide in a particular way. In order words the State government cannot be compelled to, based on its investigation, come up with a decision to safe guard the child concerned.

The Part V of the CRA provides for a child in need of care and protection. The Committee on the Rights of the Child has urged the Nigerian Government to 'Take all necessary measures to provide alternative child care options for children currently living in remand homes, with a view to abolishing the use of remand homes for the care of children without a family'.[161] This is necessary because it is considered

160. State v. Electricity Corporation of Nigeria, Ex parte Savage 8 BNLR, 55.
161. Committee on the Rights of the Child, 54th session, Ibid, 14

unhealthy for orphaned and vulnerable children to be placed in the same home with children in conflict with the law.[162] Towards the effective application of the provisions contained in this Part, Nigeria formulated the National Plan of Action on Orphans and Vulnerable Children (2006-2010) and the National Guidelines and Standards of Practice on Orphans and Vulnerable Children[163].

Part VI of the CRA provides for the case and supervision of children, Part VII contains provisions for use of scientific tests in determining the maternity or paternity of a person. Furthermore, Part VIII contains provisions dealing with the possession and custody of children. Arts IX and X deal with guardianship and wardship of children, respectively.

Part XI of the CRA contains provisions dealing with the very dedicate issue of the fostering of children. Section 113 CRA makes provision for child development officers to monitor the progress of fostered children. Section 121 CRA places on the Minister, the choice of making regulations governing private fostering of children. Private fostering of children has from time immemorial in Nigeria been an unregulated issue subject only to the whims and caprices of the relatives of the child. The country still awaits the regulations governing private fostering of children.

Part XII contains provisions dealing with the adoption of a child. The Committee on the Rights of the Child has noted that although Nigerian laws do not allow for inter-country adoption, the practice remains unregulated and is on the increase.[164] Another issue raised by the Committee is that of the existence of "baby farms" where children are sold to prospective adoptive persons who in turn sell them for profit'.[165] The Nigerian Government was urged to continue her efforts towards the eradication of these 'baby farms'.

162. Ibid.
163. Ibid, 13
164. Ibid,14
165. Ibid

Part XIII contains provisions dealing with the family court. By the provisions of Section 152 of the CRA, the family court shall at the High Court level be duly constituted if it consists of a Judge and Two Assessors. At the Magisterial level, Section 153 provides that the family court shall be duly constituted if it consists of a Magistrate and two assessors, one of which shall be a woman. Despite the provisions of the Act, only eight states in Nigeria have established family courts.[166] The Committee recommended that the Nigerian government 'expedite the establishment of family courts in all states and ensure that they are provided with adequate human and financial resources.[167] Section 155 that a child has the right to be represented by a Legal Practitioner and to free legal aid. Bodies such as the Legal Aid Council and the International Federation of Women Lawyers are playing a commendable role in upholding this provision. Section 158 of the CRA is yet another immensely important section as it provides that the atmosphere in the Family courtroom should be one of understanding allowing the child to express himself and participate in the proceedings. This provision is vital, as the atmosphere of a regular court may be found overwhelming by a child appearing before it.

Art XIV of the Act deals with Child minding and Day care of the young children. Part XV contains very idealistic provisions dealing with State government support for children and families. Part XVI contains provisions dealing with the establishment and management of community homes by state governments and Voluntary Organizations. Part XVII contains provisions dealing with Voluntary Homes. Part XVII contains provisions dealing with registered Children's Homes whilst Part XIX contains provisions dealing with the supervisory functions of the Minister.

166. 'Combined 3rd and 4th Periodic Reports of Nigeria During the 54th Session of the United Nations Committee On the Rights of the Child'. (Defence for Children International, June 2010, p15) ibid

167. Committee on the Rights of the Child, 54th session, ibid, 28.

Part XX contains general provisions dealing with Child justice administration. To aid in the application of the Act, Part XXI provides for the appointment of Supervision Officers and Inspectors. Part XXII contains provisions dealing with approved institutions and Post-Release supervision of children. Under this Part, Section 248 provides a list of institutions that mandatorily should be established by the Minister. Finally, Part XXIII contains provisions on the establishment and functions of the National, State and Local Government Child Implementation Committee. This Committee is to ensure the observance of the rights and welfare of the child as provided in the Act and other relevant treaties and Declarations.[168] Notably, there is a pending Bill before the National Assembly which proposes the establishment of a Child Protection Agency. This agency, when set up will function as the main coordinating body on children's rights in the Nigeria.[169] The National Child Rights Implementation Committee has been set up but same cannot be said of all the states and Local government Child Rights Implementation Committees.

3.2.2 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (RATIFICATION AND ENFORCEMENT) ACT

The African Charter on human and Peoples' Rights was adopted in 1981 and domesticated by Nigeria in 1983 pursuant to Section 12(1) 1979 Constitution as the AFRICAN Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No. 2 of 1983.[170] The Act is made up of only two Sections and a schedule which contains the text of the Charter. Nigeria is said to be the only common law country in Africa to have domesticated the Charter in its entirety.[171]

168. S. 261 CAR
169. Committee on the Rights of the Child, 54th session, Ibid, p3.
170. The Acts is now contained in Cap A9 Laws of the Federation of Nigeria, 2004 (hereinafter referred to as Cap A9).
171. African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the Third Periodic Report of the Federal Republic of Nigeria' (2008) p. 3 http://www.achpr.org/english/other/con observation/Nigeria/3rd co Nigeria.pdf accessed 19 October, 2016

Generally, CAP A9 is one of the most litigated upon treaty enabling statutes in Nigeria. Almost on a daily basis in Nigeria rely on its provisions to enforce the fundamental rights of individuals. Hence, there are a plethora of cases hinged on CAP A9a. Chief amongst these cases is the case of *Abacha v. Fawehinmi*[702]. This case is of such fundamental importance to the status of not just CAP A9 but also other treaty implementing statutes in Nigeria that copies of the Court of Appeal and Supreme Court decisions in this case were specifically requested for by the African Commission during the presentation of the Third Period Report of the Federal Republic of Nigeria.[173] In *Abacha's* case, the Supreme Court of Nigeria held that CAP A9, being a statute with 'international flavour' occupies a position far above other municipal statutes and is subject only to the Nigerian Constitution. This decision of the Supreme Court has been the subject of intense debate but has nevertheless been upheld in several other cases such as *Chima Ubani v. Director of State Security Service and Another*[174] and *Comptroller Nigerian Prisons v. Dr. Femi Adekanye and 26others*[175]

In its preamble, the Charter, amongst other things, states that '... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. In view of this the Charter makes no distinction between the enforcement of socio-economic rights and Civil and political rights as against the provisions of the 1999 Constitution where socio-economic rights are regarded as non-justiciable. To buttress this point, Article 1 of the Charter provides that, 'The member states of the African Union (AU) parties to the present Charter shall recognize the rights, duties and freedom enshrined

172. (2001)51 WRN 29.
173. African Commission on Human and Peoples' Rights, Ibid, 8.
174. (1991) 11 NWLR (PT 625) 129.
175. (1999) 10 NWLR (PT 623) 400

in this Charter and shall undertake to adopt legislative or other measures to give effect to them'.

Articles 2 to 29 of the Charter deal with rights and duties of individuals and States Parties. Hence, rights which cannot be subject of litigation under the 1999 Constitution can be litigated upon under Cap A9. For instance, Article 17 of the Charter which provides for the rights to education was litigated upon in the case of *SERAP*[176] *v. Federal Republic of Nigeria and Universal Basic Education Commission*[177] where the ECOWAS Community Court of Justice in Abuja declared that all Nigerians are entitled to education as a legal and human right.[178]

To promote human and peoples' rights and ensure their protection in Africa, the African Commission on Human and Peoples' Rights was established.[179] The Commission has the mandate to amongst other things, 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedom upon which African government may base their legislations',[180] however, Article 45(3) of the Charter which provides that the Commission shall 'Interpret all the provisions of the present Charter at the request of a State Party, an institution of the AU or an African organization recognized by the AU' impliedly excludes individuals. In view of this lapse the Commission has recommended that the Nigerian Government "Make the declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, allowing individuals to have standing and bring cases before the African Court'. If this

176. Socio Economic Rights Accountability Project.
177. No ECW/CCJ/APP/08/08.
178. http://www.right-to-education.org/node/717 and http://ww.serap-nigeria.org/cover/ecowas-court-to-fg-nigerians-have-a-legal-right-to-education/Accessed 18 October, 2016.
179. Article 30.
180. Article 45(1)(b)

recommendation is carried out the application of the Charter will be greatly improved.

The Federal Ministry of Justice being the coordinating Ministry responsible for ensuring compliance with the African Charter on Human and Peoples' Rights co ordinates the preparation of treaty reports to the African Commission on Human and Peoples' Rights in line with Article 62 of the Charter. To promote the application of the Charter, Nigeria, in the last report[181] presented to the Commission, stated that lack of concrete legislation on discrimination against women was one of the challenges faced in the application of the Charter. To address this, a Bill for the Abolition of all Forms of Discrimination Against Women in Nigeria and Other Related Matters, which seeks to domesticate the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was before the National Assembly which did not see the light of the day by the 8 Assembly. The Commission urged the Nigerian Government to pass this Bill into Law together with the Anti-Discriminatory Laws and Practices in Nigeria Bill.[182]

Also contained in the Periodic report was a recommendation for the repeal of Section 55(1) of the Penal Code Law[183] which endorses wife battery as chastisement. This recommendation is yet to be carried out by the Law Reform Commission.

