TREATY MAKING AND ITS APPLICATION IN INTERNATIONAL LAW: NIGERIA AND SOUTH AFRICA AS CASE STUDY*

Abstract
Treaties making is no doubt a responsibility that falls squarely within the legal and Constitutional competence of the Executive in most democratic societies. Treaties constitute the major means of entering into Agreement at international scene. The 1999 Constitution of the Federal Republic of Nigeria as amended in its section 12, requires the treaty so made to be transformed by the Nigerian Legislature before it can be admitted in Nigerian Courts. This work examined in a holistic manner treaty making and its application in both Nigeria and South Africa vis-à-vis the relationship between international law and municipal law. The research for this work is mainly through primary and secondary sources. The research found that the 1999 Nigerian Constitution does not state anything about the status of the transformed treaty neither does it state the person whom makes treaty for Nigeria in the whole document. South Africa despite being reputed as one of the most International law-friendly Constitutions in the world, yet very little has been written about how South African courts approach the actual identification and interpretation of International Law. This work therefore examined the lapses in the Constitution of both Nigeria and South Africa with respect to the making and application of treaties in the two jurisdictions. It is however recommended that Nigerian Constitution should expressly state who makes treaty for Nigeria including the status of the treaty so made. Agreements of a technical, administrative or executive nature as provided in the South African Constitution should be well defined as to know which Agreement binds the Republic.

Keywords: Treaty-making, Application, International Law, Nigeria, South Africa, Case Study

1. Introduction

Treaties being the major means of entering into Agreements in International Law, Countries apply and implements treaty provisions within their domestic plane in accordance with their respective Constitutions. The method and procedure for the application and implementation of treaties are matters flowing directly from State sovereignty and hence are governed exclusively by municipal law.[1] 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 is governed by Municipal law.[2] According to Oyebode, '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 establishing the relationship between international law and domestic law'.[3] Municipal law may prescribe the process for carrying the treaty into force but International law is not concerned with that. It is pertinent to note that it is a general rule of Customary International Law that no State is allowed to rely on a provision of its internal law as a justification for its failure to carry out an international obligation.[4] A state can only justify violation of a treaty if the violation concerned a rule of its internal law of fundamental importance.[5] Where a person that represented a State in the conclusion of a particular treaty does not have *'*full powers*'* such a treaty will not bind the State, therefore the State will be justified in repudiating same.[6] Apart from the above circumstances, every treaty in force is binding upon the parties to it and must be performed by them in good faith.[7] This is the principle of *pacta sunt servanda*. This work is a comparative study of the making and application of treaties in the two jurisdictions of Nigeria and South Africa. While Nigeria is a dualist State, South Africa operates a hybrid system between monism and dualism in her international relations, hence the special interest in South Africa.

2. Concept of a Treaty

Treaty is 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 irrespective of its particular designation.[8] The treaties (Making Procedure, Etc)Act[9] defines treaties as 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 multilateral in nature.[10] The term 'treaty' itself is the one most used in the context of International Agreements but there are variety of names which can be, and sometimes are used to express the same concept such as protocol, act, charter, covenant, Pact and Concordat.[11] They each refer to the same basic activity and the use of one term rather than another often signifies little or more than a desire for variety of expression. A treaty may be viewed as a contract. One important requirement of a treaty is that parties to a treaty intend to create legal relations between themselves by means of their agreement.[12] According to 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'.[13]

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[1].A B Akinyemi, *Readings on Federalism* (Ibadan: University of Ibadan Press, 1979)
[2].A B Oyebode, *Treaty-Making and Treaty Implementation in Nigeria: An Appraisal* (Lagos: Bolabay Publications, 2003)
[3].A B Oyebode. *Treaty-Making and Treaty Implementation in Nigeria: An Appraisal, op cit*
[4].Article 27 of the Vienna Convention on the Law of Treaties 1969.
[5].Article 46(1), *Ibid*
[6].Article 7, *Ibid*
[7].Article 26, *Ibid*
[8].Article 2, *Ibid*
[9].Cap T.20 Volume 15, Laws of the Federation of Nigeria, 2004
[10].Section 3(3) of the Treaties (Making procedure, Etc) Act 2004
[11].M N Shaw, *International Law* (United Kingdom: Cambridge University Press, 2014) 665
[12].*Ibid*
[13].JAS Grenville, *The Major International Treaties* (London: Methwen & Co Ltd, 1974)

