IMPLEMENTATION AND APPLICATION OF TREATIES IN NIGERIA

BY

LONGJOHN, CLARIBEL DIEBO

REG. NO.:ALS/LL.M/010/016

SUBMITTED TO

THE NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES
SCHOOL OF POST GRADUTE STUDIES
UNIVERSITY OF LAGOS CAMPUS, AKOKA, YABA-LAGOS

IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE MASTER OF LAWS DEGREE IN LEGISLATIVE DRAFTING

2009/2010 SESSION

CERTIFICATION

I certify that I supervised **MS. CLARIBEL DIEBO LONGJOHN** in research dissertation and agree that the paper is suitable for submission to the Nigerian Institute of Advanced Legal Studies, University of Lagos campus, Akoka, Yaba - Lagos in satisfaction of the requirement for the award of the degree of Master of Laws in Legislative Drafting (LL.M)

Signature of Supervisor: ……..

Name of Supervisor: **PROF. ANIMI AWAH**

Name of Researcher: **CLARIBEL DIEBO LONGJOHN**

Date: …….

DEDICATION

To my ever faithful God.

ACKNOWLEDGEMENT

This work would not have come to fruition without the supervision and encouragement of my project supervisor, Prof Animi Awah. I acknowledge the efforts of Mr. Samuel Tamunotonye LongJohn and Mrs. Siminialayim Banigo in sponsoring me on the LL.M programme which has culminated in the writing of this dissertation. I will not fail to acknowledge the constant reminders concerning this project issued me by my beloved friend, Captain Sule Mathew Ama. For these reminders, I am truly grateful as they ensured that this project occupied a place of priority from its start to its conclusion. Also worthy of acknowledgement are the efforts of Mr. Ampim Gogo Blankson, whose assistance cannot be quantified and Mrs. Anastesia Ifeanyichukwu Tochukwu who, in the course of this research work, aided me in the online purchase of relevant academic materials. I must not fail to also acknowledge the contribution made by Mr. Friday Okhankhuele of the National Human Rights Commission, for he graciously provided me with valuable materials on the strides made and challenges faced by the Commission.

Finally and most importantly, I acknowledge my God and father, for without Him this research work and I would not be.

TABLE OF CONTENTS

TABLE OF STATUTES

- African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation 2004.
- African Union Charter on the Rights and Welfare of the Child.
- Anglo Polish Treaty of Alliance, 1939.
- Arbitration and Conciliation Act, Cap A18, LFN 2004.
- Canadian Human Rights Act.
- Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953.
- Carriage of Goods by Sea Act Cap C2 LFN, 2004.
- Child Rights Act, Cap C50 Laws of the Federation, 2004.
- Constitution of the Federal Republic of Nigeria, 1999.
- Constitution of the Federal Republic of Nigeria, 1979.
- Convention Against Torture and other Cruel, inhuman and degrading Treatment or Punishment (CAT), 1984.
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- Convention on the Rights of the Child.
- Criminal Code Act, Cap C38 Laws of the Federation of Nigeria, 2004.
- Geneva Convention on the High Seas 1958.

- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).
- Montevideo Convention of 1933 on the Rights and Duties of States.
- National Human Rights Commission Act, 2010.
- National Human Rights Commission Act, Cap N46 LFN, 2004.
- Nigerian Law Reform Commission Act, CAP N118 LFN, 2004.
- optional protocols to the International Covenant on Civil and Political Rights (ICCPR-OP1).
- Peace Treaties 1919.
- Penal Code Law.
- Trafficking in Persons Act, 2005 (as amended).
- Vienna Convention, 1969.
- Warsaw Convention.

TABLE OF CASES

LIST OF ABBREVIATIONS

CAT	Committee Against Torture; Convention Against Torture and other Cruel Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
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
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
NAP	National Action Plan
NHRC	National Human Rights Commission
NHRI	National Human Rights Institution
NGO	Non Governmental Organisation

NLRC	Nigerian Law Reform Commission
OAU	Organisation of African Unity
SERAC	Social and Economic Rights Action Center and the Center for Economic and Social Rights
SERAP	Socio-Economic Rights and Accountability Project
UN	United Nations

ABSTRACT

A sizeable number of laws that make up the Nigerian *corpus juris* emanate from treaties. In Nigeria, treaties do not automatically have the force of law as Section 12 of the 1999 Constitution of the Federal Republic of Nigeria expressly provides that before a treaty between Nigeria and another state shall have the force of law it must be enacted into law by the National Assembly. This section of the Constitution 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 Assembly in the federation before it is enacted and assented to by the President. Hence, until a treaty has been domesticated in Nigeria, it cannot be applied within the country.

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, African Charter on Human and Peoples Rights and the Convention on the Rights of the Child. These Conventions have been ratified by Nigeria. The study also relied on the Laws of the Federal

Republic of Nigeria especially the Constitution of the Federal Republic of Nigeria, 1999 and the Child Rights Act amongst other municipal statutes. The study examined the body of Laws in Nigeria in a bid to reveal impediments to the application of International treaties that may be inherent in them. Furthermore, the study examined the attitude of the courts and some state governments within Nigeria, towards the implementation of certain treaties.

The study revealed amongst other things that there exist provisions in some statutes within the body of laws in Nigeria that impede the effective application of certain treaties. For instance, to promote the effective application of the Child Rights Act, the provisions of the Criminal Code and Penal Code on Rape have to be reviewed to be in consonance with the age of maturity of a girl child and the penalty on rape imposed by the Child Rights Act. The study also revealed that certain treaties are easier implemented through regional courts such as the ECOWAS Court.

From the study, it is clear that more still has to be done towards promoting the application of treaties in Nigeria.

INTRODUCTION

BACKGROUND TO THE STUDY

The Vienna Convention of 1969, which has its scope limited to treaties between states, defines a treaty as 'an international agreement concluded between states in a 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.'[1] Similarly, the Blacks Law Dictionary[2] defines treaty as 'A formally signed and ratified agreement between two nations or sovereigns; an international agreement concluded between two or more states in written form and governed by international law.' The above definitions are restrictive as they do not take into cognizance treaties entered into between international organizations and states. A treaty has been comprehensively defined as 'a consensual engagement which subjects of international law have undertaken towards one another with the intent to create legal obligations under international law.'[3] Treaties therefore, are agreements under international law entered into either between states or between states and international organizations. A treaty may sometimes be referred to as a 'convention', 'protocol', 'covenant', 'exchange of letters', 'act', 'charter', 'concordat', etc[4]. Irrespective of the designation used in identifying an international agreement, the fundamental principle guiding international agreements is the proposition that 'international treaties are binding upon the parties to them and must be

[1] Article 2(1)(a)
[2] 7th Ed
[3] Schwarzenberger, Georg., International Law as Applied by International Courts and Tribunals, vol. 1, Stevens & Sons, London, 1968, 438. In A.G Hamid Journal of Malaysian and Comparative Law(JMCL) Vol.30 (2003),65-88 'Treaty Making Power in Federal States with Special Reference to the Malaysian Position p2
[4] J.A.S Grenville, *The Major International Treaties 1914-1973* Methwen & co. Ltd 1974 London, P.8; Shaw *International Law ,* p.634

performed in good faith.'[5] This principle is referred to as *pacta sunt servanda* and is argued to be the oldest principle of international law.[6] The principle is embodied in Article 26 of the Vienna Convention, 1969.

As earlier stated, states and in certain cases International organizations are subjects of International law. Individuals, as a general rule can only assert violations of international law through their respective states.[7] However, states may by treaty provisions confer rights on individuals which will be enforceable under International law. An instance is the 1919 Peace Treaties which contained provisions empowering individuals to apply directly to international courts.

Over the years, the need for treaties has grown as the world's interdependence has intensified.[8] It can rightly be said that treaties form the bedrock of contemporary International law. Their importance within the realm of international law cannot be overemphasized. Various explanations regarding the rise in the number of treaties have been proffered. The growing number of treaties has been attributed to rise in regional corporations and also to the increase in the number of sovereign nations and international organizations.[9]

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. A treaty may be bilateral or

[5] Shaw, Ibid, p.633.
[6] Ibid.
[7] Ibid, p.183
[8] Australian Government Department of Foreign Affairs and Trade, <http://www.dfatgov.au/treaties/making/making1/html> Accessed 25 October,2010.
[9] J.A.S Grenville, ibid, p.1.

multilateral. While bilateral treaties are entered into between two parties only, multi lateral treaties have three or more parties.

A treaty may be viewed as a contract. One important requirement of a treaty is that parties to the treaty intend to create legal relations between themselves by means of their agreement.[10] J.A.S Grenville has identified three inducements for keeping treaty obligations[11]; firstly, a treaty contains a balance of advantages and if a country violates the provisions of a treaty such a country must reasonably expect to lose the advantages provided by that treaty. For instance, 'when one country expels a foreign diplomat, a reciprocal expulsion often follows.'[12] Similarly, a gross violation of the provisions of a treaty may lead to its termination. Secondly, a treaty may contain a deterrent element. For example, the breach of the provisions of a treaty may lead to warfare. Hence, before taking action, 'political leaders have to decide whether the violation of a treaty is worth the risk of the possible counter measures taken by the aggrieved state or states.'[13] Thirdly, a nation usually considers its international credibility before acting in breach of a treaty to which it is a party. Failure to fulfill the provisions of a treaty may 'weaken the defaulting country's international position as other states calculate whether treaties still in force with it will be honoured'[14] and whether new agreements can still be concluded with such a defaulting nation. 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

Comment [a1]: Try to exhaust an issue before starting another. J joining the rights and duties of states with types of treaties is not tidy. Split to new paragraph after you exhaust discussion on the earlier

Comment [a2]: It would be nice if you can develop the point by discussing an example where such happened

Comment [a3]: Ithese situations should be clearly demarcated and left to flow on the same indentition with the text

[10] Shaw Ibid, p.634.
[11] J.A.S Grenville, Ibid, p.4.
[12] Ibid, p.5.
[13] Ibid.
[14] Ibid.