3.2.3 NATIONAL HUMAN RIGHTS PROTECTION MECHANISM

Under international law, governments are accountable for human rights violations perpetuated by their own officials, including members of their security forces. Hence, State are required to put measures in place to prevent human rights violations. Where there are allegations of violations, States are to carry out prompt and impartial investigations and provide reparations to the victims. In line with this duty, the Nigerian Government has created a central fund 'to address the inadequacies in the

180. Article 45(1)(b)
182. African Commission on Human and Peoples' Rights, Ibid, 9 & 10.
183. CAP 89 LFN, 1990

enforcement of monetary compensation awarded in favour of victims of human rights violations perpetrated by the Government or any of its agencies'.[184] To further ensure the protection of human rights, States are to adopt laws and administrative procedures geared towards the protection of human rights within the State.[185]

Human rights have been classified into generations. Civil and political rights as enshrined in the International Covenant on Civil and Political Rights are categorized as first generation rights. They are also regarded as negative rights. Economic, social and cultural rights as encapsulated in the International Covenant on Economic, Social and Cultural Rights are categorized as second generation rights and are also referred to as positive rights. Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 contains provisions that are geared towards guaranteeing the protection of civil and political rights. These rights are, in the Constitution referred to as fundamental rights. To further ensure that the first generation rights of its populace are protected, the Fundamental Rights Enforcement Procedure Rules, 2009, lays down the procedure to be followed in the pursuit of the enforcement of a person's human rights in Nigeria. On the other hand, second generation rights are provided for in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999, wherein they are couched not as rights but as ideals to be attained by the State. The said Chapter of the Constitution is in fact titled 'Fundamental Objectives and Directive Principles of State Policy'. Section 6(6)(c) of the Constitution of the Federal Republic of Nigeria, 1999 makes the rights contained in Chapter II of the Constitution non-justiciable. The courts in Nigeria have affirmed that the provisions of Chapter II of the Constitution cannot be litigated upon.[186] However these second generation rights can also be found

184. African Commission on Human and Peoples' Rights, Ibid, p4. This fund was created by the former Attorney General of the Federation, Chief Michael Kaase Aondoakaa.

185.<http://www.amnesty.org/en/human-rights-defenders/issues/protection-mechanisms/state>accessed 16th October, 2016.

186. See Archbishop Anthony Olubunmi Okojie & Ors v. Attorney General of Lagos State (181) 2 NCLR p. 337; also Chief Adebiyi Olofinsaye v. Federal Republic of Nigeria (2004)4 NWLR (Pt 864), 581.

in the African Charter on Human and Peoples' Rights which has been domesticated in Nigeria. The Charter provides for both first and second generation rights. The provisions of its enabling statute, the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act[117] have been held by the courts to be justiciable in the case of *Abacha v. Fawehinmi*[188]. Hence, social economic and cultural rights can be enforced in Nigeria via the provisions of the African Charter on Human and Peoples' Rights Act as the Constitution does not make these rights in themselves non justiciable. The widely accepted interpretation to the provisions of Section 6(6)(c) is that social, economic and cultural rights cannot be enforced relying on the provisions of Chapter II of the Constitution but they can, however be enforced if found in other enactments.[189]

In order to protect human rights and in accordance with the Paris Principles, some States such as Nigeria, have created National Human Rights Institution (NHRIs). These institutions go by different nomenclatures in their respective states[190]. They 'are expected to act independently of the government and must be given sufficient resources to prevent dependency on state financial or other control'[191]. The Paris principles which were adopted by the UN General Assembly in 1993[192] formulate standards aimed at guaranteeing the independence of NHRIs. The role of NHRIs in the protection of human rights can be garnered from the provisions of the Paris Principles which states that,

NHRIs should encourage ratification of international instruments and encourage their implementation,... contribute to State reports which are required to be submitted by

189. See the case of A.G Ondo State v. A.G Federation & Ors (2002)9 NWLR (PT 772) 222 where the . Supreme Court held that, corruption though non justiciable as contained in Section 15(5) of the Constitution, could be made justiciable by the enactment of an Act on Corruption by the National Assembly.
190. In Australia, it is referred to as the Australian Human Rights and Equal Opportunities Commission and in Nigeria as the National Human Rights Commission.
191. Ibid
192. Muller, A. Seidensticker, F *The Role of National Human Rights Institutions in the United Nations Treaty Body Process* (German Institute for Human Rights, 2007)

State parties to United Nations bodies or Committees ... pursuant to their treaty obligations and where necessary to express an opinion on the subject, with due respect to their independence.

3.2.4 NATIONAL HUMAN RIGHTS COMMISSION

The NHRI in Nigeria, referred to as the National Human Rights Commission was established by Decree 22 of 1995.[193] Presently, the National Human Rights Commission, hereinafter referred to simply as 'the Commission', derives its powers from the National Human Rights Commission Act, 2010.

The Commission serves as a mechanism for the enforcement of human rights in Nigeria. It does this by monitoring the application of human rights treaty implementing statutes such as the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and the Child Rights Act.[194] Section 5(a) NHRC Act gives the Commission power to

> Deal with all matters relating to the promotion and protection of human rights guaranteed by the Constitution of the Federal Republic of Nigeria, the United Nations Charter and the Universal Declaration of Human Rights,... the International Convention on Economic, Social and Cultural Rights,... the Convention on the Rights of the Child, the African Charter on Human and Peoples Rights and other international and regional instruments on human rights to which Nigeria is a party;

To this end, the Commission, in 1999, before the Joint National Assembly and residential Committee on the Review of the 1999 Constitution canvassed, without success, for the upgrading of socio-economic rights to the status of fundamental

193. Ladan, M.T *Introduction to International Human Rights and Humanitarian Laws* (Ahmadu Bello University Press, Zaria, 1999) 447.
194. S.S. NHRC Act, 2010

rights.[195] Presently, 'the promotion of the progressive realization of economic, social and cultural rights'[196] is considered a matter of top most priority by the Commission. Hence all rights are treated as equal by the Commission[197].

To assess the effectiveness or otherwise of the NHRC in carrying out their aforementioned responsibilities, the ideal parameter would be the Paris Principles. The UN General Assembly Resolution 48/134 of 20th December, 1993, generally referred to as the 'Paris Principles' lays down guidelines for the effective functioning of NHRIs, Central to the effective functioning of NHRI is its independence.[198] Thus, paragraph 1 of the *Principles Relating to the Status of National Institution*[199] status that 'A national institution shall be vested with competence to promote and protect human rights'.

As part of its responsibilities an NHRI is to examine bills and 'make such recommendations as it deems appropriate in order to ensure that its provisions conform to the fundamental principles of human rights'.[200] Regarding this principle, the NHRC has fared poorly. The focus of the Commission appears to be on making recommendations towards the passage of pending bills. For instance, the Commission is recommending the passage of the bill seeking to domesticate the Convention Against Torture which same was thrown out by the 7th Assembly.[201]Similarly, the Commission joined other Civil Society Organisations in advocating for the passage of the enacted Freedom of Information Act and it scaled through.[202] The Commission

195. NHRC http://www.nigeriarights.gov.ng/index.php?option=com contents&view=article&id=26&itemid=74 has also recommended

196. Ladan, M.T '365 Days of Dynamism and Remarkable Success' Human Rights Newsletter, NHRC April-June, 2010, Vol. 10, 24.

197. 5th African National Human Rights Institutions Conference: The Imperatives of Economic, Social and Cultural Rights'. Human Rights Newsletter, NHRC July-Sept.. 2006 VOL. 5 NO. 2, 18.

198. This was reaffirmed at the international Conference of NHRIs in Edinburg, Scotland held from 8th-10th Oct, 2010. See Communique in Human Rights Newsletter, NHRC, Oct.-Dec 2010, Vol:11, 27.

199. Annexed to the Paris Principles.

200. Paragraph 3(a)(i) Principles Relating to the Status of National Institutions. Annexed to the Paris Principles.

201. Commentary, Human Rights Newsletter, NHRC, Oct-Dec, 2010, Vol:11, 5.

202. Statutory Report: National Human Rights Commission in Human Rights Newsletter, NHRC, July- Sept., 2006 Vol. 5 No. 2, 27. See also 'NHRC Condemns Continued Delay in passing FOI Bill'
national Human Rights Commission in Human Rights Newsletter, NHRC July-Sept, 2008 Vol 8, No 1, 6.

that the bills on CEDAW and the Convention on Persons with Disabilities, which were currently before the National Assembly and it could not be passed without further delay[203]. While these activities spring from the responsibilities of the Commission and should therefore be encouraged, it is also pertinent that the Commission examine legislation in force with the goal of identifying provisions that go against the fundamental principles of human rights. This is a responsibility of the Commission that can be garnered from paragraph (d) of the *Additional Principles Concerning the Status of Commissions with Quasi-Judicial Competent.*[204] The Paris Principles[205] clearly places responsibility on NHRIs 'to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation'. In line with this principle, Section 5 of the 2010 Act now contains a paragraph[206] which provides that the Commission shall 'examine any existing legislation, administrative provisions and proposed bye-laws for the purpose of ascertaining whether such enactments or proposed bills or bye-laws are consistent with human rights norms;'

The Commission is also mandated to contribute to treaty reports.[207] This mandate the Commission has striven to carry out.[208] Towards the fulfilling of the above mandate, the Commission in the year 2008, organized a Meeting of Stakeholders, one of whose recommendations was that a National Working Group on Treaty Reporting Process be established. Sequel to this recommendation, the Working Group was inaugurated in 2010 to, amongst other things, 'ensure timely preparation, submission and

203. UN General Assembly A/HRC/WG.6/4/NGA/3 27 November, 2008 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1, 2
204. Under the Paris Principles.
205. Paragraph 3(b) Principles Relating to the Status of National Institutions. Annexed to the Paris Principles.
206. Section 5(k).
207. Paragraph 3(d) Ibid.
208. See UN General Assembly A/HRC/WG.6/4/NGA/3 27 November, 2008, Ibid.

examination of required reports under each treaty by both United Nations and African Union treaty bodies'.[209]