3. Transformation and Incorporation

The doctrine of transformation holds 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.[14] International treaties do not automatically become part of national law, it therefore, requires a legislation to be made by the Parliament for the Implementation of International Law in Nigeria.[15] This is called the process of transformation. Transformation of treaties into municipal law entails clothing them domestically; by making them part of the statutes of the country but does not entail subjecting treaties to the vicissitudes of municipal politics.[16] In Nigeria, section 12(1) of the 1999 Constitution provides that: *'*No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.*'* This Constitutional prohibition on Executive law making means that any treaty concluded by the Federal Republic of Nigeria would be regarded *eo nomine* as source of domestic law, until such has been transformed in accordance with the provision of the Constitution. In *The Registered Trustees of National Association of Community Health Workers Union of Nigeria & Ors v. Medical and Health Workers Union of Nigeria*,[17] the Supreme Court of Nigeria held that the International Labour Organization Convention, having not been domesticated in Nigeria had no binding effect in Nigeria. Transformation may be achieved through two methods; by re-enactment and by reference.[18] Transformation by re-enactment or *'*force of law*'* is when the implementing statute directly enacts specific provisions of the entire treaty usually in the form of a schedule to the Statute, whereas transformation by reference is usually contained either in the long and short titles of the Statutes or in the Preamble or Schedules.[19] The rationale behind domestication of treaty by Legislatures according to a learned writer is to afford them an opportunity of providing a prominent role, even domineering role in the treaty making process.[20] Since the making of a treaty is within the jurisdictional provisions of the Executive, the Legislature sees the domestication process as a means of checking the activities of the Executive, apparently because law making function is that of the Legislature and not that of the Executive.

The doctrine of Incorporation postulates that International law should apply directly within a country without the need for transformation.[21] The positivists argue that the rules of International Law can only be applied within the Municipal area by a process of *'*Specific adoption*'* or Incorporation*'*, for they are separate systems. For treaties, there must be a transformation into domestic law, a substantive requirement that validates the application of treaty provisions to individuals.[22] Lord Denning made a fine distinction between Incorporation and Transformation in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria,*[23] where he held thus: *'* By Incorporation, the rules of International Law are incorporated into English Law automatically and considered to be English Law unless they are in conflict with an Act of Parliament while in Transformation, the rules of International law are not to be considered as part of English Law except in so far as they have been already adopted and made part of our law by the decisions of Judges or by Act of Parliament or by established custom*'*. According to Lord Denning in that case,[24] *'*under the doctrine of Incorporation, when the rules of International Law change, our English Law changes with them, but under the doctrine of Transformation, the English Law does not Change, it is bound by precedent.*'* Consequently, Lord Denning gave a Judgment that was in accordance with a developing customary rule of International Law but in conflict with English *stare decisis.*

4. Dualism and Monism

On the relationship between International Law and Municipal Law, there are two major concepts; Dualism and Monism. Dualists view International and Municipal Legal Orders as mutually exclusive, each possessing its sources, subjects and subject matter.[25] 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 Triepel[26] and strupp[27] 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.*'*[28] Elucidating on this, Mohr explains that while 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.[29] According to the Dualists, 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.[30] Going by the proposition of dualism, treaties should be non-self-executing.[31]

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[14].Anzilotti, II *Diritto Internationale nei Giudizi Inteni* (1950) p.177

[15]B I Olutoyin, '*Treaty Making and its Application under Nigerian Law: The Journey So Far',* (2014)(3) International Journal of Business and Management Invention, p.14

[16].*Ibid*

[17].(1996) 8 ECLR 1015

[18].B I Olutoyin, '*Treaty Making and its Application under Nigerian Law: The Journey So Far', op cit*

[19]A O Oyebode, 'Of Norms, Values and Attitudes: The Cogency of International Law' (2011) An Inaugural Lecture delivered at the University of Lagos.