> advantages. Treaties represent attempts to reduce the measure of uncertainty inherent in the conduct of international affairs.

The method and procedure for implementing treaties are matters flowing directly from state sovereignty and hence are governed exclusively by municipal law.[15] Parties to a treaty may conclude their treaties in virtually any manner they wish.[16] There is no prescribed form on how a treaty is to be made or concluded. However, certain rules apply in the formation of treaties.

Comment [a4]: It is difficult to tell when you are moving fo a new issue. Use of sub heads will help

Article 7 of the Vienna Convention 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 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 for 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 other parties to the treaty that they are making agreements with persons competent to do so.

[15] A.B Akinyemi, A.B (ed.), Readings on Federalism, pp52-52, NIIA/University of Ibadan Press, 1979.
[16] Shaw, Ibid, p.634.

Generally, 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;

- Consent by signature

  Article 12 of the 1969 Convention 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.[17] 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.'[18]

- Consent by exchange of Instruments

  Article 13 of the 1969 Convention provides that the consent of States to be bound by a treaty constituted 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.

- Consent by ratification

[17] G.A.S Grenville, Ibid, p.9.
[18] Shaw, Ibid, p639.

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.[19] On the other hand, it has been opined that ratification should be required unless the treaty clearly reveals a contrary intention.[20] 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. Presently 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.[21] Ratification gives a state additional time to consider the treaty and sample the opinion of its populace concerning the treaty. According to Shaw,[22]

> 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.

Comment [a5]: Presentlty connotes something yet to come into practice

- 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 latter date.[23]

[19] G. Fitzmaurice, 'Do Treaties Need Ratification?', 15 BYIL, 1934, P.129 and O'Connell, *International Law,* p.222 in Shaw, Ibid, p.640.
[20] MacNair, *Law of Treaties,* p.133. in Shaw, Ibid, p.641.
[21] G.A.S Grenville, Ibid, p.9.
[22] Shaw, Ibid,p.640.
[23] Ibid, p.641.

STATEMENT OF THE RESEARCH PROBLEM

Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 provides for the implementation of treaties by way of ratification. In Nigeria, several challenges are encountered in the implementation and application of treaties. This study is aimed at finding out;

1. Whether the present mode of implementation of treaties is effective,
2. What challenges stand in the way of effective application of treaties,
3. Ways of effectively implementing and applying treaties to enhance the well being of Nigerians.

AIMS AND OBJECTIVES OF THE STUDY

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.

SIGNIFICANCE OF THE STUDY

The significance of this study lies not only in the enormous importance of treaties in international law but also in the challenges being presently encountered in the implementation and effective application of some treaties such as the Convention on the Rights of the Child and the African Declaration of Human and Peoples Rights.

RESEARCH METHODOLOGY

This work uses a comparative and analytical 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 or after domestication are not being effectively applied.

SCOPE 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, the Occupational Safety and Health Convention and the African Charter on Human and Peoples Rights as case studies. These treaties haven been ratified in Nigeria. In discussing the application of treaties in Nigeria a look will be taken 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 implementation and application of treaties in Nigeria as reference will, where necessary, be made to other jurisdictions.

STRUCTURE OF THE STUDY

This work is divided into four 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. Further more, 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 Nigerian 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 Nigerian 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 concludes the study and contains recommendations aimed at ensuring that important treaties are speedily implemented and domesticated treaties fully applied in Nigeria.

CHAPTER 2 TREATY IMPLEMENTATION

DEFINITION OF TERMS

Ratification of treaties: This is the final establishment of consent to be bound by a treaty, by the parties to the treaty.[24] According to P. T Akper[25] '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.

Transformation: 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.[26]

Incorporation: This doctrine, on the other hand, holds that international law should apply directly within a country without the need for transformation.[27]

Domestication of treaties: 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.'[28]

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'.[29]

[24] Blacks Law Dictionary,7th ed,p.1269
[25] 'Domestication of Treaties' a paper presented to the PGDLD/LL.M Students in Legislative Drafting of the Postgraduate School, Nigerian Institute of Advanced Legal Studies, University of Lagos campus, Akoka. P.7
[26] M.N Shaw, ibid p.105
[27] Ibid
[28] Ibid, p.8

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

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. According to A.B Oyebode,[30] implementation of treaties could mean 'the execution or fulfilment of the obligations arising from treaties concluded by States.'

Ratification of a tresaty 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 statutue that actually opens the door for its implementation.[31] 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.[32] 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 establishing the relationship between international law and domestic law.[33]

Therefore, in a discussion on the implementation 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.

Comment [a6]: treaty

Comment [a7]: statute

[29] J.A.S Grenville,ibid, p.12
[30] A.B Oyebode, ibid p.322
[31] Ibid, p324
[32] Ibid, p286
[33] ibid

DUALISM AND MONISM

On the relationship between international law and municipal law, there are two major[34] theories; Monism and Dualism.

Dualists view international and municipal legal orders as mutually exclusive, each possessing its sources, subjects and subject matter.[35] According to them international law and municipal law are two distinct legal systems, so distinct that conflicts between them are impossible. The chief proponents of the dualist view are Triepel and Strupp,[36] 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'[37] 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.'[38] Thus, the dualists identified two differences they considered 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.'[39] Another proponent of Dualism, Anzilotlis, views this argument from another perspective. According

Comment [a8]: are you sure that the correct name(s) check again and confirm

[34] Apart from these major theories, other theories such as the delegation and harmonization theories exist.
[35] H. Mohr 'Treaties and the Legal Order' Paper presented at the Graduate Seminar on Legal Research, Policy and Reform at Osgoode Hall Law School, York University, Canada, 1981, p.7
[36] M.N Shaw, Ibid, p100
[37] H. Mohr, Ibid
[38] ibid
[39] ibid

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.

Monism, on the other hand, 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.[40] A leading proponent of the Monist theory is Hans Kelsen. Kelsen viewed Law as an 'integrated, united system of laws'.[41] 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.[42]

Kelsen further argues that municipal law derives its validity from the international legal order.[43] 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

[40] M.N Shaw, Ibid, p101
[41] H. Mohr, ibid, p6
[42] Ibid, p.8
[43] M.N Shaw,ibid, p.42

legislate. 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.'[44]

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 a need for transformation.

Generally, while civil law countries are traditionally Monists in approach, common law countries are traditionally Dualists.[45]

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.'[46] 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

[44] H. Mohr, ibid, p.9
[45] J.E.A Abugu *A Treatise on the Application of ILO Conventions in Nigeria* University of Lagos Press 2009,p.10
[46] M.N Shaw, ibid,p.102; Article 27 Vienna Convention, 1969

prior judicial decisions.[47] On the other hand, treaties, in most cases,[48] undergo domestication 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'[49] 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.'[50] 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.

[47] M.O.Ajomo '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)p.197; A.B Oyebode *Treaty Making and Treaty Implementation in Nigeria: An Appraisal* Bolabay Publications,Ikeja Lagos 2003,p289.
[48] A.B Oyebode, Ibid, p.291.
[49] ibid
[50] Ibid, p.343

In *General Sanni Abacha v. Gani Fawehinmi,*[51] 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 vigour 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 present 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.

Comment [a9]: is it prevent?

This position of the Supreme Court has been criticized for differing reasons. Some[52] 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.'[53]

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

[51] [2001]51WRN29
[52] Such as J.E.O. Abugu, ibid, p.15
[53] Ibid, p.16

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 grund norm within the Nigerian legal order.[54] 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.[55] 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'[56] is one based more on the tenets of morality than on the principles of law.

Having criticised the above criticism of the Supreme Court in Abacha's case. Attention will now be paid to the decision itself which, with respect, has fanned the embers 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 possess '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.[57] The Supreme Court in *Oloruntoba-Oju v. Dopamu*[58] held per Oguntade JSC, that 'any

Comment [a10]: What purpose is this statement meant to accomplish

[54] See Section 1, Constitution of the Federal Republic of Nigeria, 1999
[55] Murmansk State Steamship Line v. The Kano Oil Millers Ltd. [1974]252 S.C 1at2
[56] R. F Oppng, 'Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) Fordham Inter'l L.J. 173 in J.E.O Abugo, ibid, p15 fn5
[57] See *Capital Bancorp Ltd v. Shelter Savings and Loans Ltd [2007] All FWLR [Pt440] 684* where it was held that 'the Constitution of Nigeria and its provisions are supreme.'
[58] [2008] All FWLR [Pt 411]810

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*[59] the Court of Appeal, per Omage JCA at p.1562 paraC-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 excepted 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 Caledonian Airways Ltd*[60] the Court held that an international agreement embodied 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.