The independence on an NHRI has right been said to flow from the security of tenure of the leadership of council members.[210] In 2000, the Commission was accredited with an 'A' status[211] by the International Co-ordinating Committee (ICC) of NHRIs. This implied that the Commission was considered independent and had met the standard set up by the Paris Principles. However, sometime in 2007, the status of the Commission was downgraded to a 'B' status.[212] This downgrading was as a result of the loss of independence of the Commission which in turn was as a result of undue government interference in the activities of the Commission. For in 2006, the executive secretary of the Commission, Bukhari Bello, was arbitrarily removed.[213] Furthermore, in 2007, the commissions governing council was arbitrarily dismissed before the expiration of their tenure. Again in 2009, the then, executive secretary of the Commission, Khehinder Ajoni was also arbitrarily removed.[214] Three acts of government interference in the affairs of the Commission within a period of three years. It is no wonder that the country's 'A' status was withdrawn. The afore mentioned executive secretaries of the Commission were removed before the expiration of their tenures against the stipulation of the Paris Principles.[215]

As a result of Nigeria's loss of her Grade 'A' status the NHRC Act has been amended to, amongst other things, secure the independence of the Commission and also grant

209. 'AG Sets up Committee on Treaty Reporting' Human Rights Newsletter, NHRC, Oct-Dec, 2010, Vol: 11, 22.
210. Human Rights Newsletter, NHRC, April-June, 2010, Vol: 10, 20.
211. Voting Status.
212. Observer status.
213'NBA Writers President on NHRC Bill' Human Rights Newsletter, Oct-Dec, 2010 Ibid, 8.
214. Nigeria: Goodluck Signs Landmark Human Rights Act' Tuesday, http:www.everyhumanhasrights.org/component/content/article/9-human-rights-news/209-nigeria-goodluck-signs-landmark-human-rights-act Mar 29, 2011 Accessed 20th October, 2016.
215. Paragraph 6 Principles Relating to the Status of National Institutions. Ibid.

216. 365 Days of Dynamism and Remarkable Success' Human Rights Newsletter, April-June, 2010, Vol:10, 24.
217. CAP N46 LFN, 2004.

her financial independence in line with paragraph 5 of the *Principles Relating to the Status of National Institutions.* Inadequate funding of the Commission had before the enactment of the NHRC Act, 2010, been a major challenge faced by the Commission in carrying out its duties.[216] It was in view of this that Section 10 of the 1995 Act which provided that, 'the Commission shall *with the approval of the Attorney-General of the Federation,* determine its conditions of service, including pension and gratuities as are appropriate for its employees' (emphasis mine) has been amended to give the Commission financial autonomy. The new Section 10 reads thus, 'The Council shall determine the conditions of service, including salaries, pensions and gratuities as are appropriate for its employees'. In the same vein, Section 12 of the 1995 Act was amended to include a new sub-section (2) which stipulates that 'The fund of the Commission shall be a charge on the Consolidated Revenue of the Federation'. Charging the fund of the Commission in the Consolidated Revenue Fund (CRF) protects it from interference, thereby promoting the independence of the Commission. It is hoped that these amendments to the NHRC Act will create an enabling environment for the Commission to function maximally. Below is a consideration of some other vital amendments to the NHRC Act.[217]

On the security of tenure of members of the Commission, Section 4(2) of the 1995 Act which read thus, 'A member of the council may be removed from office by the President if he is satisfied that it is not in the interest of the public that the member should remain in office' has been re-phrased to the effect that the President can now only remove a member of council subject to confirmation by a simple majority of the Senate and only under the conditions enumerated in sub-paragraph (1)(a)-(d).

On the independence of the Commission, the phrase, 'as it considers appropriate' is

216. 365 Days of Dynamism and Remarkable Success' Human Rights Newsletter, April-June, 2010, Vol:10, 24.
217. CAP N46 LFN, 2004.

repeatedly used in the 2010 Act to enhance the independence of the Commission. For instance Section 5(h) of the 1995 Act which provided that the Commission shall 'participate in all international activities relating to the promotion and protection of human rights' has been amended to read, 'participate in such manner *as it considers appropriate* in all international activities relating to the promotion and protection of human rights'. (emphasis mine). Similarly, Section 6(a) of the NHRC Act which previously stated that the Commission shall have power to 'do all things which by this Act or any other enactment are required or permitted to be done by the Commission'. Has been amended to read thus, 'the Commission shall have power to conduct its investigations and inquiries in a manner *as it considers appropriate'*. (emphasis mine). While Section 5(h) and 6(a) of the 1995 Act were not necessarily restrictive, it is apparent that the powers of the Commission as couched in the amended Act reflect autonomy and independence. To further enhance the independence of the Commission Section 23 of the 2010 Act provides that, "The Commission may make such regulations as it deems necessary or expedient to give effect to the provisions of this Act'. This provision is a commendable departure from the provisions of Section 18 of the 1995 Act which bestowed the power to make regulations on the Attorney-General of the Federation. Also worthy of note is Section 6(3) of the 2010 Act which provides that, 'in exercising its function and powers under this Act, the Commission shall not be subject to the direction or control of any other authority or person'. This sub-section could rightly be said to be the bedrock of the, newly attained, independence and autonomy of the NHRC.

Increasing the powers of the Commission, Section 6(b)-(e) of the 2010 Act vests the NHRC with powers to, in specified instances, summon and compel the attendance of any person, body or authority. The 1995 Act was devoid of this very important

provision. To further empower the Commission Section 6(4) and (5) make it an offence punishable with a term of 6 months imprisonment or a fine of N100,000.00 for any person, body or authority to, amongst other things, refuse to comply with 'lawful directives, determination, decision or finding of the Commission'. This, essence implies that the decisions of the Commission now carry more weight than was the case under the 1995 Act. Adding to this weight, a new Section 22 is included in the 2010 Act. This Section provides that 'An award or recommendation made by the Commission shall be recognized as binding and ... shall, upon application in writing to the court, be enforced by the court'. By virtue of this provision, an award of the NHRC now has a similar status with an award of an Arbitral tribunal.[218]

To buttress the commitment of the Nigerian government towards the application of human rights treaty provisions, the National Action Plan (NAP) on human rights has been reviewed and on 24th July, 2009, was deposited at the Office of the United Nations High Commissioner for Human Rights.[219] This is considered to be a major milestone as it makes Nigeria the second country in Africa to take this step towards the enforcement of human rights.[220]

The National Action Plan on Human Rights stems from the recommendations of the Vienna Declaration and Programme of Action adopted at the Human Rights World Conference in 1993. The Declaration mandates each State to 'consider the desirability of drawing up a National Action Plan, identifying steps whereby the State would improve the protection and promotion of human rights'.[221] In essence, the NAP contains the national policy on human rights and serves as a benchmark against which the human rights performance of the country can be assessed.

218. See S. 51 Arbitral and Conciliation Act, CAP A18 LFN, 2004
219. Ibid.
220. The first country being South Africa. See 'Nigeria Affirms Commitment To Human Rights Pursuit' Human Rights Newsletter, Ibid, 26.
221. Ibid.

3.2.5 INTERNATIONAL HUMAN RIGHTS PROTECTION MECHANISM

Prior to the 1980s the States were seen as central in the enforcement of international human rights, however, by the end of the 1980, individuals began to be viewed as playing a major role in enforcing international human rights.[222] Generally, before resort is had to international human rights protection mechanisms, the rule is that all local remedies must first have been exhausted. The exhaustion of local remedy rule is reflected in all international human rights instruments[223].

The following are some of the mechanisms through which human rights are protected under international law;

3.2.5.1 *The Human Rights Council*

The Human Rights Council was created by the UN General Assembly in 2006 to replace the Commission on Human Rights. The mandate of the Council includes addressing gross and systematic violations of human rights, contributing to the prevention of human rights violations and responding promptly to human rights emergencies.[224] The HRC meets in Geneva 10 weeks a year, and is composed of 47 elected United Nations Member States who serve for an initial period of 3 years, and cannot be elected for more than two consecutive terms.[225]

3.2.5.2 *Special Procedures*

Special Procedure is the general name given to the mechanisms established by the former Commission on Human Rights and assumed by the human Rights Council

> To address either specific country situations or thematic issues in all parts of the world. Special Procedures are either an individual a special rapporteur or representative, or independent expert-or a working group. They are prominent, independent experts working on a voluntary basis, appointed by the Human Rights Council'.

222. M.N. Shaw, Ibid, 199.
223. Ibid, 203
224. http://www.amnesty.org/en/human-rights-defenders/issues/protection-mechanism/internation accessed 19th October 2016.
225. <http:www.ohchr.org/en/hrbodies/pages/HumanRightsBodies.aspx> accessed 18th October, 2016

> Special Procedures' mandates usually call on mandate-holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates. There are 30 thematic mandates and 8 country mandates. All report to the Human Rights Council on their findings and recommendations. They sometimes the only mechanism that will alert the international community on certain human rights issues.[226]

In 200, the UN Secretary General appointed the first Special Representative on Human Rights Defenders to help implement the UN Declaration on Human Rights Defenders (DHRD). The mandate of the Special Rapporteur on Human Rights includes producing human rights reports, country visits to get a comprehensive understanding of the situation facing human rights defenders and making recommendations to improve the protection of human rights defenders.[227] The Committee on the Rights of the Child has strongly recommended that Nigeria invite the Special Rapporteurs on trafficking of Per sons and on the Sale of Children, Child Prostitution and Child Pornography to visit the country.[228]

3.2.5.3 ***Treaty Bodies***

Treaty bodies are set up by respective human rights treaties basically to monitor the performance of treaty obligations by State parties. This they do by receiving reports from State parties which reports are thereafter considered in public sessions. According to M.T. Ladan, 'there is a persuasive value derived from the examination of reports in public as governments are generally sensitive to public exposure of their human rights performance'.[229] There are Nine core human rights treaties. The most

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226. Ibid.
227. http://www.amnesty.org/en/human-rights-defenders/issues/protection-mechanism/internation accessed 19th October, 2016.
228. Committee on the Rights of the Child, 54th session, Ibid, 25.
229. Ladan, MT ibid 60.

recent one, which is the Convention on Enforced Disappearance, entered into force on 23 December 2010. Hence, there are nine core human rights treaty.[230] Some treaty bodies such as the Committee on the Elimination of Racial Discrimination (CERD) are authorized to examine complaints from individuals or groups of individuals against States provided that the concerned state recognizes the right of individual petition.[231] In the same vein, the Committee Against Torture is empowered to 'initiate inquiries, in co-operation with the state party concerned, into alleged institutions of systematic torture'.[232]

yet another treaty body is the Committee on the Rights of the Child. The UN General Assembly adopted the Convention on the Rights of the Child on 20th November, 1989. The Committee on the Rights of the Child was set up pursuant to the provisions of Article 43 of the Convention which provides for the establishment of a Committee. The Committee receives reports from States and submits reports, bi-annually, to the General Assembly through the Economic and Social Council (EOSOC).[233]

The African Commission on Human and Peoples Rights is one of the treaty bodies on the regional plane. This Commission receives reports in respect of the African Charter on Human and Peoples Rights.