[20]M Mwagiru, *'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Practice'* (2011)(3) Journal of Language, Technology Entrepreneurship in Africa No. 1, p.140

[21].M N Shaw, *International Law, op cit* at p.655

[22].U O Umozurike, *Introduction to International Law* (Ibadan: Spectrum Law Publishing, 2005) 30

[23].(1997) QB 529 (CA) pp.553-554

[24].(1997) QB 529 (CA) pp.553-554

[25]H Mohr, 'Treaties and the Legal Order' Paper Presented at the Graduate Seminar on Legal Research, Policy and Reform at Osgoode Hall Law School, New York University Canada, 1981, p.7

[26]H Triepel, *Volkerrecht Und Landesercht, Berlin, 1899 and A Conte, Human Rights in the Prevention and Punishment of Terrorism; Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (London: Springer Heidelberge Dordrecht, 2010) 91

[27].R Struup, *Elements of International Law* (Berlin: 1930) p.47

[28].H Mohr, *Treaties and the Legal Order, op cit*

[29].*Ibid*

[30]R Higgins, *Problems and Process: International Law and How We Use It* (London: Oxford University Press, 1994) 205 in C Nwapi, '*African Journal of International and Comparative Law,'* March (2011) (19) No.1 at pp.38-65

[31].A O Enabulele, *'Implementation of Treaties in Nigeria and the status Question: whither Nigerian Court'? op cit*

The position of the Dualists on the superiority of municipal law over International Law is in conflict with the holding of the Supreme Court of Nigeria in the case of *General Sani Abacha v. Gani Fawehinmi,*[32] where His Lordship; Justice Ogundare JSC stated that *'*if there is a conflict between the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1990; a Statute with International flavour 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.*'* It is to be noted that the Lead Judgment of Ogundare JSC in that case[33] is vehemently criticized in this work as the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act being a transformed treaty enjoys equal status with an Act of Parliament even though same is not provided by the Constitution.

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.[34] A leading proponent of the concept of Monism is Hans Kelsen. Kelsen viewed law as an *'*Integrated United system of laws.*'*[35] 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'.[36] Kelsen further argues that Municipal Law derives its validity from the International Legal Order.[37] According to Kelsen, since States are composed of individuals hence, individual human beings are the subject of both Legal Orders. The Monists thus conclude that where there is a conflict between both Legal Orders, the Courts are to apply International Law. Furthermore, International law is to be immediately applicable within the Municipal Legal Order without the need for transformation. Therefore, monism believes in self-executing treaties.[38] While Civil Law Countries are traditionally monists in approach, Common Law Countries are traditionally dualists.[39] Nigeria is a dualist nation as can be garnered from the provisions of section 12 of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Based on this provision of the Constitution, the Supreme Court held in *Registered Trustees of National Association of Community Health Workers of Nigeria & Ors v. Medical and Health Workers Union of Nigeria,*[40] that the International Labour Organization Convention, not having been domesticated in Nigeria cannot therefore be applied in Nigeria.