[59] [2006] All FWLR [Pt 299] 1549
[60] (*1990) NWLR(Pt160)507*

FEDERALISM AND TREATY IMPLEMENTATION IN NIGERIA

According to Wheare, one of the arguments for establishing a Federation is that it will provide for a harmonised foreign policy within the State.[61] It is common in federations to find their constitutions 'either forbidding their component states from entering into treaty relations with foreign states or permitting them to do so only with express authorisation from the federal government.'[62] According to M.O Ajomo[63]

> In a unitary State whose legislature possesses unlimited powers, the problem is simple. Parliament will either fulfil 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 fulfil its treaty obligations in good faith.

Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 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 the 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 assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.'

[61] K.C Wheare,*Federal Government,* 1963,p179 in 'Treaties: Their Making and Implementation under the New Nigerian Constitution,p.2, paper presented at the 10th Annual Conference of the Nigerian Society of International Law, held at the Nigerian Institute of International Affairs, Lagos March 22-25, 1075

[62] Treaties: Their Making and Implementation under the New Nigerian Constitution, ibid see fn9

[63] Ibid,p.199

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 power is shared with the states.[64] Section 4(7)(a) of the Constitution gives the state Houses of Assembly exclusive powers to make laws over residual matters.[65]

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 the bill wanting to domesticate the treaty. Where a treaty bordering on an issue outside 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. Presently, only about two-third of the 36 states in Nigeria have passed the Convention into law[66].

[64] See Section 4(7)(b) Constitution, Federal Republic of Nigeria, 1999

[65] 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.

[66] A. Omoware 'Child Rights Act in Nigeria- Reality or Farce. http://www.mediafire.com/?daadjgbt32t7cp accessed 18th Feb,2011

Comment [a11]: Your essay is rather sketchy and in outlines. The reason is not far fetched. You are limited by inability to search and harnesh appropriate materials. You can do better. You need to flesh up your discussion with thinking of scholars on the issue, analysis, and appropriate live examples which should exist in this area of law and practice.

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The Vienna Convention of 1969, which has its scope limited to treaties between states, defines a treaty as 'an international agreement concluded between states in a 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.'[67] Similarly, the Blacks Law Dictionary[68] defines treaty as 'A formally signed and ratified agreement between two nations or sovereigns; an international agreement concluded between two or more states in written form and governed by international law.' The above definitions are restrictive as they do not take into cognizance treaties entered into between international organizations and states. A treaty has been comprehensively defined as 'a consensual engagement which subjects of international law have undertaken towards one another with the

[67] Article 2(1)(a)
[68] 7th Ed.

intent to create legal obligations under international law.'[69] Treaties therefore, are agreements under international law entered into either between states or between states and international organizations. A treaty may sometimes be referred to as a 'convention', 'protocol', 'covenant', 'exchange of letters', 'act', 'charter', 'concordat', etc[70]. Irrespective of the designation used in identifying an international agreement, the fundamental principle guiding international agreements is the proposition that 'international treaties are binding upon the parties to them and must be performed in good faith.'[71] This principle is referred to as *pacta sunt servanda* and is argued to be the oldest principle of international law.[72] The principle is embodied in Article 26 of the Vienna Convention, 1969.

As earlier stated, states and in certain cases International organizations are subjects of International law. Individuals, as a general rule can only assert violations of international law through their respective states.[73] However, states may by treaty provisions confer rights on individuals which will be enforceable under International law. An instance is the 1919 Peace Treaties which contained provisions empowering individuals to apply directly to international courts.

[69] S Georg., 'International Law as Applied by International Courts and Tribunals',
vol. 1, Stevens & Sons, London, 1968, 438. In A.G Hamid, 'Treaty Making Power in Federal States with Special Reference to the Malaysian Position' Journal of Malaysian and Comparative Law(JMCL) Vol.30 (2003),65-88.
[70] J.A.S Grenville, *The Major International Treaties 1914-1973(* Methwen & co. Ltd, London ,1974) P.8; MN Shaw *International Law ,* (4th edn, Cambridge University Press, United Kingdom, 1997) p.634.
[71] MN Shaw, Ibid, p.633.
[72] Ibid.
[73] Ibid, p.183

Over the years, the need for treaties has grown as the world's interdependence has intensified.[74] It can rightly be said that treaties form the bedrock of contemporary International law. Their importance within the realm of international law cannot be overemphasized. Various explanations regarding the rise in the number of treaties have been proffered. The growing number of treaties has been attributed to the rise in regional corporations and also to the increase in the number of sovereign nations and international organizations.[75]

Kinds of treaties: A treaty may either be bilateral or multilateral. While bilateral treaties are entered into between two parties only, multi lateral treaties have three or more parties.

Nature of treaties: A treaty may be viewed as a contract. One important requirement of a treaty is that parties to the treaty intend to create legal relations between themselves by means of their agreement.[76]

The force of treaty obligations: J.A.S Grenville has identified three inducements for keeping treaty obligations[77]; firstly, a treaty contains a balance of advantages and if a country violates the provisions of a treaty such a country must reasonably expect to lose the advantages provided by that treaty. For instance, 'when one

[74] Australian Government Department of Foreign Affairs and Trade, <http://www.dfatgov.au/treaties/making/making1/html> Accessed 25 October,2010.
[75] J.A.S Grenville, ibid, p.1.
[76] MN Shaw Ibid, p.634.
[77] J.A.S Grenville, Ibid, p.4.

country expels a foreign diplomat, a reciprocal expulsion often follows.'[78] Only recently, the Czech Republic expelled two diplomats from the Ukrainian embassy in response to the expulsion of two Czech diplomats from Kiev, Ukraine.[79] Also recently, the United States government expelled the Ecuadorean ambassador in retaliation for the expulsion of the United States envoy to Ecuador.[80] Similarly, a gross violation of the provisions of a treaty may lead to its termination. Secondly, a treaty may contain a deterrent element. For example, the breach of the provisions of a treaty may lead to warfare. Hence, before taking action, 'political leaders have to decide whether the violation of a treaty is worth the risk of the possible counter measures taken by the aggrieved state or states.'[81] Thirdly, a nation usually considers its international credibility before acting in breach of a treaty to which it is a party. Failure to fulfill the provisions of a treaty may 'weaken the defaulting country's international position as other states calculate whether treaties still in force with it will be honoured'[82] and whether new agreements can still be concluded with such a defaulting nation. According to G.A.S Grenville,

[78] Ibid, p.5.
[79] Czech News Agency(CTK) 'Prague Expels Two Ukrainian Diplomats Reciprocally to Kiev's Step' 18 May, 2011 http://www.praguemonitor.com/2011/05/18/prague-expels-two-ukrainian-diplomats-reciprocally-kievs-step Accessed 4th July, 2011.
[80] Matthew Lee, The Canadian Press, 'US Expels Ecuadorean Ambassador in Retaliation for Expulsion of American Envoy' Thurs,7 April, 2011 http://www.ca.news.yahoo.com/ap-source-us-expels-ecuadorean-ambassador-retaliation-expulsion-20110407-075742-907.html Accessed 4th July, 2011.
[81] Ibid.
[82] Ibid.

> 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 sovereignty and hence are governed exclusively by municipal law.[83] Parties to a treaty may conclude their treaties in virtually any manner they wish.[84] There is no prescribed form on how a treaty is to be made or concluded. However, certain rules apply in the formation of treaties. Article 7 of the Vienna Convention 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 the State for such purposes and to dispense with full powers.

[83] A.B Akinyemi, A.B (ed.), *Readings on Federalism*, (NIIA/University of Ibadan Press, 1979)pp52-52.
[84] MN Shaw, Ibid, p.634.

> 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 for 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 other parties to the treaty that they are making agreements with persons competent to do so.

Generally, 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;

- Consent by signature

  Article 12 of the 1969 Convention 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.[85] However, where the treaty is made subject to acceptance, approval or ratification, the signature will be a mere formality

[85] G A S Grenville, Ibid, p.9.

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.'[86]

- Consent by exchange of Instruments

  Article 13 of the 1969 Convention provides that the consent of States to be bound by a treaty constituted 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.

- 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.[87] On the other hand, it has been opined that ratification should be required unless the treaty clearly reveals a contrary intention.[88] 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

[86] MN Shaw, Ibid, p639.
[87] G. Fitzmaurice, 'Do Treaties Need Ratification?', 15 BYIL, 1934, P.129 and O'Connell, *International Law,* p.222 in MN Shaw, Ibid, p.640.
[88] MacNair, *Law of Treaties,* p.133. in MN Shaw, Ibid, p.641.

consent of the legislative arm of the government of the country intending to enter into the treaty.[89] Ratification gives a state additional time to consider the treaty and sample the opinion of its populace concerning the treaty. According to Shaw,[90]

> 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.

- 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 latter date.[91]

1.2 STATEMENT OF THE RESEARCH PROBLEM

Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 provides for the implementation of treaties by way of ratification. In Nigeria, several challenges are encountered in the implementation and application of treaties. This study is aimed at finding out;

4. Whether the present mode of implementation of treaties is effective,

[89] G A S Grenville, Ibid, p.9.
[90] MN Shaw, Ibid,p.640.
[91] An example of such a treaty is the 1958 Geneva Convention on the High Seas. See MN Shaw, Ibid, p.641.

5. What challenges stand in the way of effective application of treaties,
6. Ways of effectively implementing and applying treaties to enhance the well being of Nigerians.

1.3 AIMS AND OBJECTIVES OF THE STUDY

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

1.4 SIGNIFICANCE OF THE STUDY

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

1.5 RESEARCH METHODOLOGY

This work uses a comparative and analytical 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[92] or after domestication are not being effectively applied.