The decisions of treaty bodies are termed 'concluding observations' or concluding comments'. They are formulated as views and do not have binding force.[234] They can rightly be said to be simply persuasive.

230. They are the Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee against torture, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, Committee on Enforced Disappearance and the Committee on Migrant Workers. Note that there is also a Subcommittee on Prevention of Torture, established under the Optional Protocol to the Convention against Torture. See <http:www.ohchr.org/en/hrbodies/pages/HumanRightsBodies.aspx> accessed 19th October, 2016
231. See Article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination.
232. Ladan, M.T Ibid 65.
233. Shaw, M.N Ibid, 245 & 246
234. Muller,A Seidensticker, F ibid, 20.

Several other Committees exist through which human rights are enforced under international. The aims and objectives of this study will not permit an in-dept examination of the workings of these Committees.

3.6 ROLE OF NHRIs IN THE TREATY REPORTING PROCESS

In November, 2006, a conference was held in Berlin on the role of National Human Rights Institutions (NHRIs) in the treaty reporting process.[235] The handbook on the Role of National Human Rights Institutions in the United Nations Treaty Body Process contains the following ideal roles of NHRIs in the treaty body process;[236]

a. ***Encouraging governments to comply with their reporting obligations:*** while some States are behind in their reporting obligations, there are others who have never fulfilled their reporting obligations. NHRIs are in a good position to, through dialogue, urge their governments to comply with reporting obligations.

b. ***Urging ratification of treaties and removal of reservations to ratified treaties:*** NHRIs have a role to play in canvassing the ratification of Human Rights treaties. Where their governments have reservations that defeat the object ant purpose of a treaty, NHRIs can urge their governments to withdraw or review such reservations.

c. ***NHRIs reports and additional information to treaty bodied:*** Treaty bodies welcome information from other sources to supplement reports from States. This gives treaty body a better appreciation of the implementation of a treaty within a given state.

d. ***Assisting governments to prepare reports to treaty bodies:*** NHRIs may be able to offer vital information, data and statistics on human rights issues to the government institution charged with the preparation of the treaty report. Furthermore, NHRIs may invite experts from relevant UN agencies to train their

235. Ibid, 10
236. Ibid, Chap 3.

government officials on treaty reporting. NHRIs are however advised against getting too involved in the actual preparation of the treaty report as this would affect the ability of the NHRI to be independent in discharging its function of reviewing the government's human rights record.

e. ***Encouraging NGO reporting:*** Treaty bodies have developed mechanisms wherein they can be briefed by Non Government Organisations (NGOs).[237] NHRIs are thus, to encourage the involvement of NGOs in the treaty reporting process by organizing workshops aimed at enlightening NGOs on the treaty reporting.

f. ***Interacting with treaty bodies' country rapportuers and pre-sessional working*** groups: NHRIs could contribute to the list of issues by cooperating with country rapportuers who are assigned the task of compiling these lists.

g. ***Participation in official sessions of treaty bodies:*** Certain treaty bodies[238] provide NHRIs with an opportunity to make a statement during the official presentation of their State's report.

h. ***Dissemination of concluding observations:*** NHRIs can play an important role in disseminating information on concluding observations. This they can do by publishing concluding observations in print and electronic media.

i. ***Monitoring the implementation of concluding observations:*** NHRIs may also mount pressure on their government to ensure that concluding observations are implemented. This was successfully done by the Canadian Human Rights Commission. The Canadian Human Rights Commission successfully urged its government to implement the concluding observations of the Human Rights Committee calling on Canada to immediately repeal Section 67 of the Canadian

237. Muller, A Seidensticker, F Ibid, 14.
238. Such as the Committee on the Elimination of all Forms of Racial Discrimination and the Committee on Migrant Workers.
239. Source: HRCttee (2006): Concluding Observations-Canada UN Doc. CCPR/C/CAN/CO/5, 22 April 2006.
240. The First Nations people were the original inhabitants of Canada.

Human Rights Act.[239] The offending Section excluded some first Nations people[240] from protection under the Act. It was, in other words, a discriminatory provision.

j. ***Encouraging capacity development activities by international actors:*** In cases where States may be unable to implement concluding observations for reasons other than political will, NHRIs can solicit support from international agencies to aid its government in the implementation of concluding observations.

k. ***Encouraging the acceptance of the individual complaints procedure:*** It has been reported[241] that the individuals complaints procedure under the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention Against Torture and other Cruel, inhuman and degrading treatment or Punishment (CAT) and the optional protocols to the International Covenant on Civil and Political Rights (ICCPR-OPI) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are generally under utilized NHRIs can play a role in urging their governments to accept the procedure. This can be done by explaining the benefits and purpose of the procedure to government officials. This role of NHRIs can be done in partnership with NGOs.

l. ***Awareness-raising and educational activities:*** There is generally a lack of awareness about the Individual Complaints procedure. NHRIs can thus, raise awareness by making use of the print and electronic media and also by organizing seminars.

m. ***Assisting individuals to file complaints:*** NHRIs can render assistance to individuals who wish to take advantage of the individual complaints procedure.

239. Source: HRCttee (2006): Concluding Observations-Canada UN Doc. CCPR/C/CAN/CO/5, 22 April 2006.
240. The First Nations people were the original inhabitants of Canada.
241. Muller, A Seidensticker, F ibid, 52.

This assistance can be rendered by advising such persons on the appropriate treaty body to forward their complaint to and also on the admissibility of their petition.

n. ***Urging the implementation of views:*** NHRIs can, with the permission of the complainant, assist in ensuring the implementation of UN Treaty bodies' views on petitions. This can be done by publishing the views of treaty bodies and advising their governments on implementation of views on petitions.

o. ***Encouraging the enactment of enabling legislation:*** Columbia, Finland and Spain, amongst others, have enacted enabling legislation giving treaty bodies' views on petitions a defined status under their domestic law. This allows victims to enforce the views of treaty bodies through local courts or administrative bodies.

3.7 ROLE OF THE NIGERIAN LAW REFORM COMMISSION

The Nigerian Law Reform Commission was established by the Nigerian Law Reform Commission Act. The Long Title of the Act reads thus,

> An Act to set up a Law Reform Commission for Nigeria to undertake the progressive development and reform of substantive and procedure law applicable in Nigeria by way of codification, elimination of anomalous or obsolete laws and general simplification of the law in accordance with general directions issued by the government, from time to time and for matters connected therewith.

Also of particular interest are the provisions of Section 5 of the Act which provides for the functions of the Commission. This Section generally bestows on the Commission the responsibility to review and codify all Federal laws. Furthermore, amongst the specific duties of the Commission are 'the repeal of obsolete, spent and unnecessary enactments' and 'the reduction in the number of separate enactments.

The NLRC has, over the years confined itself to the codification of the laws of the federation, neglecting its duty of repealing obsolete provisions contained in our statute books. It is the duty of the NLRC to rid the nation not just to conflicting statutes but also of multiple enactments on an issue. For instance, while Section 277 Child Rights Act defines a child as a person below the age of 18 years, Section 29 Criminal Procedure Act places the age of a child at 13 years and below. Also, while Section 31 of the Child Rights Act, on one hand, provides that,

- No person shall have sexual intercourse with a child. A person who contravenes this Section commits an offence of rape and shall be liable to life imprisonment. *It is immaterial that the offender believed the person to be 18 years or above;* or that the child consented to sexual intercourse (emphasis mine).

Section 218 Criminal Code on the other hand, provides that, 'Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning'. This provision of the Criminal Code does not provide for children above 13 years. Another provision of the Criminal Code that attempts to derogate from the provision of Section 13 CRA is Section 220 Criminal Code. This Section provides a defence for a person charged with defiling a girl below the age of thirteen. By the provisions of this Section, the Accused has a defence if he believed on reasonable grounds that the girl was or above the age of 16 years. Furthermore, while Section 21 CRA provides that 'No person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void'. Section 29(4)(a) 1999 Constitution states that "full age" means the age of 18 years and above". Subsequently, Section 29(4)(b) provides that 'any woman who is married shall be deemed to be of full age'. This

provision of the Constitution impliedly permits the marriage of persons under the age of 18 years.

The above are but a few of the provisions contained in existing enactments that attempt to derogate from the provisions of the CRA which is an Act that has its roots not just in the Convention on the Rights of the Child but also in the African Union Charter on the Rights and Welfare of the Child.[242] It may be argued that the Constitution is supreme and thus should not be amended to place it in line with any other enactment. This argument would be flawed as Section 19 CFRN 1999 which contains the foreign policy objectives of the nation provides, amongst other things, for 'respect for international law and treaty obligations'. In view of this provision, it will certainly not be out of place for the Constitution to be amended to conform with international law standards.

3.8 ROLE OF THE COURTS

Section 6 CFRN, 1999 vests judicial powers in the courts. It is the duty of the courts to interpret and pronounce on the provisions of statutes when matters hinging on these statutes are brought before the courts. When treaty enabling statutes are brought before the Nigerian Courts for interpretation and enforcement the courts are not to lose sight of the provisions of Section 19(d) CFRN 1999. This Section, although non justiciable, is contained in the Constitution to direct all arms of government. Hence, Section 13 CFRN 1999 provides that 'it shall be the duty and responsibility of all organs of government and of all authorities and persons exercising legislative executive and judicial powers to conform to, observe and apply the provisions of this Chapter of the Constitution'.