5. Treaty-Making and Application in Nigeria

As a dualist State, International and Municipal Laws exist in Nigeria. There is supremacy of municipal legislation over International laws, hence the need to domesticate treaties before their application within Nigeria. It is regrettable that the Constitution of Federal Republic of Nigeria, 1999 as amended does not provide for treaty-making power. The Constitution does not provide the person who will make treaty for Nigeria. Instead of making provision for the Person that will make treaty for Nigeria, the Constitution provides for treaty implementation. This is confirmed by section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides thus: *'*No treaty between the Federation and other Country shall have the force of law except to the extent for which any such treaty has been enacted into law by the National Assembly. The National Assembly implements the treaty so made by enacting same into law. The side explanatory note of section 12 of the Constitution of the Federal Republic of Nigeria, 1999 as amended along with Item 31 of the Exclusive Legislative List makes it clear that the National Assembly's legislative role is limited to the implementation of treaties. According to Nwabueze,[41] section 12(1) of the Constitution reflects the inherited Common Law position that treaty-making is a purely an Executive act that requires subsequent implementation within the country by way of legislation enacted by the Legislature. He explains that treaty-making and its implementation are two separate functions, the former for the Executive and the latter for the Legislature.[42]

The Treaties (Making Procedure, Etc) Act instead of salvaging the situation, worsened the problem by opening a floodgate of Persons that will make treaty on behalf of the Federal Republic of Nigeria; Ministry, Government, Agency, Body or Person.[43] Both the Constitution and the Treaties (Making Procedure, Etc) Act do not provide a specific person that negotiates and makes a treaty on behalf of Nigeria. Even though the Treaty-Making power is within the purview of the Federal Government, both the Constitution and the Treaty (Making Procedure, Etc) Act ought to have specifically mentioned the person that can make treaty on behalf of the Federal Government of Nigeria. It is believed that the President being the *alter ego* of the Federal Government can make and negotiate treaties on behalf of the Federal Government. It is wrong for treaty-making powers to be provided by the Treaties (Making Procedure, Etc) Act; an ordinary legislation without same being provided by the Constitution which is the *font est origo* of Nigeria's jurisprudence. Treaties being part of International Law, the making of same ought to be provided in the Constitution of the Federal Republic of Nigeria 1999 as amended which is a higher law than the Treaties (Making Procedure, Etc) Act. It will also avoid conflict and voidness which provisions of ordinary laws have with the Constitution where there is a clash.[44] The ratification and implementation of a treaty culminates in its application. Where a treaty is not applied, the entire process is defeated. In view of this, the application of treaties is closely monitored by the United Nations through its Treaty Bodies.[45] These Bodies monitor the progress in the application of treaties basically through reports received from State parties to treaties. It is through Treaty Reporting that the United Nations knows how States have fared in

[32].(2000) FWLR (Pt 4)
[33].(2000) FWLR (Pt 4)
[34].M N Shaw, *International Law, op cit*
[35].H Mohr, *'*Treaties and the Legal Order', *op cit*
[36].H Mohr, *'*Treaties and the Legal Order', *op cit*
[37].M N Shaw, *International Law, op cit*
[38]A O Enabulele, *'Implementation of Treaties in Nigeria and the Status Questions: whither Nigerian Court'? op cit.*
[39]J E A Abugu, *A Treaties on the Application of International Labour Organization Convention in Nigeria* (Lagos: University of Lagos Press, 2009)10
[40].(1996) 8 ECLR 1015
[41].B O Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (London: Sweet & Maxwell, 1983) pp.255-256
[42].*Ibid*
[43].Section 1(2) of the Treaties (Making Procedure, Etc) Act 2004
[44].Section 1(3) of the Constitution of the Federal Republic of Nigeria 1999 as amended
[45]Such as the Committee Against Torture(CAT), the Committee on the Rights of the Child and the Human Rights Committee(HRC)

the implementation and application of respective treaties. 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.[46]