1.6 SCOPE 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

[92] Presently, 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 Newsletter, NHRC Oct-Dec 2010, Vol;11 pp 5 & 19.

limited to the implementation and application of treaties in Nigeria as reference will, where necessary, be made to other jurisdictions.

1.7 STRUCTURE OF THE STUDY

This work is divided into four 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. Further more, 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 Nigerian 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 concludes the study and contains recommendations aimed at ensuring that important treaties are speedily implemented and domesticated treaties fully applied in Nigeria.

CHAPTER 2 TREATY IMPLEMENTATION

2.1 DEFINITION OF TERMS

Ratification of treaties: This is the final establishment of consent to be bound by a treaty, by the parties to the treaty.[93] According to P. T Akper[94] '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.

Transformation: The doctrine of transformation stipulates 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.[95]

Incorporation: This doctrine, on the other hand, holds that international law should apply directly within a country without the need for transformation.[96]

Domestication of treaties: 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.'[97]

[93] Blacks Law Dictionary,7th ed,p.1269.
[94] 'Domestication of Treaties' a paper presented to the PGDLD/LL.M Students in Legislative Drafting of the Postgraduate School, Nigerian Institute of Advanced Legal Studies, University of Lagos campus, Akoka. P.7.
[95] MN Shaw, ibid p.105.
[96] Ibid.
[97] Ibid, p.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'.[98]

Application of treaties: This relates to the enforcement of treaty provisions within a country.[99]

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.[100] 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.[101] A.B Oyebode opines that,

[98] J.A.S Grenville,ibid, p.12.

[99] What in this work is termed 'application of treaties' appears to be what A.O Oyebode refers to as 'treaty implementation', According to the learned author, implementation of treaties could mean 'the execution or fulfilment of the obligations arising from treaties concluded by States.' See A.B Oyebode, *Treaty Making and Treaty Implementation in Nigeria: An Appraisal* (A Dissertation submitted to the Faculty of Graduate Studies of York University in partial fulfilment of the requirements for the degree of Doctor of Jurisprudence, 1988) p322.

[100] Ibid, p324.

[101] Ibid, p286.

> 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.[102]

Therefore, in a discussion on the implementation 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[103] theories; Monism and Dualism.

Dualists view international and municipal legal orders as mutually exclusive, each possessing its sources, subjects and subject matter.[104] 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[105] and Strupp,[106] both of the positivist school of thought. Dualism is largely

[102] Ibid.
[103] Apart from these major theories, other theories such as the delegation and harmonization theories exist.
[104] H Mohr 'Treaties and the Legal Order' Paper presented at the Graduate Seminar on Legal Research, Policy and Reform at Osgoode Hall Law School, York University, Canada, 1981, p.7.
[105] H Triepel, *Volkerrecht und Landesrecht,* Berlin, 1899 in MN Shaw, ibid, p.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 Heidelberg Dordrecht London Newyork) p.91 fn41.

based on the concept of the state as sovereign and the 'highest good in society'[107] 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.'[108] Hence, the dualists identified two differences they considered 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.'[109] 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

[106]R Strupp, 47 HR, p389 in M.N Shaw, Ibid, p100. See also Strupp, *Elements* (2nd Ed, 1930) in A. Conte, ibid.
[107] H Mohr, Ibid.
[108] Ibid.
[109] Ibid.

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.[110] Going by the dualist theory, treaties should be non-self executing.[111]

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.[112] A leading proponent of the Monist theory is Hans Kelsen. Kelsen viewed Law as an 'integrated, united system of laws'.[113] 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.[114]

Kelsen further argues that municipal law derives its validity from the international legal order.[115] 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

[110] R Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press (1994), p. 205. In C Nwapi African Journal of International and Comparative Law, Mar, 2011, Vol 19, No.1, pp.38-65, at p44.
[111] AO Enabulele 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' African Journal of International and Comparative Law 2009, Vol.17, pp.326-341, at p328. See fn 5.
[112] MN Shaw, Ibid, p101.
[113] H Mohr, ibid, p6.
[114] Ibid, p.8.
[115] MN Shaw,ibid, p.42.

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 legislate. 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.'[116]

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 a need for transformation. The Monist theorists thus, believe in self-executing treaties.[117]

While civil law countries are traditionally Monists in approach, common law countries are traditionally Dualists.[118] Nigeria is a dualist nation as can be garnered from the provisions of Section 12 of the 1999 Constitution. Based on this provision of the Constitution, the Supreme Court held in *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v. Medical and Health Workers Union of Nigeria,*[119] that the International Labour Organisation Convention, not having been domesticated in Nigeria cannot therefore be applied in Nigeria.

[116] H Mohr, ibid, p.9.
[117] A O Enabulele, ibid p.327.
[118] J E A Abugu *A Treatise on the Application of ILO Conventions in Nigeria(* University of Lagos Press, Lagos, 2009)p.10; A O Enabulele ibid.
[119] [2008] 2 NWLR (Pt. 1072) 575, 623.

2.3 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.'[120] 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 decisions.[121] On the other hand, treaties, in most cases,[122] undergo domestication before they are applied in Great Britain.

Whilst in some countries[123] the position occupied by treaties in the hierarchy of norms is expressly stipulated in the Constitution, the Nigerian Constitution is silent on the issue. However, Section 12 of the 1999 Constitution, which portrays Nigeria as a Dualist State by providing for the domestication of all treaties before they can apply within the country, implies that treaties, after domestication, should occupy

[120] M N Shaw, ibid,p.102; Article 27 Vienna Convention, 1969.
[121] M O.Ajomo 'Development in International Law and International Relations' in *The Challenge of the Nigerian Nation* Ed T A Aguda (Nigerian Institute of Advanced Legal Studies, Lagos, 1985)p.197; A B Oyebode *Treaty Making and Treaty Implementation in Nigeria: An Appraisal (* Bolabay Publications,Ikeja Lagos, 2003)p289.
[122] A B Oyebode,(dissertation) Ibid, p.291.
[123] Such as the Republics of Senegal 2001 (Articles 96 and 98) and Benin1990 (Articles 146 and 147). See A O Enabulele, ibid, p328. See fn6.

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 provision 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 Fawehinmi,*[124] 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 vigour 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.

[124] [2001]51WRN29

This position of the Supreme Court has been criticized for differing reasons. Some[125] 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.'[126]

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 grund norm within the Nigerian legal order.[127] 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.[128] 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

[125]Such as J E O Abugu, ibid, p.15.
[126] Ibid, p.16.
[127] See Section 1, Constitution of the Federal Republic of Nigeria, 1999 .
[128] *Murmansk State Steamship Line v. The Kano Oil Millers Ltd*. [1974]252 S.C 1 at p2.

of an irresponsible government'[129] 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* case, attention will now be paid to the decision itself which, with respect, has fanned the embers 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 flavour possess '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.[130] 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*[131] 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

[129] 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 in J.E.O Abugo, ibid, p15 fn5.
[130] See *Capital Bancorp Ltd v. Shelter Savings and Loans Ltd [2007] All FWLR [Pt440] 684* where it was held that 'the Constitution of Nigeria and its provisions are supreme.'
[131] [2008] All FWLR [Pt 411]810.

Regd. Trustees., C.S.S.T v. C.O.E., Kogi State[132] 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 excepted 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.

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

> since statutes 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 cognisance 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,[133] there are three modes via which treaties can be made applicable in Nigeria. They are;

[132] [2006] All FWLR [Pt 299] 1549.
[133] Ibid, 332.

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.
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*[134] the treaty under consideration was the Warsaw Convention on International Carriage by Air enacted into Carriage by Air (Colonies, Protectorates and Trust Territories) Order,[135] 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 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

[134] (*1990) NWLR(Pt160)507* .
[135] Laws of Nigeria 1958.

provision, a treaty which has not been domesticated cannot have the force of law in Nigeria, except it falls under the first category of treaties as enumerated above by A.O Enabulele. The first category of treaties as enumerated by Enabulele deals with treaties that operate in Nigeria by virtue of the doctrine of succession to treaties.[136] Furthermore, this decision is unsupported by the 1979 Constitution as no treaty, regardless of its mode of coming into operation in Nigeria is given a special status above other municipal laws. It has been rightly said that elevating treaty enabling statutes over other municipal legislation not only defeats the aim of dualism but also 'diminishes a country's sovereignty and undermines her independence.'[137]

Another flaw with this decision lies in the difficulty that may arise in identifying treaty implementing statutes in cases where the treaty enabling statute does not expressly refer to the Convention it seeks to domesticate but only incorporates it by inference.[138] According to C. Nwapi[139] a solution to this problem would be

> to invoke the principle that the legislature is presumed to intend to legislate in compliance with international law, and to ignore the determination of whether or not the Act is implementing legislation, once it is shown that the provision in question,

[136] The doctrine of succession to treaties provides that 'a new State inherits the international obligations that its predecessor has made' Nigeria follows the doctrine of succession. See 'State Succession and the Nyrere Doctrine' at <http;//www.unep.org/doc/onlinemanual/compliance/Resource/tabid/594/Default.aspx>. Accessed 3rd July, 2011.
[137] A O Enabulele, ibid, p341.
[138] C Nwapi 'International Treaties in Nigerian and Canadian Courts' African Journal of International and Comparative Law Mar. 2011 vol.19, No.1 pp38-65 at p47.
[139] Ibid.

> 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 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 its overrule,

as decided in the case of *Abacha v. Fawehinmi*[140] 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.