242. Omoware, A'Child Rights Act/Laws: Reality or Farce' p.5 http:/www.mediafire.com/?daadigbt32t7c9 accessed 18th October, 2016.

CHAPTER FOUR

4.1.0 DOMESTICATION UNDER SOME DUALIST SATATES

Unlike those of the monist states as shown above, constitutions of dualist states accord treaties no special treatment. Treaties have no legal effect in the domestic scene until they are transformed into municipal law by Acts of Parliament. This principle is a product of the seventh-century English constitutional struggle between the King and Parliament, resulting in the vesting of complete legislative power in the latter and the conduct of foreign relations and treaty-making in the former. This division of powers was inherited by most former colonies of the United Kingdom, including the United States.[243]

Under dualism, the provisions of transformed treaties enjoy no primacy. They have status similar to any domestic law and can be amended of repealed by later legislation. When that happens, there would be breach of the treaty provisions, but there would be no remedy in the national legal system. The following are examples of the practice in states that follow the dualist system.

4.1.1 United Kingdom

The UK is the best exemplification of the dualist system. The treaty-making power is vested in the executive, the Secretary of State for Foreign and Commonwealth Affairs or foreign minister. Although the Crown does not require any parliamentary authority to enter into any treaty, under a constitutional practice (known as the Ponsonby Rule) a treaty which requires ratification or analogous procedure like one which has budgetary ramifications, "is 'laid before' (notified to) both houses of Parliament, with a short explanatory memorandum, for twenty-one days while Parliament is sitting"[244]. If it so wishes, Parliament can debate it, though this seldom happens except where a

243. Aust, A. 2007. *Modern Treaty Law and Practice.* 2nd ed. Cambridge: Cambridge University Press, 188.
244. Ibid, 188.

treaty requires legislation or relates to a matter of great political importance. In such a case, the government arranges for the debate.

Since 2000 when the British Government adopted recommendations of Parliament's Procedure Committee Report on the 'Parliamentary Scrutiny of treaties',[245] copies of treaties that require Parliamentary approval are sent to the relevant departmental committees. If primary or subsidiary legislation is required to implement a treaty, the government will not ratify it until such legislation has been passed.[246]

Under the British Constitution no provision of any treaty, including the European Convention on Human Rights which was fully incorporated by the Human Rights Act 1998, and the European constituent treaties which are applied to Britain by the European Communities Act 1972, can be effective in its municipal law without legislation. However, Britain is obliged, under Article 46(1) of the European Convention on Human Rights to which it is a party, to comply with judgments of the European Court of Human Rights and those of the European Court of Justice. However the exit of the Britain from EU, this Act may not affect her.

4.1.2 Australia

Although the Australia Constitution does not stipulate which organ of state enters into treaties, in practice, the executive is authorized to enter into treaties and ratify them, but it is only after Parliament domesticates them by legislation that they have the force of law. In *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC*[247] the High Court of Australia, basing itself on the principle of separation of powers, held that provisions of an international treaty to which Australia is a party do not form part of Australia law unless those provisions are incorporated into municipal law by statute.

245. Parliamentary Select Committee on Procedure. 2000. *Second Report:Parliamentary Scrutiny of treaties.* Available at: http:/www.publications.parliament.uk/pa/cm199900/cmselect/cmproced/210/21003.htm (Accessed October 24, 2016.

246. Shaw, M.N. 2008. *International Law.* 6th ed, 112.

247. (1995) HCA 20.

The practice is that the executive lays the proposed text of a treaty, together with an explanation on how it affects the national interest (the "National Interest Analysis") including the amendments of treaties, or withdrawal from them, are laid on the table of Parliament for at least 15 sitting days before they are ratified.[248] In other words, before Australia ratifies any treaty, the same is tabled in Parliament with an explanation from the relevant department on how the treaty will serve the national interest. The Joint Standing Committee on Treaties (JSCOT) considers it, invites views from the general public, holds public hearings and, as Australia is a Federal State, considers the views of the States and then writes a report to Parliament recommending whether or not the treaty should be ratified. It is after all those stages are passed that the government decides to ratify a treaty. This procedure is departed from only when the Foreign Secretary declares a treaty as urgent or sensitive, and involves foreign trade, or I strategic for foreign policy interests. Though the executive has the right to ratify a treaty whether or not JSCOT does not recommend its ratification; however, as stated, it cannot have the force of law until it is domesticated by Parliament through legislation.[249]

4.1.3 Denmark

The Danish Constitution authorizes the King to deal with international matters.[250] However, an act that affects the territorial status of the State, a treaty that requires the cooperation of the Folketinget (the Danish Parliament), the use of armed forces against a foreign country other than defence against military attack, and any obligation of crucial importance as well as withdrawal from an international treaty that had been approved by the Folketinget require consent of the Folketinget.

248. Twomey, A. 2000. *Federal Parliament's Changing Role in Treaty Making and External Affairs.* Available at: http://www.aph.goov.au/About Parliament/Parliamentary Department/Parliamentary Library/pubs/rp/rp9 900/2000RP15 Accessed October 24, 2016
249. Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal,* 50, 465-509
250. Kingdom of Denmark Constitution 1992, Article 19.

Whatever its nature, however, each treaty requires to be domesticated by legislation before it can have the municipal force of law.[251]

4.1.4 Finland

Other than issues of war and peace, treaties of a legislative nature, treaties affecting the Constitution and any other important treaty, which require the approval of the Riksdagen (the Finish Parliament), the Finish Constitution authorizes the President and the Government to conduct the foreign affairs of the State. Except for a commitment that is of a constitutional nature, which requires two-thirds majority, consent of the Riksdagen is given by a simple majority. Whatever the case, the Constitution authorizes the Parliamentary Foreign Affairs Committee to demand from the Government a report regarding foreign and defence policies.[252]

4.1.5 Ireland

The Irish Constitution obliges Government to obtain Parliamentary approval for all treaties that require expenditure of public funds before entering into them. Save for those, the Irish Constitution authorizes the Government to enter into and ratify all other international treaties but it has to lay them in Parliament the only exemption in this regard being those of a technical or administrative nature.[253]

4.1.6 Italy

The Italian Constitution provides that the general rules of international law are supreme to domestic law[254] and the courts enforce them. Article 10 thereof stipulates that: "the Italian Judicial System conforms to the generally recognized principles of international law".[255] The Italian Constitution requires ratification by Parliament, that

251. Kingdom of Denmark Constitution 1992, Article 19.
252. Finland Constitution 2000, Chapter 8 SS. 93-97
253. Constitution of Ireland 1999, Article 29.
254. Henkin, L. et. Al 1987. *International Law Cases and Materials*. St. Paul, Minnesota: west Publishing Co., 207
255. Constitution of the Italian Republic, Article 10, par. 1.

is by legislation,[256] of only the treaties of a political nature, and those with provisions on arbitration or judgment, changing the State territory, treaties that impose financial obligations, and those that require amendments of existing legislation.[257]

4.1.7 Antigua and Barbados

Antigua and Barbados enacted the Ratification of Treaties Act in 1989 which gives the executive exclusive powers to enter into treaties, but requires treaties concerning the international status of the country, its security, sovereignty or membership of an international organization, to be approved by its legislature. The Act makes it explicit that no provision of any treaty shall become part of the law of that country "except by or under an Act of Parliament".[258]

4.1.8 South Africa

The 1996 South Africa Constitution has both monist and dualist elements. While negotiation and signature of the treaties is the function of the President,[259] ratification is a function of both Houses of Parliament. Ratification of important treaties requires the approval of the National Assembly as well as the National Council of the Provinces.[260] However, international agreements of a technical, administrative or executive nature, or agreements, that do not require ratification, commonly referred to as self-executing treaties, which are not inconsistent with its constitution or other legislation, automatically form part of the law of South Africa. Self-executing agreements are those whose provisions are capable of enforcement on their own without further legislative action. These two types of agreements must, however, be laid on the table of Parliament All others require legislation. Section 231 of the South African Constitution, which provides for treaties, states:

256. Constitution of the Italian Republic, Article 72.
257. Constitution of the Italian Republic, Article 80.
258. Aust, A. 2007. *Modern Treaty Law and Practice* 2nd ed. Cambridge: Cambridge University Press, 194.
259. South African Constitution 1996, Article 82(1)(i).
260. South African Constitution 1996, Article 231.

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the National Assembly and the Council within a reasonable time.

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The Rules of Procedure require a copy of an international agreement together with an explanatory note to be presented to the Speaker of the National Assembly who lays it on the table of the House. The Speaker then refers it to the House Committee concerned of any other Committee that the House may decide for examination and reporting. After examining the agreement, the relevant Committee, in consultation with the Foreign Affairs Committee and any other Committee whose ministry may be affected by it, then presents a report to Parliament recommending its approval or rejection. The Speaker also refers all agreements of a technical, administrative and

executive nature, or those that do not require ratification or accession to the relevant Committee for the receipt of information.

Besides self-execution agreements, extradition treaties do not require legislation to become part of the domestic law. In the *President of the Republic of South Africa & Others Vs Nello Quaglian & Others*[261], applicants who faced extradition from and to the United States of America contended that the Extradition Treaty between South Africa and the United States of America was not enforceable as it had not been domesticated by legislation. Rejecting that contention, the South African Constitutional Court held that as the South African Extradition Act[262] authorized the President to enter into extradition treaties with foreign governments and that such agreements would take effect once agreed to by Parliament, and the extradition treaty with the United States of America having met those criteria, no separate legislation was required. If that were to be the case, all of South African extradition treaties with other countries, and they are many, would require separate pieces of legislation most likely with identical would which would make no sense.