6. Treaty-Making and its Application in South Africa

South African Constitution of 1996 is reputed to be one of the most International law-friendly Constitutions in the world.[47] It provides for example, that the interpretation of Bill of Rights must take into consideration International law.[48] The South African Constitution also provides that when interpreting any legislation, any reasonable interpretation consistent with International law must be preferred over any other interpretation that is inconsistent with International law,[49] and that Customary International law is law in the Republic except where it is in conflict with the Constitution or an Act of Parliament.[50] It is to be noted that *'*treaty*'* is referred to as an International Agreement in the Republic of South Africa. This is why the South African Constitution,[51] used the word *'*International Agreement*'* instead of treaty in its provisions. International Agreements are sources of International relations.[52] It is imperative to state that South Africa operates a hybrid system between monism and dualism in her International relations. Under the South African Constitution, Customary International Law is generally considered to be automatically part of South African law as long as it does not conflict with the Constitution or South African legislation.[53] This is a monist approach to the implementation of International law. Furthermore, the Constitution obliges every Court to prefer any reasonable interpretation of legislation which is consistent with International Law over any alternative interpretation that is inconsistent with International law.[54] This is in conformity with the provision of the Vienna Convention which provides that *'*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'*.[55]

The Republic of South Africa has great respect for International law hence the provision of section 233 in her Constitution; preferring any reasonable interpretation of the legislation that is consistent with International law than otherwise. With regard to treaties, South Africa follows a dualist approach with respect to the domestic effect of International treaties. While ratification of a treaty creates International obligations for South Africa, the dualist system means that in order for the treaty obligation to be given the force of law domestically, South Africa cannot simply become a party to the treaty; the treaty must be incorporated into domestic legislation.[56] The negotiating and signing of all International Agreements is the responsibility of the National Executive.[57] Though ratification of a treaty creates International obligations for South Africa, the dualist system creates International obligation by giving the International Agreement force of law domestically by incorporating it into domestic legislation.[58] Even though it is believed that both the President and the Cabinet may jointly participate in the negotiation of an International Agreement, it is not clear whether both the President and the Cabinet members will jointly sign an International Agreement. It may be difficult for the President and all Cabinet members to sign an International Agreement. The President being the Head of State and Head of the National Executive has the exclusive preserve to sign an International Agreement which will be binding on the Republic of South Africa.[59] However, the Cabinet must consider and approve all International Agreements before signing by the President. Section 231(2) and (3) o the 1996 Constitution of the Republic of South Africa lay down procedures governing domestic approval for the conclusion of International Agreements. While under section 231(2), the International Agreements require only Executive approval but must be tabled in Parliament, under section 231(3) the International Agreements requires both Executive and Parliamentary approvals before they are binding on the Republic.[60]

It is important to state that the nature of an International Agreement that requires either accession or ratification by the National Executive is not defined by the Constitution. For example, what constitutes an International Agreement of a technical, administrative or Executive nature is not certain. The Constitution under Section 231(3) ought to have defined when an International Agreement is of a technical, administrative or Executive nature. It is only when the nature of the International Agreement is known or established that one can decipher whether the Agreement will be ratified or acceded to by the National Executive Council. There is a reprieve under section 231(4) of the 1996 Constitution of the Republic of South Africa as the subsection uses the word *'*Any*'* when it provides thus: '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.

By the provision of section 231(4) of the Constitution, any International Agreement including those of a technical, administrative or executive nature becomes Law in the Republic when it is enacted into law by national legislation. The subsection qualifies a self-executing provision of an Agreement as law in the Republic that has been approved by Parliament unless it is inconsistent with the Constitution or Act of Parliament. It is interesting to note that the Person who makes

[46]For Instance, Article 62 of the 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.

[47]Dire Tladi, *'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga'* (2016) (16.2) African Human Rights Law Journal, Pretoria South Africa

[48].Section 39(1)(b) of the 1996 Constitution of the Republic of South Africa

[49].Section 233, *Ibid*

[50].Section 232 of the 1996 Constitution of the Republic of South Africa

[51].Section 231 (1-5) of the 1996 Constitution of the Republic of South Africa

[52].Sivu Maqungo, *'Treaty-Making and Approval of Treaties in South Africa: A workshop'* (2010) Pretoria

[53].Section 232 of the 1996 Constitution of the Republic of South Africa.