2.4 FEDERALISM AND TREATY IMPLEMENTATION IN NIGERIA

According to Wheare, one of the arguments for establishing a Federation is that it will provide for a harmonised foreign policy within the State.[141] It is common in federations to find their constitutions 'either forbidding their component states from entering into treaty relations with foreign states or permitting them to do so only with express authorisation from the federal government.'[142]This is as it relates to treaty making as against treaty implementation. In Nigeria, issues relating to the external

[140]Ibid,
[141] K.C Wheare,*Federal Government,* 1963,p179 in 'Treaties: Their Making and Implementation under the New Nigerian Constitution,p.2, paper presented at the 10th Annual Conference of the Nigerian Society of International Law, held at the Nigerian Institute of International Affairs, Lagos March 22-25, 1975 .
[142]Treaties: Their Making and Implementation under the New Nigerian Constitution, ibid, fn9.

affairs of the Republic are placed within the competence of the Federal Government[143].

According to M.O Ajomo[144]

> In a unitary State whose legislature possesses unlimited powers, the problem is simple. Parliament will either fulfil 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 fulfil 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 the 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 assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.'

[143] Item 26 on the Exclusive Legislative List, 1999 Constitution.
[144] Ibid,p.199.

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.[145] Section 4(7)(a) of the Constitution gives the state Houses of Assembly exclusive powers to make laws over residual matters.[146]

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'[147] 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 the end of the year 2010,

[145] See Section 4(7)(b) Constitution, Federal Republic of Nigeria, 1999.
[146] 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.
[147] This term is used here in the sense in which it is used in S.12 CFRN, 1999.

only 24 states in Nigeria had passed the Convention into law[148]. With some of the states, even after intense and prolonged advocacy by Civil Society Organisations, adopting a slightly varied version of the CRA.[149]

The provision of Section 12 of the 1999 Constitution has been criticised on the grounds that it is unclear and 'undermines the concept of federalism'.[150] To forestall a situation where states refuse to 'ratify'[151] 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.'[152] 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

[148] Child Rights Information Network(CRIN) See' Nigeria: National Laws' http://www.crin.org/resources/infodetail.asp?id=24753 Accessed 6 July,2011. See also '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,p14). http://www.juvenilejusticepanel.org/resource/items/D/C/DCICRC54DCINotesJuly10_EN.pdf Accessed 6 July, 2011

[149] 'Nigeria:National Laws,' ibid. On marriageable age, while the S.21 CRA places it at 18years, the Child Rights Law of Akwa Ibom state places it at 16years 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.

[150] C Nwapi, ibid,p49.

[151] See fn 81

[152] C Nwapi, ibid, p50

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 benefitting 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.

CHAPTER THREE TREATY APPLICATION

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[153]. These bodies monitor the progress in the application of treaties basically through reports received from State parties to treaties.

3.1 TREATY REPORTING

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.[154] 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 specified either by the treaty or its treaty body.[155] A treaty report consists of two complementary documents; the common core document and a targeted treaty specific document.

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

[154] 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.

[155] The Committee on the Rights of the Child receives reports from states parties at five year intervals. See Committee on the Rights of the Child, 54th session, ibid, p28.

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 communities can be brought together, whilst vulnerable and marginalized groups can be brought into active participation of the nation building process.'[156]

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.'[157] Some treaties require State parties to also report on the factors and difficulties, if any, affecting the implementation of the treaty.[158]

[156] G. Curry '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) p.1.

[157] 'Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents' UN Human Rights Instruments General HRI/MC/2005/3 1st June, 2005, p.5. See also Article 18 Convention on the Elimination of All Forms of Discrimination against Women.

[158] Article 44 Convention on the Rights of the Child.

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'.[159] Similarly, the UN secretariat has come up with harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents.[160]

[159] <http://www.ishr.ch/treaty-bodies/852-inter-committee-meeting-focuses-on-cats-new-reporting-procedure> Accessed 16th February, 2011.

[160] Harmonized guidelines on the 'common core document' were adopted by the Fifth Inter-Committee Meeting of the Human Rights treaty bodies. Cf.: 5th Inter-Committee Meeting/18th Meeting of Chairpersons of the Human Rights Treaty Bodies (2006): Harmonised Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Documents. UN Doc. HRI/MC/2006/3, 10th May, 2006. See A. Muller, F. Seidensticker *The Role of National Human Rights Institutions in the United Nations Treaty Body Process (*German Institute for Human Rights, 2007) p13, fn7.

Form of treaty reports: 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 harmonised guidelines on reporting under the international human rights treaties contains, amongst other things, the desire of the human rights treaty bodies that common core documents presented to them do not exceed 80pages. Whilst, initial treaty-specific documents are not to exceed 60 pages, and subsequent treaty-specific documents are to be limited to 40 pages. Furthermore, they require that Pages should be formatted for A4-size paper, with 1.5 line spacing, and text set in 12 point Times New Roman type.[161] 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.

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.'[162] As earlier stated a treaty report

[161] Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents' UN Human Rights Instruments General HRI/MC/2005/3, pp9&10.
[162] <http://www.bayefsky.com/complain/47_state_reporting.php.> accessed 16th February, 2011.

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 country, and should be updated whenever major changes occur in the country.'[163] 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.[164]

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.[165] The 'list of issues' also aids in giving structure to the dialogue between the State

[163] A. Muller, F. Seidensticker, ibid, p13.
[164] Ibid.
[165] ibid, p14.

party and members of the treaty body.[166] 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 "observations" 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.[167]

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 procedures.

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

[166] Ibid, p15.
[167] <http://www.bayefsky.com/complain/47_state_reporting.php.> accessed 16th February, 2011.

UN draft of harmonized guidelines on reporting under the international human rights treaties,[168]

> The common core document should contain information relating to the implementation of each of the treaties 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.
>
> 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 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[169] whose rights were before the enactment of the Act not comprehensively provided for by any statute in Nigeria. The Child Rights Act, 2003

[168] '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.
[169] See Preamble to the Child Rights Act, 2003.

comprises 278 Sections[170] 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 may rightly be regarded as the central principle governing the application of the Act. The provision contained 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. [171] Section 2(1) of the Act provides inter alia that 'a child shall be given such protection and care as is necessary for the well being of the child…' Whilst Section 2(2) of the Act provides that

> 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, health, 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 in civil litigation.

[170] Divided into 24Parts.
[171] Committee on the Rights of the Child, 54th session, ibid p.8.

Part II of the Act provides for the rights and responsibilities of a child. These rights are more encompassing than the general rights provided 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 Sections 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 Sections 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 law 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 20CRA. 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[172], Child betrothal[173], Tattoos and skin marks on children[174], exposure of children to use, production and trafficking of narcotic drugs[175], 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 provision 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

[172] Section 21 CRA.
[173] Section 22 CRA.
[174] Section 24 CRA.
[175] Section 25 CRA.

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 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.[176] 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 right to education.[177] 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.[178] If this recommendation is carried out, the Child Rights Act will prevail over Child Rights Laws in the event of inconsistencies between them.[179]

Section 30 of the Act prohibits the buying, selling or otherwise dealing in children for 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, by 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

[176] Committee on the Rights of the Child, 54th session, ibid p.8.
[177] Ibid, p18.
[178] Ibid, p3.
[179] See S.4(5) Constitution, Federal Republic of Nigeria, 1999.

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. Subsection (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 or bodies of offences.

Part IV of the Act contains provisions aimed at providing security for abused children. Sections 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 42(14) 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 Sections 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 duty.[180] 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.'[181]This is necessary because it is considered unhealthy for orphaned and vulnerable children to be placed in the same home with children in conflict with the law.[182] Towards the effective application of the provisions contained in this Part, Nigeria formulated the National

[180] State v. Electricity Corporation of Nigeria. Ex parte Savage 8 BNLR p.55.
[181] Committee on the Rights of the Child, 54th session, ibid, p14.
[182] Ibid.

Plan of Action on Orphans and Vulnerable Children (2006-2010) and the National Guidelines and Standards of Practice on Orphans and Vulnerable Children.[183]

Part VI of the CRA provides for the care 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. Parts IX and X deal with guardianship and wardship of children, respectively.

Part XI of the CRA contains provisions dealing with the very delicate 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

[183] Ibid, p13.

increase.[184]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.'[185] The Nigerian Government was urged to continue her efforts towards the eradication of these 'baby farms'.

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.[186] 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.'[187] Section 155 stipulates 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

[184] Ibid, p14.
[185] Ibid.
[186] '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.
[187] Committee on the Rights of the Child, 54th session, ibid, p28.

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.

Part XIV of the Act deals with Child minding and Day care of 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.

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.[188] 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.[189] The National Child Rights Implementation Committee has been set up but same cannot be said of all the state 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.[190] 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.[191]

[188] S.261 CRA.
[189] Committee on the Rights of the Child, 54th session, ibid, p3.
[190] The Act is now contained in Cap A9 Laws of the Federation of Nigeria, 2004 (hereinafter referred to as Cap A9).
[191] 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 9 July, 2011.

Generally, CAP A9 is one of the most litigated upon treaty enabling statutes in Nigeria. Almost on a daily basis lawyers in Nigeria rely on its provisions to enforce the fundamental rights of individuals. Hence, there are a plethora of cases hinged on CAP A9. Chief amongst these cases is the case of *Abacha v. Fawehinmi*[192]. 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 Periodic Report of the Federal Republic of Nigeria.[193] 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 Services and Another*[194] and *Comptroller Nigerian Prisons v Dr. Femi Adekanye and 26others*[195]

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

[192] [2001]51WRN29.
[193] African Commission on Human and Peoples' Rights, Ibid, p.8.
[194] (1991) 11 NWLR (PT 625) 129.
[195] (1999) 10 NWLR (PT623) 400.