It was also decided in the above case that once the President has decided to enter into a particular treaty, he can delegate the formal details of negotiations, execution and ratification to any member of the national executive, like the Minister for Foreign Affairs.

4.1.9 United States of America

The Constitution of the United States of America deals with treaties in what has been described as 'remarkably complex'.[263] It is described as remarkably complex because it provides for a unique monist system in which both the legislature and the executive,

261. (2009) ZACC1.
262. South African Extradition Act, No. 67 of 1962, Section 2.
263. Aust, A. 2007. *Modern Treaty Law and Practice.* 2nd ed. Cambridge: Cambridge University Press, at 194, 157.

unlike other countries, have all along been involved in treaty making.[264] Article II of the Constitution vests the executive power in the President. Some provisions of that Article have been held to give the President power to make international agreements other than treaties without the consent or authority of the Senate. These provisions include the Executive Power Clause in Section 1; the Commander-in-Chief Clause in Section 2; and the power to receive ambassadors and other public officials in Section 3. Where the powers granted in this Article are exclusive, like the Commander-in-Chief powers, the President may solely make international agreements commonly referred to as "executive agreements". *Dole v. Carter*[265] is a classic example of the exercise of such authority. In that case, Senator Dole challenged President Carter's authority to return to Hungary coronation regalia through an executive agreement, arguing that that required a bilateral treaty duly approved by the Senate. The District Court held that "as a matter of law... the President's agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution". On appeal, the American Court of Appeals asserted that the President's action of returning the Hungarian property to the people of Hungary "uniquely demanded the single voiced statement of the Government's views".[266] In the case of *United States v. Belmont,*[267] the Supreme Court of the United States held that the powers of the President of the United States in the conduct of foreign affairs included the power, without the consent of the Senate, not only to recognize Russia and establish diplomatic relations with it, but to also "to determine the foreign policy of the United States with respect to the Russian nationalization decrees".[268] In that case, by a decree enacted in 1918, the

264. Henkin, L. et. Al. 1978. *International Law Cases and Materials.* St. Paul, Minnesota: west Publishing Co., 194
265. 444 F. Supp. 1065 (D. Kan. 1977), 569 F. 2d 1109 (10th Cir. 1977).
266. *Dole v. Carter,* 569 F. 2d at 1110.
267. *United State v. Belmont,* 1937, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.
268. Henkin, L. Opcit.

Soviet Government, inter alia, nationalized and appropriated all of its property and assets of every kind and wherever situated including the deposit account with Belmont. As result, the deposit became part of the property of the Soviet Union until 1933 when, through exchange of diplomatic correspondence, in order to bring about a final settlement of the claims and counter claims between the Soviet Government and the United States, the Soviet Government released and assigned to the United States Government all amounts due to that government from American nationals including the deposit in Belmont. That notwithstanding. Belmont refused to release the deposit and in a suit by the United States, the District Court held that it would be contrary to the controlling public policy of the State of New York to release the deposit. On appeal, the US Supreme Court overturned that decision and held, inter-alia the President had powers without the consent of the Senate, to make such executive agreement with a foreign government.

Executive agreements are international compacts dealing with any matter falling within the purview of his independent power under the American Constitution that the President of the United States has power to make without the approval of the Senate. There is no express provision in the American Constitution authorizing them. The power has arisen from "constitutional usage of long standing" which, as stated in the above cases, has been recognized by the American Supreme Court.[269] Although their scope is not clearly defined, it is not mutually exclusive with the scope of the treaty-making power. They can be concluded in any area in which ordinary treaties can be made. Where prompt action is required and where the subject matter of the agreement requires frequent amendments, the President is authorized to invoke those powers when he believes that an international agreement is necessary in the national interest and when the treaty making procedure, which is normally quite long, is impracticable

269. Ibid, 218

or likely to render ineffective an established national policy. They are also made in national security matters that require to be held in confidence.

Save for non self-executing executive agreements the implementation of which may require financial outlay which, ipso facto, require implementing legislation, all self-executing executive agreements come into force upon execution.[270] Like all other international agreements or treaties, under the supremacy clause in the American Constitution,[271] they become part of the supreme law of the United States of America and supersede prior inconsistent legislation. They may also be superseded by any inconsistent Acts of the Congress.[272]

Except for 'executive agreements' which, as stated, the constitution impliedly authorizes him to make, the American Constitution grants the President power to make international treaties, but only in consultation and by a resolution of at least two thirds of members of the Senate present. The Constitution provides that "he the President) shall have power, by and with the advice and Consent of the Senate, to make treaties provided two-thirds of the Senators present concur".[273] The consent of the Senate is required at the end of the process before a treaty is ratified. If the Senate deems it fit, it is entitled to condition its approval upon certain conditions or reservations or declarations. The Senate Rules of Procedure stipulate the procedure to be followed in the referral of treaties to relevant Committee (with a majority being required at every stage) and their examination. Once the Senate accords its consent to the making of a treaty, it has no power to recant such consent.[274]

The treaties that the US makes fall into two broad categories, namely, self-executing

270. Ibid, 218
271. US Constitution Article VI, section 2.
272. Henkin, op. cit, 219
273. US Constitution Article II, Section 2
274. Henkin, op cit 214

and non self-executing treaties. The distinction between self-executing and non self-executing is made on political consideration. For instance, where a treaty relates to acquisition of territory and financial arrangements, those are said to be political questions of definition or exposition which should be left to the legislature and should not have automatic operation.[275]

Where implementing legislation is required in respect of a treaty that the Senate has approved, the American practice is to delay ratification until such legislation is passed. Once ratified, all self-executing treaties apply directly as part of the supreme law of the land, whereas non self-executing conventions are legally enforceable after legislative transformation.[276] As is the case with UK, although "there is a presumption that Congress will not legislate contrary to the international obligations of the state", the American legislature can, however, take action the effect of which will be a beach of treaty obligations[277]. In such case, the later legislation prevails within the American jurisdiction, but internationally the country would be liable for breach of that treaty.[278] In *Diggs v. Schultz,*[279] the court declared that: "under our constitutional scheme, Congress can denounce treaties if it sees it fit to do so, and there is nothing the other branches of government can do about it". Similarly, a provision in a treaty that US enters into and is effective as part of the US law supersedes any inconsistent preexisting legislation or treaty.[280]

Whatever the nature of the treaty, whether it is an executive agreement made by the President of the United States without the approval of the Senate or Congress, or it is a self-executing or non self-executing treaty, once ratified treaties automatically

275. Ibid, 211
276. Shaw, M. 2008. *International Law.* 6th ed. Cambridge University Press, 118.
277. Ibid, 120
278. Henkin, L. et. Al. 1978. Supra, 206
279. 470 F. 2d 461, 466-7 (1972); 60 ILR, 393, 397.
280. Op. cit, 206

become part of the American supreme law. Article VI Section 2 of the US Constitution provides that:

> All Treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.[281]

With the foregoing comparative examples of state practice in other states, we now move to consider what Nigeria's position has been prior to enactment of the Alteration Act 2010 and also consider whether her position has changed after the Alteration Act.

4.2 DOMESTICATION OF TREATIES BEFORE THE THIRD ALTERATION ACT

As earlier stated, the Nigerian Constitution adopts the dualist approach to distinguish municipal law from international law. While every law duly passed by the National Assembly and State Houses of Assembly, within their area of competence is binding on all organs and persons within Nigeria and applied by the Courts of the Land after the assent of the president or Governor, as the case may be, a treaty cannot apply on its own force upon being made by the president until it is implemented by the National Assembly and sometimes with the concurrence of the Houses of Assembly of the component states[282], in line with section 12(1) of constitution of the Federal Republic of 1999 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[283]

281. US Constitution Article II.
282. Section 12(2) and (3) of CFRN 1999 as amended.
283. Ibid, S. 12(1)

Nigerian courts have severally interpreted this section literally and thus resisted invitations to apply the provisions of unimplemented treaties. In Registered Trustees of *National Association of Community Health Practitioners of Nigeria & Ors v. Medical Workers Union of Nigeria*,[284] both the court of Appeal and the Supreme Court held that the International Labour Organization (ILO) Convention, not having been domesticated by the National Assembly, cannot be applied in Nigeria. The above decision followed the authority in *Abacha v. Fawehinmi*[285] where Ogundare JSC held that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.

Provision of Section 12 of the Constitution and the attitude of courts which gave literal interpretation to the section showed that Nigeria was clearly a dualist state. According to Ejiwunmi JSC, it is therefore manifest that no matter how beneficial to the country or the citizenry, on international treaty to which Nigeria has become a signatory may be it remains unenforceable, if it is not enacted into the law of the country by the National Assembly.

4.3 DOMESTICATION OF TREATIES UNDER THE THIRD ALTERATION ACT 2010.

The constitution of the Federal Republic (Third Alteration) Act 2010 is to be applauded. As noted by Bimbo, the 'Act constitutes a watershed in the history of the National Industrial Court of Nigeria, in that it ushered in a number of redial but positive innovations on the structure, power, status and jurisdiction of the court[286]. The Act re-establishes the court as the National Industrial Court of Nigeria and lists it among the superior courts of record in Nigeria. The court among other things, is conferred with exclusive jurisdiction over matters relation to international best

284. (2005)2 NWLR (Pt. 1072) 575, 623
285. (2000)6 NWLR (Pt 660), 228
286. Atilola, B National Industrial Court and Jurisdiction over international Labour Treaties under the Third Alteration Act. Available at NICN.gov.ngl...l accessed 20 October, 2016

practice in labour application or interpretation of international labour standards and section 254(c)(2)[287] provides:

> Notwithstanding anything to the contrary in the constitution, the National Industrial Court shall have jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, work place, industrial relation or matters connected therewith.