[54].Section 233, *Ibid*

[55].Article 31(1) of the Vienna Convention on the Law of Treaties, 1969

[56].Botha Neville, *'Treaty-Making in South Africa: A Reassessment'* (2000) South African year book of International Law

[57]Section 231(1) of the 1996 Constitution of the Republic of South Africa. Note that the National Executive includes the President and Cabinet respectively under sections 83 and 91 of the Constitution.

[58]O E Nwebo, *Contemporary Issues in International Law and Diplomacy* (Owerri: Zubic Infinity Concept, 2020)

[59]Section 83(a) of the 1996 Constitution of the Republic of South Africa.

[60].Dire Tladi, '*Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga', op cit*

International Agreements in South Africa is known and well defined by virtue of section 231 of the 1996 Constitution unlike in Nigeria where the Constitution[61] does not provide who makes treaty for the Federal Republic of Nigeria. While Treaties (Making Procedure, Etc) Act[62] of Nigeria classified Agreements in order to decipher the one that will be enacted into law, ratified or need not to be ratified, the 1996 Constitution of the Republic of South Africa by virtue of Section 231(3) classified International Agreement into technical, administrative or Executive nature but fails to define them for the purpose of accession or ratification by the National Executive Council. It is submitted that the South African monist approach to International law; automatic application of Customary International law in her domestic Plane is commendable as it makes the Country very receptive to International law except same is inconsistent with the provision of her Constitution or Act of Parliament. The dualist approach of the two Countries to International law makes the application of treaties domestically only when same have been enacted by the Parliament of the respective Countries.

7. Relationship between International Law and Municipal Law

International law is related with Municipal law in two forms: Customary International Law and treaty. Customary International Law is treated as the Law of the land using the adoption or Incorporation principles.[63] This was inherited from English Common Law approach being Nigeria's Colonial Master. In Nigeria today, no part of its Constitution make express or implied reference to the reception of Customary International Law. However, in South Africa,[64] Customary International Law is part of her domestic law. 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,[65] the position of International Law within the sphere of Municipal Law varies from State to State. 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 decisions.[66] In spite of all criticisms against the application of International law in Nigeria's domestic plane, the position of the law as at today in Nigeria remains that a treaty possesses *'*a greater vigour and strength*'* than other domestic Statutes and accordingly enjoys a superior status to other domestic Statutes in the hierarchy of norms in Nigeria except the constitution.[67] Thus, the decision of the Supreme Court in *Abacha v. Fawehinmi*[68] recognizes the supremacy of the Constitution and *afortiori* the fact that Nigeria is a dualist State, as well as the fact that a treaty must be domesticated before it can be applied in Nigeria. This is the stark reality irrespective of the morality of the International treaty principle of *Pacta Sunt Servanda* and the implication of Article 27 of the Vienna Convention on the Law of Treaties 1969 which provides that *'*a Party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.*'* It is hoped that another opportunity may present itself for the Supreme Court to review its decision regarding the position of treaties in the hierarchy of domestic Statutes.[69] It is submitted that relationship between International and domestic law varies from State to State. While in some Countries[70] including South Africa,[71] International law is incorporated in their municipal law. Nigeria, being a dualist State, International law can only apply in her Municipal plane unless same has been domesticated by an Act of National Assembly by virtue of section 12 of the 1999 Constitution as amended. By the principle of *Pacta Sunt Servanda*,[72] treaties are binding upon States and they must perform same in good faith. Rules of a State's municipal Law should not be an excuse for the State's breach of International Law.[73] However, the application of International Law in a Municipal plane is subject to the State's sovereignty and independence.[74]

8. Conclusion and Recommendations

It is undoubtedly that the making and application of treaties are two different things. In dualist States,[75] treaties so made can only apply in the Country's municipal plane when the treaty has been domesticated by the Country's Parliament. In Monists States,[76] treaties apply automatically into the Country's municipal plane without the need for legislation. Once treaties enter into force, a number of questions can arise as to the way in which they apply in particular situations.[77] Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each Party in respect of its entire territory.[78] This is the general rule, but it is possible for a State to stipulate that an International Agreement will apply only to part of its territory.[79] It is pertinent to note that as dualist States, the making and application of treaties in both Nigeria and