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 Organisation of African Unity (OAU) parties to the present Charter shall recognise the rights, duties and freedom enshrined 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 right to education was litigated upon in the case of *SERAP*[196] *v. Federal Republic of Nigeria and Universal Basic Education Commission*[197] where the ECOWAS Community Court of Justice in Abuja declared that all Nigerians are entitled to education as a legal and human right.[198]

[196] Socio Economic Rights Accountability Project.
[197] *No ECW/CCJ/APP/08/08.*
[198] http://www.right-to-education.org/node/717 and http://www.serap-nigeria.org/cover/ecowas-court-to-fg-nigerians-have-a-legal-right-to-education/ Accessed 9 July, 2011.

To promote human and peoples' rights and ensure their protection in Africa, the African Commission on Human and Peoples' Rights was established.[199] 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 Governments may base their legislations;'[200] 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 OAU or an African organisation recognised by the OAU' 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 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

[199] Article 30.
[200] Article 45(1)(b).

application of the Charter, Nigeria, in the last report[201] 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) is before the National Assembly. The Commission urged the Nigerian Government to pass this Bill into Law together with the Anti-Discriminatory Laws and Practices in Nigeria Bill.[202] These Bills are still pending before the National Assembly.

Also contained in the Periodic report was a recommendation for the repeal of Section 55(1) of the Penal Code Law[203] which endorses wife battery as chastisement. This recommendation is yet to be carried out by the Law Reform Commission.

[201] Nigeria's 3rd Periodic Country Report:-2005-2008 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (Federal Ministry of Justice Abuja, September, 2008)p.22 http://www.achpr.org/english/state_reports/Nigeria/3_Periodic Rpt.pdf Accessed 9 July, 2011.
[202] African Commission on Human and Peoples' Rights, Ibid, pp 9 &10.
[203] CAP 89 LFN, 1990.

3.3 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, States 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 enforcement of monetary compensation awarded in favour of victims of human rights violations perpetrated by the Government or any of its agencies.'[204] 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.[205]

Human rights have been classified into generations. Civil and political rights as enshrined in the International Covenant on Civil and Political Rights are categorised 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 categorised as second generation

[204] 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.

[205] <http://www.amnesty.org/en/human-rights-defenders/issues/protection-mechanisms/state> accessed 16th February, 2011.

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.[206] However these second generation rights can also be found 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'

[206] See *Archbishop Anthony Olubunmi Okogie & Ors v. Attorney General of Lagos State*(181) 2NCLR p.337; also Chief *Adebiyi Olafisoye v. Federal Republic of Nigeria* (2004) 4NWLR (Pt 864) p.581.

Rights (Ratification and Enforcement) Act[207] have been held by the courts to be justiciable in the case of *Abacha v. Fawehinmi*[208]. 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.[209]

In order to protect human rights and in accordance with the Paris Principles, some States such as Nigeria, have created National Human Rights Institutions (NHRIs). These institutions go by different nomenclatures in their respective states.[210] They 'are expected to act independently of the government and must be given sufficient resources to prevent dependency on state financial or other control'[211]. The Paris principles which were adopted by the UN General Assembly in 1993[212] formulate standards aimed at guaranteeing the independence of NHRIs. The role of NHRIs in

[207] Cap LFN, 2004.
[208] Ibid fn 51.
[209] See the case of *A.G Ondo State v. A.G Federation & Ors* (2002) 9NWLR (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.
[210] In Australia, it is referred to as the Australian Human Rights and Equal Opportunities Commission and in Nigeria as the National Human Rights Commission.
[211] ibid .
[212] A. Muller, F. Seidensticker *The Role of National Human Rights Institutions in the United Nations Treaty Body Process (*German Institute for Human Rights, 2007) p33.

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 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.

3.3.1 NATIONAL HUMAN RIGHTS COMMISSION

The NHRI in Nigeria, referred to as the National Human Rights Commission was established by Decree 22 of 1995.[213] 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.[214] Section 5(a) NHRC Act gives the Commission powers 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

[213] M.T Ladan *Introduction to International Human Rights and Humanitarian Laws* (Ahmadu Bello University Press Zaria, 1999) p.447.
[214] S.5 NHRC Act, 2010.

> 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 Presidential Committee on the Review of the 1999 Constitution canvassed, without success, for the upgrading of socio-economic rights to the status of fundamental rights.[215] Presently, 'the promotion of the progressive realization of economic, social and cultural rights'[216] is considered a matter of top most priority by the Commission. Hence all rights are treated as equal by the Commission.[217]

To assess the effectiveness or otherwise of the NHRC in carrying out their afore mentioned responsibilities, the ideal parameter would be the Paris Principles. The UN General Assembly Resolution 48/134 of 2oth December, 1993, generally referred to as the 'Paris Principles' lays down guidelines for the effective functioning of NHRIs. Central to the effective functioning of an NHRI is its independence.[218] Thus, paragraph 1 of the *Principles Relating to the Status of*

[215] NHRC http://www.nigeriarights.gov.ng/index.php?option=com_content&view=article&id=26&Itemid=74 Accessed 8 July, 2011.
[216] N. Ladan '365 Days of Dynamism and Remarkable Success' Human Rights Newsletter, NHRC April-June,2010, Vol:10, p24.
[217] '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 p.18.
[218] 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, p.27.

National Institutions[219] states 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.'[220] 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 is pending before the National Assembly.[221] Similarly, the Commission joined other Civil Society Organisations in advocating for the passage of the just enacted Freedom of Information Act.[222] The Commission has also recommended that the bills on CEDAW and the Convention on Persons with Disabilities, which are currently before the National Assembly, be passed without further delay.[223] 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

[219] Annexed to the Paris Principles.
[220] Paragraph 3(a)(i) Principles Relating to the Status of National Institutions. Annexed to the Paris Principles .
[221] Commentary, Human Rights Newsletter, NHRC, Oct-Dec, 2010, Vol:11, p.5.
[222] Statutory Report: National Human Rights Commission in Human Rights Newsletter, NHRC,July-Sept.,2006 Vol.5 No.2. p.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, p.6.
[223] 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 Paragragh 15(c) of the Annex to Human Rights Council Resolution 5/1. P.2.

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 Competence.*[224] The Paris Principles[225] 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 paragragh[226] 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.[227] This mandate the Commission has striven to carry out.[228] 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

[224] Under the Paris Principles.
[225] Paragraph 3(b) Principles Relating to the Status of National Institutions. Annexed to the Paris Principles.
[226] Section 5(k).
[227] Paragraph 3(d) Ibid.
[228] See UN General Assembly A/HRC/WG.6/4/NGA/3 27 November,2008, Ibid.

other things, 'ensure timely preparation, submission and examination of required reports under each treaty by both United Nations and African Union treaty bodies.'[229]

The independence of an NHRI has rightly been said to flow from the security of tenure of the leadership of council members.[230] In 2000, the Commission was accredited with an 'A' status[231] 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.[232] 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. [233] 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, Kehinde Ajoni was also arbitrarily removed.[234] Three acts of government

[229] 'AG Sets up Committee on Treaty Reporting' Human Rights Newsletter, NHRC, Oct-Dec, 2010, Vol:11, p.22.
[230] Human Rights Newsletter, NHRC, April-June, 2010, Vol:10, p.20.
[231] Voting Status.
[232] Observer status.
[233] 'NBA Writes President on NHRC Bill' Human Rights Newsletter, Oct-Dec,2010 Ibid, p.8.
[234] 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 10th June, 2011.

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[235].

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 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.[236] 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 pensions 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

[235] Paragraph 6 Principles Relating to the Status of National Institutions. Ibid.
[236] '365 Days of Dynamism and Remarkable Success' Human Rights Newsletter, April-June,2010, Vol:10, p.24.

shall be a charge on the Consolidated Revenue of the Federation.' Charging the fund of the Commission on 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.[237]

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 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

[237] CAP N46 LFN, 2004.

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 Sections 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 functions 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 6months 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, in 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.[238]

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.[239] 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.[240]

[238] See S.51 Arbitration and Conciliation Act, CAP A18 LFN, 2004.
[239] Ibid.
[240] The first country being South Africa. See'Nigeria Affirms Commitment To Human Rights Pursuit' Human Rights Newsletter, ibid, p.26.

The National Action Plan on Human Rights stems from the recommendations of the Vienna Declarations 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.'[241] 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.

3.4 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 1980s individuals began to be viewed as playing a major role in enforcing international human rights.[242] 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.[243]

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

[241] Ibid.
[242] M.N Shaw, ibid p199.
[243] Ibid, p203.

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.[244] 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.[245]

Special Procedures

Special Procedures 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.'
>
> 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

[244] http://www.amnesty.org/en/human-rights-defenders/issues/protection-mechanisms/international accessed 16th February, 2011.
[245] <http:www.ohchr.org/en/hrbodies/pages/HumanRightsBodies.aspx> Accessed 10th June, 2011.