This provision is unique in that it renders impotent, as far as international labour standards, conventions or treaties are concerned, the constitutional requirement 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. According to Flora the implication of this provision is that claimants can now invoke, before the National Industrial Court, the relevant provisions of international treaties ratified by Nigerian notwithstanding that same have not been domesticated by an Act of the National Assembly[288]. Thus, the judicial authority of Abacha v. Fawehinmi[289] on the question of domestic application of international conventions is no longer a good law as far as international labour conventions or treaties is concerned. In the same vein, the case of *MHWUN v. Minister of Health & Productivity*[290] will be decided differently under this regime.

It is important to note that before the coming into effect of the third Alteration Act, 2010, Nigeria has always come under the criticisms of the international labour organization (ILO) for failure to domesticate international labour conventions duly ratified. This development will now be a thing of the past.

287. CFRN Third alteration Act 2010
288. Flora A.O, Article on re-examination of the requirement of Domestication of treaties in Nigeria, Department of Jurisprudence and International Law, Faculty of Law, university of Benin, Benin City, 23.
289. Supra.
290. Supra

The position of Nigeria in its relationship with international Law has changed since the coming into effect of Alteration Act 2010, Nigeria is no longer a pure dualist state because the Alteration Act 2010 has relaxed some powers contained in Section 12 of 1999 Constitution and allowed National Industrial Court power to entertain international matters relating to labour law. The implication of the Third Alteration Act to the position of Nigeria is that, Nigeria is now a dualist-monist state.

4.4 DOMESTICATION OF TREATIES UNDER THE TREATIES MAKING PROCEDURE ACT

To be able to deal with this topic effectively, there is a need to study the Act[291] itself critically, attention will be given to Section 3 of the Act which in a clear terms categorizes treaties into three main groups.

An Act to provide among other things, for treaty making procedure and the designation of the Federal Ministry of Justice as the depository of all treaties entered into between the Federation and any country.

The treaty making procedure act as the name implies provides for the procedure in which every treaty negotiated and entered into for and on behalf of the federation by any ministry, government agency, body or person shall be made in accordance with the procedure specified in this Act.

Section 3(1)

(a) Law-making treaties being agreements constituting rules which govern inter-state relationship and co-operation in any area of endeavor and which have the effect of altering or modifying existing legislation or which affects the legislative powers of the National Assembly[292],

(b) Agreements which impose financial, political and social obligations on Nigeria or which are of scientific or technology import[293],

291. Treaties making procedure Act CAP. T20 LFN 2004
292. Section 3(1)(a) Treaties making procedure Act Cap. T20 LFN 2004
293. Ibid 3(1)(b)

(c) Agreements which deal with mutual exchange of cultural and educational facilities[294].

(2) The Treaties or agreements specified in-

(a) Paragraph (a) of section (1) of this section need to be enacted into law;

(b) Paragraph (b) of subsection (1) of this section need to be ratified;

(c) Paragraph (c) of subsection (1) of this section may not need to be ratified.

(3) "Treaties or Agreements" in this Act mean instruments whereby an obligation under international law is undertaken between the Federation and any other country and includes "Conventions", "Act", "general acts" "Protocols", "Agreements" and "*modi-vivendi*" whether they are bilateral or multi-lateral in nature.[295]

The words of Section 3(1)(a)[296], the intentions of the draft man are that any treaty entered into between the Federation and any Country which constitutes rules to govern interstate relationship and co-operation in any area of endeavour which is capable of changing the existing law or which can affect the powers of the National Assembly to make law, section 3(2)(a)[297] says such treaty needs to be enacted by the National Assembly into law before it can have the force of Law in Nigeria. The implication of Section 3(1)(a) is that any treaty that falls within this class must strictly comply with the provision of section 12(1)[298] and nothing less.

Section 3(1)(b)[299] states that agreements which impose financial, political and social obligations on Nigeria or which are of scientific or technology import. Section 3(2)(b) provides that such treaties only need to be ratified. The effect of this section is that treaties that fall within this class do not need to comply with section 12(1)[300] before

294. Ibid 3(1) (c)
295. Ibid 3 (3)
296. Ibid 3(1) (a)
297. Ibid 3(2) (a)
298. Constitution, op cit
299. Treaties making procedure Act 2004
300. Constitution, op cit

they can have the force of law in Nigeria.

Section 3(1)(C)[301] provides that treaties entered into which deal with mutual exchange of cultural and educational facilities is interpreted by section 3(2)(c)[302] to mean that such treaties do not need to be ratified, that means such treaties once signed by executive can have the force of law in Nigeria. The implication of such treaties according to the section is that they do not need to be ratified, talk more of under going process of transformation as required by Section 12(1) of the constitution of the Federal Republic of Nigeria.

Unlike the provision of Section 254(c)(2)[303] of the Constitution which only opens the space for National Industrial Court to invoke any international labour treaties or convention which Nigeria is a signatory, Section 3(1)(b) and (c)[304] makes it open to every court to invoke international treaties fall within the above paragraphs which Nigeria has ratified or is a signatory to them. The provisions of section 3(1)(a), (b) and (C)[305] has placed Nigeria in a position of a dualist-monist state.

4.5 CHALLENGES FACED IN TREATY APPLICATION

From the body of the work it can be garnered that the following are some of the challenges that stand in the way of effective application of treaties in Nigeria:

- Section 12 of the CFRN needs to be reconciled with section 3 of Treaties making procedure Act 2004 to ensure smooth enforcement of the Act by the Courts.
- Existence of statutes containing provisions that conflict with the provisions of treaty enabling statutes like Treaties Making Procedure Act,Third Alteration Act ETC
- Unenlightenment amongst the populace of their rights and the remedies available to them by virtue of some treaty enabling statutes.

301. Treaties making procedure Act 2004
302. Ibid 3 (2) (c)
303. Third Alteration Act 2010
304. Treaties making procedure Act 2004
305. Ibid

- Improper understanding of the Convention on the Rights of the Child by some states especially in the Northern part of the country.
- Lack of political will to enforce economic, social and cultural rights as enshrined in the African Charter on Human and Peoples' Rights.
- Non existence of adequate infrastructure to effectively apply the provisions of treaties domesticated.
- Inadequate training of personnel, such as Police and Judicial officers to carry out the provisions of the Child Rights act (CRA). It has been reported that in Nigeria, children as young as 11 years of age have been held in inhuman conditions, this can be linked to inadequate training of police officers.

CHAPTER FIVE

5.1 SUMMARY OF FINDINGS

At the time of writing this research work, the following findings were made and summarized.

The researcher found out that section 12 of the constitution which is meant to act as a check on the power of executive as is the case with other constitutional provisions that serve as check and balance on the powers of the different arms of government, has now become the major constraint to domestication of international treaties in Nigeria.

The research found out that there is an obvious lack of cooperation between the executive and the legislative in the area of treaty ratification and domestication. According to Honourable Day Bush-Alebiosu, a member of the House of Representatives of the Seventh Assembly and Chairman of the House Committee on Treaties and protocol said National Assembly cannot accurately tell the number of treaties that have been signed by Nigeria[306].

The researcher also found out that constitution has failed to state the status of a domesticated treaty with the municipal laws. Whether such domesticated treaty is below, at par or superior to National law.

The research discovered that in some dualist states like U.S.A., some member of the senate are assigned to join the executive arm in the ratification process so that once concluded the treaty automatically forms part of American legislation and this method is lacking in Nigeria.

The research also noted that section 254(c)(2) of the Third Alteration Act 2010 has to some extent relaxed the rigidity of section 12 on treaties domestication and made it simple for National Industrial Court to apply international treaties relating to labour

306. www.channelstv.com/.../non-domestication. Accessed 20 November 2016

law which Nigeria has ratified. However, the work found out that conventions outside labour matters still need to undergo process of transformation in Nigeria.

The work noted that there is no harmonization between the constitution and the treaties making instruments like the Treaties making procedure Act 2004 and therefore causing hindrances to the transformation of treaties into municipal law.

The research found out also that many beautiful treaties like the African union's Kampala Convention for the protection and Assistance of IDPs in Africa on April 17, 2012 has not been domesticated in Nigeria despite its relevance to our IDPs. The convention gives IDPs rights to sue government where she fails in her obligation.

The work also found out that some domesticated treaties like the child Right Act, there is no political will by some states to implement them, and most citizens of Nigeria are not sensitized on the existence of such treaties.

5.2 OBSERVATION

During the research work the following observations were made.

It is observed that over decades ago Nigeria has ratified several international treaties, but many of these treaties are not operational because they have not been domesticated.

The work observed that only 26 states in Nigeria have domesticated CRA.

The research also observed that even the 26 states that domesticated CRA, have not established family courts as required by sections 149 and 150 of the Act.

The work also observed that treaties that fall outside the Exclusive legislative list require the participation of the state Houses of Assembly for them to be domesticated.

The work also observed that the attitude of Nigerian courts toward section 12 on interpretation is literal approach

It is observed that in monist state, international law prevails over municipal law while in a dualist state national legislation takes precedent over international law.

It is also observed in the work that a state can also embrace monist-dualist theories together.

Another observation is the inadequate knowledge of international standards amongst politicians and officials as reason for the low level of domestication of international treaties or conventions.

5.3 RECOMMENDATIONS

Having endeavored to explain the inadequate legal framework governing the observance and domestication of international treaties or conventions in Nigeria, the paper recommends the following;

Nigeria having adopted a dualist system does not permit an international convention to be automatically domesticated, it is therefore imperative for the government to adopt an easy framework that will facilitate the domestication of relevant international treaties or conventions. The dualist system has shown that the non automatic domestication of human rights conventions has slowed down the implementation of human rights conventions. It is important that executive branch which is charged with negotiating international treaties should move at the same pace with National Assembly which gives the assents in order for the process of domestication of treaties into law to be speeded up.

This low domestication rate also reflects the country's limited capacity in processing protocols". This low processing of protocols can be enhanced by establishing a system such as a special committee which will examine the ways and means of domesticating international treaties instruments to enhance this process. I strongly

recommend commitment, seriousness, honesty and sincerity in the process of domestication of ratified treaties by our national leaders. There is also the issue of preservation of power, property and other privileges by those in charge who so not like to see challenges to or criticism of the same. It is important that those in charge put aside their personal agendas and implement international conventions that will be of benefit to everyone.