[61]Section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended.
[62].Section 3 of the Treaties (Making Procedure, Etc) Act 2004
[63].M N Shaw, *International Law, op cit* at p.671
[64]The proposition that Customary International Law formes part of the Common Law of South Africa is well entrenched in Section 232 of the 1996 Constitution of the Republic of South Africa which provides that "Customary International Law is the Law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."
[65].M N Shaw, *International Law, op cit* at p. 102. Article 27 of the Vienna Convention on the Law of Treaties, 1969
[66]M O Ajomo, *'Development in International Law and International Relations in the Challenge of Nigerian Nation'* (ed) T.A Aguda (Lagos: Nigerian Institute of Advanced Legal Studies, (1985). Zp.197
[67].This is by virtue of the Supreme Court's decision in *Abacha v. Fawehinmi* (2000) FWLR (Pt 4) p.533
[68].*Ibid*
[69].O E Nwebo, *Contemporary Issues in International Law and Diplomacy, op cit* at p.134
[70]Article 26 of the French Constitution of 1946 provides that diplomatic treaties duly ratified and published are SUPERIOR in authority to French Internal legislation both prior and subsequent to the treaty. Also, Article 25 of German Constitution states that the general rule of Public International Law shall be an integral part of the Federal Law.
[71]Section 232 of the 1996 Constitution of the Republic of South Africa provides that "Customary International Law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."
[72].Article 26 of the of the Vienna Convention on the Law of Treaties, 1969
[73].Article 27, *Ibid*
[74].Article 2(1), (4) and (7) of the United Nations Charter
[75]For example, in Nigeria, a treaty can only be applied when same has been enacted into law by the National Assembly by virtue of Section 12(1) of the Constitution of Federal Republic of Nigeria 1999 as amended.
[76]For example, section 232 of the 1996 Constitution of the Republic of South Africa provides that "Customary International Law is Law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."
[77]M N Shaw, *International Law, op cit* at p.202
[78].Article 29, *ibid*
[79]In the past, so-called "Colonial application Clauses" were included in some treaties by the European Colonial Powers which declared whether or not the terms of the Particular Agreement would extend to the various Colonies.

South Africa are the same except that South Africa being also a Monist State, Customary International Law applies automatically in her domestic plane unless it is inconsistent with the Constitution or an Act of Parliament.[80] It is recommended that the treaty-making powers of the President of the Federal Republic of Nigeria should be expressly provided in the 1999 Constitution of the Federal Republic of Nigeria. Nigeria, being a dualist Country should incorporate Customary International law into her domestic laws as obtains in South Africa[81] and other jurisdictions.[82] There is still the need for the Supreme Court of Nigeria to revisit the decision of *Abacha v. Fawehinmi*[83] 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.[84] The revisitation of the decision by the Supreme Court will straighten the record in the development of International Law. The provision of section 231(3) of the 1996 Constitution of the Republic of South Africa ought to be amended to provide the definition of what constitutes an International Agreement of a technical administrative or Executive nature as it will determine whether the Agreement will be ratified or acceded to by the National Executive Council.

[80]Section 232 of the 1996 Constitution of the Republic of South Africa

[81]*Ibid.* The section provides that "Customary International Law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

[82]For example, Article 25 of German Constitution states that the general rule of Public International Law shall be an integral part of the Federal Law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the Territory.

[83](2000) FWLR (Pt 4) p.533 at 587

[84]Note that the dissenting opinion of Achike JSC is that "a treaty which has been incorporated into the body of the Municipal laws ranks at par with the municipal laws. This is contrary to the lead Judgment of Ogundare JSC which held that the same treaty shall stand on a higher pedestal above all other Municipal laws.