> 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 are sometimes the only mechanism that will alert the international community on certain human rights issues.[246]

In 2000, 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.[247] The Committee on the Rights of the Child has strongly recommended that Nigeria invite the Special Rapporteurs on Trafficking of Persons and on the Sale of Children, Child Prostitution and Child Pornography to visit the country.[248]

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

[246] Ibid.
[247] http://www.amnesty.org/en/human-rights-defenders/issues/protection-mechanisms/international accessed 16th February, 2011.
[248] Committee on the Rights of the Child, 54th session, ibid, p25.

examination of reports in public as governments are generally sensitive to public exposure of their human rights performance.'[249] There are Nine core human rights treaties. The most recent one, which is the Convention on Enforced Disappearance, entered into force on 23 December 2010. Hence, there are nine core human rights treaty bodies.[250] Some treaty bodies such as the Committee on the Elimination of Racial Discrimination (CERD) are authorised to examine complaints from individuals or groups of individuals against States provided that the concerned state recognises the right of individual petition.[251] In the same vein, the Committee Against Torture is empowered to 'initiate inquiries, in co-operation with the state party concerned, into alleged situations of systematic torture.'[252]

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

[249] M.T Ladan, ibid p60.
[250] 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 10th June, 2011.
[251] See Article 14 of the International Convention on the Elimination of all Forms of Racial Disccrimination.
[252] See UN Doct. A/48/44/Add. 1 (Nov. 9, 1993) 14 Human Rights L.J., 426 (1999), In M.T Ladan, ibid p65.

submits reports, bi-annually, to the General Assembly through the Economic and Social Council (ECOSOC).[253]

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.[254] They can rightly be said to be simply persuasive.

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

3.5 ROLE OF NHRIs IN THE TREATY REPORTING PROCESS

In November, 2006, a conference was held in Berlin on the role of NHRIs in the treaty reporting process.[255] The handbook on the Role of National Human Rights

[253] M.N Shaw, ibid pp 245&246.
[254] A. Muller, F. Seidensticker, ibid, p20.
[255] Ibid, p10.

Institutions in the United Nations Treaty Body Process contains the following ideal roles of NHRIs in the treaty Body process;[256]

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 for 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. *NHRI's reports and additional information to treaty bodies:* 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.

[256] Ibid, Chap 3.

Furthermore, NHRIs may invite experts from relevant UN agencies to train their 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 Governmental Organisations (NGOs).[257] NHRIs are thus, to encourage the involvement of NGOs in the treaty reporting process by organising workshops aimed at enlightening NGOs on the treaty reporting.

f. *Interacting with treaty bodies' country rapporteurs and pre-sessional working groups:* NHRIs could contribute to the development of 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[258] provide NHRIs with an opportunity to make a statement during the official presentation of their State's report.

[257] A. Muller, F. Seidensticker, ibid,p.14.

[258] Such as the Committee on the Elimination of all Forms of Racial Discrimination and the Committee on Migrant Workers.

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 Human Rights Act.[259] The offending Section excluded some first Nations people[260] 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.

[259] Source: HRCttee (2006): Concluding Observations – Canada. UN Doc. CCPR/C/CAN/CO/5, 22 April 2006, para. 22; and CHRC (2005): Press Release - November 4, 2005. http://www.chrc-ccdp.ca/media_room/news_releases-en.asp?id=329tcontent_type=2 .

[260] The First Nations people were the original inhabitants of Canada.

k. *Encouraging the acceptance of the individual complaints procedure:* it has been reported[261] 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-OP1) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are generally under utilised. 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 organising seminars.

m. *Assisting individuals to file complaints:* NHRIs can render assistance to individuals who wish to take advantage of the individual complaints procedure. This assistance can be rendered by advising such persons on the

[261] A. Muller, F. Seidensticker, ibid,p52.

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.

3.6 ROLE OF THE NIGERIAN LAW REFORM COMMISSION

The Nigerian Law Reform Commission was established by the Nigerian Law Reform Commission Act CAP 313 LFN, 1990, now CAP N118 LFN, 2004. 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 procedural 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 of 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 18years, Section 29 Criminal Procedure Act places the age of a child at 13years 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 18years 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 13years. Another provision of the Criminal Code that attempts to derogate from the provision of Section 31 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 16years. Furthermore, while Section 21 CRA provides that 'No person under the age of 18years 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 18years 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 18years.

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.[262] 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

[262] A Omoware, 'Child Rights Act/Laws:Reality or Farce' p.5 http://www.mediafire.com/?daadjgbt32t7c9 accessed 18th Feb,2011.

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.

3.7 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.’

Generally, Nigerian Courts are reluctant to hold that a statute is repealed by implication. This was stated in *Chairman, Moro Local Government v. Lawal.*[263] In the above mentioned suit, the court stated thus,

> Therefore, although a later statute may suspend or repeal an earlier one either expressly or by implication. Suspension or repeal by implication is not, as a general rule, favoured by the courts in the absence of clear words to that effect.

The above position of the Nigerian courts does not augur well for the effective application of treaties for as long as there continues to be statutes that conflict with treaty implementing human rights legislation, human rights violators will continually find a way of short changing the society.

[263] ALL FWLR[PT440]684, pp726-727.

CHAPTER FOUR CONCLUSION

The present mode of implementation of treaties as laid down by Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 will be effective only when it is strictly adhered to by members of the legislative arm of government. Treaties are so vital in the international sphere that the image of a country could be marred by lack of implementation or poor application of a treaty.

Treaties do not automatically have the force of law in Nigeria. Nigeria, being a dualist country requires treaties to be transformed into municipal law by the legislative arm of government. When treaties are so transformed they occupy the same status as other municipal laws save the constitution which supersedes all other laws in Nigeria. The courts in Nigeria have, in some of their judgments, attempted to place treaty enabling statutes in a special category above other laws. This attempt is unconstitutional.

Section 12 of the Constitution which is the provision governing the implementation of treaties in Nigeria reflects the federal nature of the country. This section provides for the active participation of constituent states in Nigeria when a treaty in respect of a matter not included in the Exclusive Legislative List is to be implemented.

After a treaty has been implemented, the next stage in the process is its application. The application of UN treaties is monitored by UN treaty bodies through treaty reports received from states. At the regional level the African Commission on Human and Peoples Rights monitors the implementation of the African Charter on Human and Peoples Rights. Special rapporteurs also aid treaty bodies in monitoring the application of treaties in State parties. To guide States in presenting more focused reports, certain treaty bodies have provided guidelines on treaty reporting. The treaty reporting procedure provides States with an opportunity to dialogue with members of treaty bodies noting issues made with regard to the application of treaties in their country.

In ensuring the effective application of treaties in Nigeria, the Nigerian government on all levels and several institutions in Nigeria have differing roles to play. The National Human Rights Commission, which is a National Human Rights Institution, should ideally, play a vital role in ensuring that Nigeria complies with her treaty reporting obligations to human rights treaty bodies. This Commission has in recent times played a commendable role in the promotion of human rights within the country. They have even appointed a Special Rapporteur on Child Rights with a mandate to monitor and collect data on violations of children's rights in the State

party.[264] With the amendment of the NHRC Act, it is expected that more will be done by the Commission towards the promotion of human rights in Nigeria.

At the international level, the Human Rights Council, the Special Rapporteur on Human Rights Defenders and treaty bodies play prominent roles in encouraging states to apply human rights treaties. The Office of the High Commissioner on Human Rights also provides assistance, on request, to States in preparation of treaty reports.

The Nigerian Law Reform Commission, in promoting the application of treaties in Nigeria has a duty to repeal all existing provisions that run contrary to provisions of treaty enabling statutes. When done, this will create a conducive environment for the application of the treaty enabling statutes within the country. It has been reported that a man arraigned by the National Agency for the Prohibition of Trafficking in Persons (NAPTIK)[265], for having carnal knowledge of a minor, was convicted and got away only with a sentence of two years imprisonment on the first charge and 5years imprisonment with an option of fine! On the second charge. Both sentences are to run concurrently.[266] This sentence was handed down in spite of the fact that the said convict admitted to having molested several children. Stories such as the above are, sadly, a common feature in Nigerian newspapers. It is indeed disheartening that in

[264] Committee on the Rights of the Child, 54th session, ibid, p4.
[265] Under section 13 Trafficking in Persons Act, 2005 (As Amended).
[266] M. Olugbode, 'Man Jailed Over Sex With Minor' (THISDAY, Vol.16, No.5916, p.9) 5 July, 2011.

these times of zero tolerance to human rights violations at the international sphere, a self confessed serial child molester would be given a minimal sentence crowned with an option of fine. The NLRC has to as a matter of immense urgency repeal all existing provisions that derogate from treaty implementing human rights statutes.

For a sense of co-ordination and order to be restored to the Nigerian *corpus juris* the NLRC must arise to its responsibilities. It may be argued that provisions in the body of laws in Nigeria, inconsistent with treaty enabling statutes stand repealed by implication. The Nigerian courts, however, frown at implied repeal of statutes. In *Chairman Moro Local Government v. Lawal*[267] the Court of Appeal, per Sankey JCA, held that,

> The law is that the repeal of statutes is never presumed or implied. It is always desirable that the repeal must be via a clear and direct provision in a subsequent enactment repealing an existing one....Therefore, although a latter statute may suspend or repeal an earlier one either expressly or by implication, is not as a general rule, favoured by the courts in the absence of clear words to that effect.