It is therefore important that those elected to National Assembly should be obliged even by law to ensure that during their tenure of office, they bring up a motion in the floor of the house to recommend a particular convention for domestication. Elected members of National Assembly should be crusaders for international treaties or conventions in order to enhance the preservation and protection of the human rights. Members of the National Assembly should be equipped educationally on the role and the need for its domestication to enhance national cohesion with the international community. In order to accelerate this process, education can play a critical role. The general public should be sensitized as well as politicians. We should all receive some form of education regarding International Human Rights Conventions and their importance to good governance and national development.

Such awareness can be done through workshops or seminars for those in public institutions, radio and television programs for the rest of the citizenry. The subject of human rights should also be included in the school syllabus of secondary schools. Furthermore, the constitutional framework governing international conventions should be strengthened to ensure the domestication and observance of these conventions. Despites the government having gone a long way in establishing institutions such as the Human Rights Commission amongst others, a lot more remains to be done. For example the functions of the Commission state that pursuant

to section 5(b) of the Human Rights Commission Act it can only investigate allegations and recommend. It does not have the power to enforce any of the recommendations it makes or implement or put systems in place that would help in the domestication and observation of international human rights conventions.

I therefore recommend similar to what others have earlier recommended that institutions such as the Human Rights Commission should be empowered to make and implement decisions. It should not just have the responsibility to recommend. The ability of the commission to only make recommendations is a hindrance for the Commission to be effective in its work because "these recommendations can either be adopted or ignored by government authorities". The Human Rights Commissions Act should be revisited so that more powers are given to the Commission in its work and also increase the funding at the Commission so that more work can be done effectively and efficiently.

The Commission is not well funded and according to section 12(c) of the Human Rights Commission Act, the commission can receive any form of grant from international organizations or contributions. I recommend that international organizations should contribute more funds so as to make the commission more independent even though her funds comes from a consolidated revenue of the Federation. This will go a long way in assisting the commission in its operations. In situations where the funding is low the commission will not perform at its best and the lack of sufficient funds has limited the Commission's area of operations.

I recommend that Government should provide additional funds in order to allow for the provisions of such as the Economic, Social and Cultural Rights to be implemented at least in a limited manner at the outset so as to improve the standard of living. Furthermore, the Human Rights Commission should play a role in the process of

domestication of international human rights conventions. There being part of the responsibility and their awareness on the importance of human rights conventions can help achieve a lot more domestication of these conventions. With its involvement in the domestication of international treaties or conventions, it can assist in speeding up the process. Its mandate should not just end at investigating and recommending at implementation as well.

In terms of the observance of international conventions, it is important to ensure that all conventions signed and ratified regardless of Nigeria being a dualist state should be observed even if not domesticated. This would not be counter to the principle of dualism because Nigeria is now seen as monist-dualist state. For example the Convention against Torture should be strictly observed so as to preserve the human race as it involves cruel, inhuman and degrading treatment which can lead to death of an individual or mental incapacitation. It must be seen to be observed and not only be made to be theoretical in nature. The Police Public Complaints Authority has had police officers dismissed from duty after having been found guilty of committing such illegal acts as torture. However, none of the perpetrators of torture have been prosecuted. This in itself is a hindrance towards the observation of the Convention against Torture (CAT) in particular. I will recommend that it should not just end at dismissal of the perpetrators but also ensuring that they are taken to court and tried. This will assist curb the vice.

The work also recommends that even though section 12 CFRN was intended to ensure cooperation between the executive and the legislative arm, as evident in the provision for checks and balance, the National Assembly uses this section to frustrate the efforts of the executive and therefore making section 12 to be seen as a constraint rather than a contribution to the domestication of international treaties in Nigeria. There is need

for a coordination of efforts between the two arms of government; the signing of a treaty should not be done in secrecy. To that end, it is recommended that where possible, the legislature should be informed before an international instrument is signed, such knowledge on the part of the legislature will make for commitment in enforcing treaty obligations.

In addition, it is recommended that a similar enactment like Third Alteration Act of 2010 be made in relation to human rights treaties especially ones that provide for social and economic rights which are presently unenforceable under the 1999 constitution as amended.

It is also clear that the Treaties Making Procedure Act 2004 has come to open more opportunities for citizens and courts to invoke some international treaties, it is recommended that the National Assembly needs to revisit the Act and itemize clearly those treaties that fall in section 3(1) (a), (b) and (c) of the Act so as to avoid confusion in the interpretation of such treaties.

Members of the legal profession in Nigeria should borrow a leaf from what is happening in other jurisdiction like Canada, for instance, she operates the same dualist system, but courts and litigants look to international law to resolve a great range of domestic legal issues not withstanding that such treaties are not domesticated in her country. Unlike the present situation in Nigeria where international law is rarely applied and where there is an unenthusiastic attitude towards it. The attitude of members of legal profession will go a long way in determining the extent to which international laws can be used to enforce the rights of Nigerians in the municipal courts.

I recommend also that the 36 states of the Federation should establish family courts in conformity with sections 149 and 150 CRA, this will reduce frequent abuses of children's rights in Nigeria.

Nigeria should avoid getting involved in any practice that undermines its existing international law obligations, for instance, Nigeria's conduct in entering into a bilateral agreement with the United States which provides that Nigeria may not submit an American citizen to the international criminal court (ICC) for prosecution without the prior consent of the U.S.' contradicts Nigeria's existing obligation under the Rome statute. It is recommended that Nigeria move to rescind its agreement with the U.S. through the proper channels provided under international law.

5.4 CONTRIBUTION TO KNOWLEDGE

The respect that Nigeria has for international law necessitated the allowance of its implementation of treaties through its section 12 of its constitution but without stating in this important document, who are entitled to commit the country by way of Treating Making Procedure Act.

It is submitted that a matter of this magnitude should be entrenched in the constitution and not in such a lesser document that cannot withstand the constitution in case of conflict. It only provides for its implementation without more. Apart from the above, the constitution does not contain any section in the entire document that provides for the relationship between international laws and Nigeria law, whether customary or treaty.

The worse is that, the constitution fails to state the status of transformed treaty viz-a-viz other domestic legislations. It ought to provide like in some other jurisdictions constitution whether such transformed treaty is below, at par or superior to other

domestic legislation rather than leaving such to the whims and caprices of the courts. As it was canvassed in this work that there is still the need for the Apex court in the land to revisit the decision in *Abacha v. Fawehinmi* because it was observed that the lead judgment cannot be the correct position of the law. This is in view of the dissenting opinion of the same court. if the relationship between international law and municipal law is well entrenched in the constitution, the problem of status would have been finally addressed and better still, whatever is granted the constitution cannot be taken away by any subsidiary legislation including transformed treaty.

The constitution is also limited as far as domestication of treaties is concerned, because it does not provide the number of days within which National Assembly shall domesticate treaties already signed or ratified by the executive, if time limit is provided by the constitution, pressure from Nigerians and civil liberty groups will come on the National Assembly to domesticate these ratified treaties especially where such treaties are to better the lives of the citizens. This lacuna needs to be filled by giving it a legal backing that shall enable National Assembly wake up from their slumber to work for the good of this country.

The arrival of Third Alteration Act 2010 which has changed the status of Nigeria from a dualist state to a monist-dualist state is commendable because it has relaxed to some extent the rigidity created by section 12 of the 1999 constitution as amended and opened the space for National Industrial Court to invoke and enforce the arrays of international labour conventions duly ratified by Nigeria not withstanding that same have not been domesticated by an Act of the National Assembly. It is the researcher's view that the status of Nigeria in relation to international law is a monist-dualist state and not pure dualist state as it was before, this is as a result of the alteration of the

constitution in 2010. Therefore section 12 needs to be amended to fill this gap created by the Third Alteration Act.

Finally, this work has also noticed that section 3(1) of the Treaties Making Procedure Act 2004 is ambiguous because the drafters could not specifically itemize those treaties that should be grouped under paragraph (a) , those to be grouped under paragraph (b) and those to be grouped under paragraph (c) so as to make the interpretations easier for the judiciary. It is the researcher's view that this section of the Act be.revisited and amended by the National Assembly to give it the beauty it deserves.

5.5. CONCLUSION

No doubt, the place of treaty in international relations cannot be underestimated. It is the bedrock of so many international agreements. As such it should be given its primus position in the affairs of state within the municipal system. It was deciphered that Nigeria as a nation has participated in a number of international treaties including but not limited to the 1982 United Nations Conventions on the law of the sea and several of them. It has also caused many of them to be domesticated while plethora of them ere yet to be domesticated. To those that were domesticated, they can be applied in Nigerian courts while those that have not been domesticated do not have locus before Nigeria courts. There is the need to revisit the treating making process. It is advocated that where for example the subject matter of the treaty will affect some of the constituent states of the federation or some local governments, those entities that will be affected by the outcome of the treaties should partake in its making. This work has also shown the importance of carrying the legislatures along while entering into treaties as this will serve as an advanced notice preparatory for its transformation so that when the time for it eventually turns up they will not be in the dark.

As illustrated in the preceding chapters, it may be noted that the current legal framework is not effective and therefore playing a major role in slow process of domestication and observance of international conventions. This leads to a lack of respect or observance of human rights despite the fact that chapter four of the constitution has incorporated same. There is also the attitude of not wanting to domesticate international institutions for various reasons such as selfish motives. We have also seen that some international rights instruments such as Economic and Cultural Rights have been domesticated by Nigeria through the African Charter of Human and People's Rights but due to unavailability of resources and inadequate funding for those constitutional institutions mandated to help in the observance and implementation of these treaties such as the Human Rights Commission who are though authorized by their Act to get grants, yet a lot need to be done to enable them have financial independent to act effectively. It will be an added advantage to harmonize the constitution with international instruments to help in the observance and domestication of international treaties.

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