In the same vein, in *Asims (Nig) Ltd v. Lower Basin Development Authority*[268] Tanko Muhammad JCA (as he then was), stated that 'a repeal is never presumed or implied but must be direct... thus, the general principle of law that a statute is not repealed simply because a similar statute dealing with the same subject is enacted still holds good and valid.' Nevertheless, 'where the provisions of two Acts are so

[267] [2008] All FWLR [Pt 440] 684 at pp725-727 para G.
[268] (2002) 8NWLR PP110 -111.

plainly repugnant, one to the other provision and demand inconsistent conclusion that effect cannot be given to both at the same time, a repeal of the earlier provision of the law by implication is inevitable....'[269] It follows therefore that the provisions of Section 220 Criminal Code which are so clearly inconsistent with that of Section 31 CRA stand repealed by implication. This is especially as Section 274 CRA provides unequivocally that the provisions of the CRA supersede the provisions of any other enactment relating to children.

The role of courts in the application of treaty provisions lies primarily in giving effect to treaty provisions. The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is being applied in Nigeria on a regular basis especially as it relates to civil and political rights. The provisions of this Act have also been enforced by the African Commission in the case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) vs. Nigeria.*[270] The ECOWAS court also hears matters touching on the application of the provisions of this treaty.[271]

[269] Leadway Assurance Co. Ltd v. J.U.C Ltd (2005) 5NWLR (Pt 919) 539 at p556. Per Omage JCA.

[270] Comm. 155/96, 2001-2002 Afr. Ann. Act. Rep., Annex V in N.J Udombana, 'The Justiciability of Economic, Social and Cultural Rights in Nigeria: the Role of Courts' in D.A Guobadia (ed) *Nigerian Current Legal Problems* (vol 6, Nigerian Institute of Advanced Legal Studies, Lagos, 2005) p153.

[271] See *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission,* No. ECW/CCJ/APP/08/08. Chapter 2 of the Constitution of the Federal Republic of Nigeria, 1999, which contains the Fundamental Objectives and Directive Principles of State Policy, with Education (s.18) as one of the fundamental objectives of the government, is made non justiciable by Section 6(6)(c) of the Constitution. Nevertheless, SERAP, a Non Governmental Organisation challenged the Federal Government on the

Nigeria appears simply to have domesticated the CRA and thereafter gone to sleep on the issue of its application. The mechanisms for protecting the rights of children as provided for in the Act have not been put in place since the enactment of the Act in 2003. An example of these mechanisms can be found in Sections 149 and 150 CRA. These Sections provide for the establishment of family courts at two levels. Section 162 CRA further bestows exclusive jurisdiction on family courts to hear matters relating to children. Section 248 CRA provides a list of institutions to be established by the government to facilitate the application of the Act. Furthermore, Sections 260, 264 and 268 provide for the establishment of the Child Rights Implementation Committee at the National, state and local government levels. Considering that the Child Rights Act which was originally intended to cover all the states of the federation now only governs the Federal Capital Territory, its provisions therefore have no effect over the other states of the federation. States who have domesticated the treaty will be governed by the provisions of their respective Child Rights Laws. Presently the only Federal Government has been reported to have established the Child Rights Implementation Committee. The Rivers State chapter of FIDA (Nigeria)

non justiciability of the right to education, denial of the right of people to their wealth and natural resources and the right of people to economic and social developments guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and People's Rights to which Nigeria is a signatory, The ECOWAS court held amongst other things, that the right to Education can be enforced. http://www.right-to-education.org/node/717 Accessed 28 July, 2010.

has set up a committee to apply the provisions of the Child Rights Law of Rivers State. This Committee is still in its stage of infancy.

4.1 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:

- Existence of statutes containing provisions that conflict with the provisions of treaty enabling statutes.
- Unenlightenment amongst the populace of their rights and the remedies available to them by virtue of some treaty enabling statutes.
- Inproper understanding of the Convention on the Rights of the Child by some states 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 the Child Rights Act.
- Inadequate training of personnel, such as Police and Judicial officers to carry out the provisions of the Child Rights Act. It has been reported that in Nigeria,

'children as young as 11years of age have been held in custody in inhuman conditions in the Criminal Investigation Department.'[272] This can be linked to inadequate training of Police officers.

4.2 RECOMMENDATIONS

- For avoidance of doubt as to what provisions have been repealed by the CRA, the NLRC is advised to expressly repeal derogating statutes/provisions such as Section 55(1) Penal Code Law, Sections 218 and 220 Criminal Code.
- Amendment/updating of statutes by NLRC to bring them in line with treaty provisions.
- Faced with a situation where the NLRC has failed in repealing obsolete statutes, Nigerian courts could come to the aid of Human Rights by making pronouncements repealing obsolete statutes that clearly derogate from human rights treaty enabling statutes.
- Establishment of family courts in all the states in conformity with Sections 149 and 150 CRA.

[272] '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,p16) ibid.

- Establishment of approved institutions such as the Special Mothers Center in line with Section 248 of the CRA.
- Establishment of the Child Rights Implementation Committee by all the state governments in conformity with the provisions of the Convention on the Rights of the Child.
- NHRC and NGOs are advised to organise seminars to create awareness among the populace, on the option they have in enforcing their economic, social and cultural rights via the provisions of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.
- In the course of the implementation of a treaty, the provisions of Section 12 CFRN, 1999 should be strictly adhered to by the National Assembly as failure to comply with the provisions of Section 12(2) particularly will lead to the domestication of an Act with very limited coverage as was the case with the CRA.
- The Nigerian Government is advised to speedily carry out vital Concluding Observation emanating from treaty bodies such as the recommendation made by the Committee on the Rights of the Child that 'special police units dealing with children be established in all states of the federation and ensure that they receive training on the Child Rights Act and the Convention.'[273]

[273] Ibid, p17.

BIBLIOGRAPHY

BOOKS

Blacks Law Dictionary, 7th Ed.

A Conte, *Human Rights in the Prevention and Punishment of Terrorism; Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Springer Heidelberg Dordrecht London, 2010) .

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

AB Akinyemi, *Readings on Federalism* (Nigerian Institute of Advanced Legal Studies/ University of Ibadan Press, 1979).

AB Oyebode, *Treaty Making and Treaty Implementation in Nigeria: An Appraisal* (Bolabay Publications Ikeja Lagos, 2003).

G Curry, *Building Sustainable Capacities on Human Rights Treaty Reporting Evaluation and Strategic Planning Report* (United Nations Development Programme, Democratisation

and Civil Society Empowerment Unit, Kabul, Afganistan, 2007).

JAS Grenville, *The Major International Treaties 1914-1973* (Methwen & Co. Ltd, London, 1974).

JEA Abugu, *A Treatise on the Application of ILO Conventions in Nigeria* (University of Lagos Press, Lagos, 2009).

MN Shaw *International Law* (4th edn, Cambridge University Press, United Kingdom, 1997).

MO Ajomo, T A Aguda(ed) 'Development in International Relations' in *The Challenge of the Nigerian Nation* (Nigerian Institute of Advanced Legal Studies, Lagos, 1985).

MT Ladan, *Introduction to International Human Rights and Humanitarian Laws* (Ahmadu Bello University Press, Zaria, 1999).

NJ Udombana 'The Justiciability of Economic, Social and Cultural Rights in Nigeria: The Role of Courts' in DA Guobadia (ed) *Nigerian Current Legal Problems*

(Vol 6, Nigerian Institute of Advanced Legal Studies, Lagos, 2005).

JOURNALS

AG Hamid — 'Treaty Making Power in Federal States with Special Reference to the Malaysian Position' (Vol 30, Journal of Malaysian and Comparative Law, 2003).

AO Enabulele — 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' (Vol 17, African Journal of International and Comparative Law, 2009).

C Nwapi — 'International Treaties in Nigerian and Canadian Courts' (Vol 19. No.1 African Journal of International and Comparative Law, Mar, 2011).

G Fitzmaaurice — 'Do Treaties Need Ratification?' (15 BYIL, 1934).

SEMINAR&CONFERENCE PAPERS

H Mohr — 'Treaties and the Legal Order' Paper presented at the graduate seminar on Legal Research, Policy and

Reform at Osgoode Hall Law School, York University, Canada, 1981.

KC Wheare — *Federal Government* 1963, in 'Treaties: Their Making and Implementation under the New Nigerian Constitution' Paper presented at the 10th Annual Conference of the Nigerian Society of International Law, held at the Nigerian Institute of International Affairs, Lagos, March 22-25, 1975.

PT Akper — 'Domestication of Treaties' A paper presented to the PGDLD/LL.M Students in Legislative Drafting of the Post Graduate School, Nigerian Institute of Advanced Legal Studies, University of Lagos Campus, Akoka.

NEWSPAPERS&NEWSLETTERS

THISDAY, Vol.16, No.5916, 5 July, 2011.

Human Rights Newsletter, NHRC Oct-Dec 2010, Vol. 11.

Human Rights Newsletter, NHRC April- June, 2010, Vol. 10.

Human Rights Newsletter, NHRC July –Sept, 2008, Vol.8, No.1.

Human Rights Newsletter, NHRC July –Sept, 2006, Vol. 5, No.2.

OTHERS

- Nigeria's 3rd Periodic Country Report: 2005-2008 on Implementation of the African Charter on Human and Peoples Rights in Nigeria (Federal Ministry of Justice Abuja, September, 2008).
- African Commission on Human and Peoples Rights Concluding Observations and Recommendations on the Third Periodic Report of the Federal Republic of Nigeria (2008).
- 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).
- UN General Assembly A/HRC/WG.6/4/NGA/3 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.